IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JOHN B. THOMPSON,

Plaintiff,

v. Case No. 07-21256 (Judge Adalberto Jordan)

THE FLORIDA BAR and
DAVA J. TUNIS,

Defendants.

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW plaintiff, John B. Thompson, hereinafter Thompson, as an attorney on his own behalf, and hereby affords notice to the court of supplemental authority on the issue of judicial immunity, stating:

The court at the hearing on October 9, 2007, indicated to the parties that it would appreciate additional case authority, if they have it, on whether a state judge, acting as a bar disciplinary referee, enjoys absolute judicial immunity. This determines whether this court has authority to enjoin, in this instance, defendant Dava Tunis, who holds the office of Miami-Dade County Circuit Court Judge, but who serves in the state disciplinary proceedings against plaintiff as "referee."

Plaintiff has read with interest today's filing by defendant Tunis' able counsel on this issue, but unfortunately the cases cited do not answer the question posed by the court, for the following reasons:

THE SUPREME COURT'S TEST IN *STUMP V. SPARKMAN*

As the court knows, the leading case on judicial immunity is the U.S. Supreme Court case of *Stump v. Sparkman*, 435 US 349 (1978). The court held that there is a two-prong test to determine if a judicial officer shall be immune to suit. The test:

1. Whether it is a function normally performed by a judge; and

2. Whether the parties dealt with the judge in his judicial capacity.

Under *Stump v. Sparkman*, what referee Tunis has done and is presently doing fails both prongs of the test. Take for example what this referee is presently doing to thwart even the issuance of subpoenas:

SUBPOENAS

First of all, what judge in the state "normally performs the function" of signing subpoenas? Answer: ***None***. Not a single judge in the state of Florida "normally performs the function" of signing a subpoena. Why is that? Because of Rule 1.410, Florida Rules of Civil Procedure which states, for example:

"2) On oral request of an attorney or party and without praecipe, ***the clerk shall*** issue a subpoena for testimony before the court or a subpoena for the production of documentary evidence before the court or a subpoena for the production of documentary evidence before the court signed and sealed but otherwise in blank, both as to the title of the action and the name of the person to whom it is directed, in the subpoena shall be filled in before service by the attorney or party." [emphasis added]

The Rules of Civil Procedure in this state, then, specify that "the clerk" is the one to issue subpoenas. Not the judge. The clerk. Issuance of a subpoena is a *ministerial* function, not a *judicial* one. Note further that the command verb "shall" is used to

express the absolute requirement that the clerk *must* issue the subpoena upon the mere "oral request of an attorney or party." Further, the word "shall" is the most powerful command verb in the English language, as distinguished from "may."

Put another way, so that it is crystal clear, all an attorney or party has to do is ask for a subpoena and he/she gets it, no questions asked, whether it be for a deposition or production of documents. Upon its issuance to the requesting party and its service on the witness, then there is a battle as to whether it should be quashed or limited.

Contrast this with what Dava Tunis is doing. She has reduced to an order the demand and requirement that has utterly prevented Thompson from getting subpoenas for discovery. Tunis has refused to perform this purely ministerial function which we have seen is not "normally a judicial function" in this state by a) refusing to sign subpoenas for deponents and witnesses whom she has clairvoyantly determined will only be asked for privileged information under oath, and b) refusing to issue a subpoena for any witness unless Bar Prosecutor Tuma and the deponent *agree* on a time and place for the deposition! This preemptive "gatekeeping" by the referee of the discovery process so that discovery does not occur is absurd.

The consequence of all this is that Thompson cannot get subpoenas that he wants for testimony he wants to get. The Bar's prosecutor is literally determining for Thompson what witnesses he gets to depose, what documents he secures, as the prosecutor has convinced this referee that The Bar gets to completely control even the ministerial issuance of a subpoena.

This obstruction of the discovery process is by design by The Bar, and its has been accomplished by a referee who is refusing to perform the purely ministerial act of "a

clerk" by abusing a clerk's discretion that no court clerk, under the Rules of Civil Procedure, has.

Is there "judicial immunity," then, for the refusal of a referee to perform a ministerial act that *no judge* in Florida, acting as a judge, ever performs, let alone "normally performs?" Of course not. At the very least, this federal court must enjoin referee Tunis from this outrageous and consequential flummoxing of Thompson's efforts to use the discovery process to marshall evidence. This thwarting of the simple function of issuing a subpoena is horribly consequential and damaging to Thompson's basic due process rights.

A BAR REFEREE IS NOT ACTING AS JUDGE

The second prong of the *Stump v. Sparkman* test is this: "Whether the parties dealt with the judge in his judicial capacity." A judge who is acting as a referee is not acting as a judge. If the duties of a referee are not fully congruent with the "judicial capacity," then what is a referee? It is clearly a quasi-judicial officer performing a quasi-judicial function. Note:

Florida's Canon 4 of Judicial Conduct states:

A. A judge shall conduct all of the judge's ***quasi-judicial*** activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the ***judicial office***; or

(3) interfere with the proper performance of ***judicial duties***. [emphases added]

Further, the Florida Supreme Court has held, defendant Tunis' case citations from other jurisdictions notwithstanding, that Bar disciplinary proceedings are "quasi-judicial administrative proceedings." See *The Florida Bar v. Roberts*, 770 So.2d 1207 (Fla.

2000). The Bar now wants to pretend that bar proceedings are *judicial* proceedings, despite the clear holding of the Florida Supreme Court in *Roberts*. Why? So that judges serving as referees can get away with things that no judge would be allowed to do while at the same time hiding behind a *faux* "judicial immunity" to avoid any remedy.

We have seen that Tunis is blocking the ministerial issuance of subpoenas, which no judge would be allowed to get away with. But in being so clever, the artifice fails. Who presides over a quasi-judicial proceeding? Why, a quasi-judge, that's who. How can someone who is not fully a judge, even by The Bar's own definition, enjoy, as defendant Tunis asserts, "absolute immunity" for what she does not only in a quasi-judicial capacity but in performance of duties—like signing subpoenas—that no judge in Florida "normally performs?"

The Bar knows that if Thompson secures subpoenas, then he gets to depose and put on the witness stand at trial folks like Ben Kuehne. That is The Bar's worst nightmare, which is precisely why it has enlisted the aid of a referee to shut down the discovery process altogether. Judge Tunis must be ordered, by this federal court, at least to issue subpoenas, for to hold otherwise denies Thompson the discovery he needs to defend himself.

I HEREBY CERTIFY that this has been served upon record counsel this 11th day of October, 2007, electronically.

/s/ JOHN B. THOMPSON, Plaintiff
Attorney, Florida Bar #231665
1172 South Dixie Hwy., Suite 111
Coral Gables, Florida 33146
Phone: 305-666-4366
amendmentone@comcast.net