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 MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT IN STATE DISCIPLINARY PROCEEDINGS

COMES NOW plaintiff, John B. Thompson, hereinafter Thompson, as an attorney on his own behalf, and hereby moves this court for an order either dismissing the state disciplinary proceedings or granting him summary judgment in the state disciplinary proceedings, stating:

THE FLORIDA BAR HAS *NO* SOVEREIGN IMMUNITY WHEN 42 USC 1988 IS APPLIED TO THE FACTS IN THIS CASE

Thanks to the court's show cause order, Thompson has been contacted by real federal civil rights lawyers from around the country who read the *ABA Journal's* on-line edition as to what this court was trying to do by its show cause and were appalled by it. The happy result of that contact for Thompson and for this case is that they have provided Thompson with the case law that explains precisely how 42 USC 1988 wipes out any pretense by The Florida Bar that it enjoys any semblance of any kind of sovereign immunity which it claims under 42 USC 1983. This court would do well this moment, for the sake of the administration of justice in this case and beyond, to read with great care what is contained in this pleading, because the additional legal authority contained

herein a) wipes out sovereign immunity defenses, b) entitles Thompson to summary judgment including money damages, costs, and attorneys, fees, c) entitles him at least to dismissal of the state disciplinary proceedings, and d) obliterates all of the defendants' grounds for their motions to dismiss.

To begin the analysis, Thompson on page three of his Third Amended complaint bases his cause of action, in part, upon 42 USC 1988. Thus, no amendment to the pending complaint is necessary for the relief Thompson now rightly seeks .

42 U.S.C. 1988(a) provides:

"The jurisdiction in civil and criminal matters conferred on the courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction is held, so far as the same is not inconsistent with the Constitution and laws of the United States, *shall be extended to and govern the said courts in the trial and disposition of the cause*, and if it is of a criminal nature, in the infliction of punishment on the party found guilty." [Emphasis added.]

Section 1988 was enacted to "fill in the gaps" in federal law in order to provide the widest possible protection for civil rights. As the United States Supreme Court observed in *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978), "This statute recognizes that in certain areas federal law is unsuited or insufficient to furnish suitable remedies."

Under section 1988, federal courts must apply state law as needed to protect fundamental constitutional rights. For example, under section 1988 there is no distinction made between procedural and substantive law. (See *Brazier v. Cherry*, 293 F.2d 401, 408 (5th Cir. 1961) (noting the "sweeping language" of section 1988).)

The Supreme Court has set forth a three-part test that directly tracks the language of section 1988 for federal courts to follow in using a state rule of decision:

1. The court is to see if there are any applicable United States laws suited to effectuate the civil rights statutes.

2. If there is no suitable federal law, the court is to look to state common law as modified and changed in the statutes and constitutions of the relevant states.

3. The court is to apply state law only if it is not inconsistent with the Constitution and the laws of the United States.

(*Burnett v. Grattan*, 468 U.S. 42, 47 (1984); see also *Jund v. Town of Hempstead*, 941 F.2d 1271, 1278 (9th Cir. 1991).)

The plain language of section 1988 (a) makes it clear that where the above requirements are met, application of state law is mandatory. (See *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 485, (1980) (Section 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is inconsistent with the Constitution and laws of the United States.")

Now then, what state laws must be applied, by means of 42 USC 1988 to the illegal acts of The Florida Bar to thereby fashion, properly, a federal remedy based upon state law?

There are two statutes, either one of which is sufficient. The first is Florida's Anti-SLAPP Statute, whose text in its entirety follows:

768.295 Strategic Lawsuits Against Public Participation (SLAPP) suits by governmental entities prohibited.--

(1) This section may be cited as the "Citizen Participation in Government Act."

(2) It is the intent of the Legislature to protect the right of Florida's citizens to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. The Legislature recognizes that "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, as they are typically called, have increased over the last 30 years and are mostly filed by private industry and individuals. However, it is the public policy of this state that government entities not engage in SLAPP suits because such actions are inconsistent with the right of individuals to participate in the state's institutions of government. Therefore, the Legislature finds and declares that prohibiting such lawsuits by governmental entities will preserve this fundamental state policy, preserve the constitutional rights of Florida citizens, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(3) As used in this section, "governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof.

(4) No governmental entity in this state shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

(5) A person or entity sued by a governmental entity in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may petition the court for an order dismissing the action or granting final judgment in favor of that person or entity. The petitioner may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the governmental entity's lawsuit has been brought in violation of this section. The governmental entity shall thereafter file its response and any supplemental affidavits. As

soon as practicable, the court shall set a hearing on the petitioner's motion, which shall be held at the earliest possible time after the filing of the governmental entity's response. The court may award, subject to the limitations in s. 768.28, the party sued by a governmental entity actual damages arising from the governmental entity's violation of this act. The court shall award the prevailing party reasonable attorney's fees and costs incurred in connection with a claim that an action was filed in violation of this section.

(6) In any case filed by a governmental entity which is found by a court to be in violation of this section, the governmental entity shall report such finding and provide a copy of the court's order to the Attorney General no later than 30 days after such order is final. The Attorney General shall report any violation of this section by a governmental entity to the Cabinet, the President of the Senate, and the Speaker of the House of Representatives. A copy of such report shall be provided to the affected governmental entity.

History. -- s. 1, ch. 2000-174.

What has The Florida Bar done, demonstrably so, to run afoul of Florida's Anti-SLAPP statute? It is has filed an action against Thompson in retaliation for his speech and activities critical of The Bar. He has criticized a state official, Judge Ronald Friedman. He has been unrelenting, over the past three years in his criticism and activities against The Florida Bar, and Thompson can show, by means of the remedies set forth in the above state Anti-SLAPP statute, that Thompson's whistle blowing against The Bar and his opposition to The Bar explains the furious response of Bar officials and Bar operatives such as Sheila Tuma.

Referee Tunis has refused even to given Thompson a hearing on the above-provided Anti-SLAPP Statute, which can be a full defense to any Bar disciplinary proceeding.

As the court can see, Florida's Anti-SLAPP statute constitutes a total waiver of ***any*** form of sovereign immunity. Further, Thompson can recover attorney's fees, costs, and actual damages (see *supra*) should he decide to do so. Should the court proceed in this regard, which it must, then Thompson must be allowed to amend in order to recover

damages, costs, and fees, which plaintiff's remedy was unthinkable to The Bar. It's not unthinkable now, in light of 42 USC 1988. It's now a given.

While this court and the parties have spent weeks discussing and briefing "abstention" and "sovereign immunity" and so on, which plaintiff has thoroughly enjoyed, we have had available to us the above state remedy, via 42 USC 1988 as Thompson has pled in his complaint. Further, we have had the procedural means set forth above to shut down this SLAPP Bar disciplinary process immediately.

The other Florida Statute that affords plaintiff a means of not only shutting down this ridiculous attempt by The Bar to use "discipline" to punish a lawyer for his behavior that it can't even explain is unethical, let alone prove, is Florida's Religious Freedom Restoration Act:

761.01 Short title.--This act may be cited as the "Religious Freedom Restoration Act of 1998."

761.02 Definitions.--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

761.03 Free exercise of religion protected.--

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

761.04 Attorney's fees and costs.--The prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

761.05 Applicability; construction.--

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

As the RFRA Statute makes clear on its face, a plaintiff may not only assert RFRA as a defense in any state proceeding, but also as a basis for money damages, costs and attorney's fees.

Referee Tunis refused to allow Thompson to argue RFRA as a defense. Her mistake. Her very *big* mistake.

The court will recall that at the October 9 hearing before it, plaintiff noted that a Supreme Court Justice had once written that where there is a wrong, there is likely a

remedy. This court said that was not the case. Thompson responded by noting that "thirst presupposes there is water somewhere."

Well, the "water" that the defendants and this court cannot deny plaintiff now is found in the application of Florida's Anti-SLAPP Statute and its RFRA Statute through 42 USC 1988.

The Florida Bar has repeatedly told Thompson to get lost when he has sought to sit down with The Bar and try to resolve this mess. Maybe now it will, now that it sees its precious sovereign immunity and abstention defenses are gone as to Thompson. If they don't do so, then this Paul Revere is going to ride this 42 USC 1988/RFRA/Anti-SLAPP pony as far as Thompson wishes to go.

WHEREFORE, plaintiff Thompson moves this court to dismiss the state disciplinary proceedings in their entirety, under both of the aforementioned state statutes as applied by 42 USC 1988.

Further, Thompson moves this court for summary judgment as to the liability of The Florida Bar under these two statutes, with damages, costs, and attorney's fees to be determined at a subsequent evidentiary proceeding or upon amendment of his complaint, if the court deems it necessary.

I HEREBY CERTIFY that this has been served upon record counsel this 16th day of October, 2007, electronically.

/s/ JOHN B. THOMPSON, Plaintiff
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