

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 REFER MATTER TO MAGISTRATE**

COMES NOW plaintiff, John B. Thompson, hereinafter Thompson, as an attorney on his own behalf, and hereby moves the court to refer a certain matter to the magistrate, stating:

The court is improperly addressing fact-dependent affirmative defenses of The Florida Bar as if they were assertions of a failure to state a claim upon which relief can be granted and doing so, improperly, in treating these in motions to dismiss.

For example, this court is entertaining, for weeks now, arguments about "abstention" in all its forms, when the court knows full well that abstention can be defeated by plaintiff upon a showing of bad faith, due process violations, and extraordinary circumstances. The cases cited even by the defendants say that.

How does this court determine if there has been bad faith? By and at an evidentiary proceeding. The court has allowed The Bar to saunter into court and assert that Thompson has no proof, for example, of bad faith, and then when Thompson rebuts that improper assertion, the court becomes exercised.

The fact is, “abstention” is an affirmative defense, not the basis for a motion to dismiss, by virtue of the fact that, as already noted, abstention turns on the misconduct of The Bar which can only be proven or disproven by *evidence*. Thompson has asserted there is bad faith, which is all he needs to do. The court has authority in its hands, provided to this court, which delineates how the *Middlesex* trial court presided over *evidentiary proceedings to determine if there was any bad faith or extraordinary circumstances!* Why did it do that? Because that court understood that it could not interpose the abstention affirmative defense until or unless it took evidence about the exceptions to it, like *bad faith*.

What this court must do, in order to comply with the clear law on these abstention and other issues is refer this to the magistrate for evidentiary proceedings to determine if abstention can be defeated. It can be. Thompson can prove the bad faith, special prosecution, improper prosecutorial motive, extraordinary circumstances, and so forth which the defendants’ own cases say must defeat abstention.

This court cannot and must not rule on the motions to dismiss. Evidence must be taken. Thompson promises not to bring the dirty pictures.

WHEREFORE, the magistrate must be ordered to conduct an evidentiary hearing now, before dismissal, on these issues.

I HEREBY CERTIFY that this has been served upon record counsel this 17<sup>th</sup> day of October, 2007, electronically.



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