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 MEMORANDUM OF LAW IN SUPPORT OF HIS *VERIFIED* MOTION FOR RELIEF FROM THIS COURT'S ORDER OF DISMISSAL FOR FRAUD

COMES NOW plaintiff, John B. Thompson, hereinafter Thompson, as an attorney on his own behalf, and provides further legal authority for relief from this court's dismissal order, stating:

Unfortunately for The Bar and its record counsel herein, Greenberg Traurig, there is such a thing as "judicial estoppel," enunciated clearly by a unanimous US Supreme Court in *New Hampshire v. Maine*, 532 US 742 (2001). In that case, a party told the court one thing and then sought to get out from under what it told the court in another setting:

"Judicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion. Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *Davis* v. *Wakelee*, 156 U.S. 680, 689. The purpose of

the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."

What the defendant did in this instant case was secure abstention from the Middle District in *Mason v. The Florida Bar*, cited to this court as supplemental legal authority in support of its motion to dismiss on the basis of abstention. It then turned around and denied plaintiff herein his access to the Board of Governors for the purpose of presenting his constitutional defenses.

This court has, as filed, Thompson's written request for that access and Bar President Frank Angones' letter stating that there is no right to access, completely at odds with what The Bar told the Mason court and this court. This violates judicial estoppel, as The Bar sought to get out from under what it told both courts.

Plaintiff would have appealed this court's dismissal order to the Eleventh Circuit if The Bar had been truthful and had told this court that it had no intention of allowing Thompson to present his constitutional defenses, including his First Amendment defenses, to the various levels of the disciplinary process. And he would have prevailed in that appeal. Instead, taking The Bar at its word as offered to this court he acceded in this court's ruling, based upon The Bar's promise, and forewent his appeal.

New Hampshire doesn't just bind The Bar and Greenberg Traurig by judicial estoppel. It also binds this court. This court is now on notice, fully, that it was lied to by The Bar. This court cannot ignore such a misrepresentation, and further it cannot ignore the fact that it granted abstention on the basis, as this court specifically ruled, that Thompson had an "adequate state remedy," to fully present his constitutional defenses. He had NO opportunity to present those defenses at ANY level of the proceedings.

NONE. He was denied access to the Grievance Committee. He was denied any consideration of these defenses by the Referee, whose Final Report is completely devoid of any rulings on these issues because she did not even evaluate them. And the Disbarment Order completely ignores these defenses, because Thompson was not allowed to present them even to the Board of Governors, as *Mason* mandates, let alone to the Supreme Court.

Thus, The Bar's assertion that Thompson would have such an opportunity was an elaborate ruse, which subterfuge opens the doors to relief from this court's fraud-based dismissal order.

This court will remember that it, *sua sponte,* entered a show cause order requiring plaintiff to explain why he should not be disciplined for sending the court what it called "obscene" materials which proved the selective prosecution by The Bar. This court needs to know that the lawyer operating that site, which was linked to on the home page of his Bar-approved web site, thereafter removed all of what he called "Adult Porn Sites" from that page, and now the site has been shut down by him altogether. It appears that what The Bar should have accomplished has been accomplished by the undersigned's alerting this court to the duplicity of The Bar. And this court, unwittingly, helped paper over that duplicity by targeting the undersigned for discipline because he sent this court evidence of it.

This court then, if it is to be evenhanded, should be concerned about the duplicity of The Bar and Greenberg Traurig in sending this court something that really did compromise the honor and reliability of this judicial process—the *Mason* case which it violated and by which it thus hoodwinked this court.

There is something else to consider. Rule 60(d))1), Federal Rules of Civil Procedure affords to Thompson a right to bring an independent, stand-alone new cause of action arising out of the fraud perpetrated upon this court by The Bar/Greenberg:

> (d) Other Powers to Grant Relief.
>
> This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

The U.S. Supreme Court decided *Hazel-Atlas Glass Co. v Hartford-Empire Co.,* 322 U.S. 238 (1944) in which it held a party may, *at any time*, bring a new cause of action, as Rule 60(d)(1) presently provides, to remedy a fraud upon the court.

This court can anticipate such an action if it does not address the fraud within this action, as Thompson will have his day in court that this court, based upon the fraud of the "smartest guys in the room" over at Greenberg, Traurig.

I HEREBY CERTIFY that this has been served upon record counsel this 18TH day of August, 2009, by the court's electronic system.

/s/ JOHN B. THOMPSON, Plaintiff
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