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.
_____/

MOTION TO DISMISS SECOND AMENDED COMPLAINT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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, moves to dismiss the Second Amended Complaint For Declaratory Judgment, For Injunctive Relief, For Attorney's Fees, And For A Writ Of Mandamus filed against her, and in support thereof states as follows:

PROCEDURAL AND FACTUAL SUMMARY

Plaintiff, in his Second Amended Complaint for Declaratory Judgment, For Injunctive Relief For Attorney's Fees And For A Writ Of Mandamus (hereafter "2d Amended Complaint") alleges that Judge Tunis currently serves as the referee in Florida Bar disciplinary proceedings against the Plaintiff. (2d Amended Complaint, ¶ 3). Only one count of the 2d Amended Complaint is against Judge Tunis, that

entitled, "Judge Tunis And Her Ongoing Federal Civil Rights Violations." Plaintiff contends that Judge Tunis is aware that the real reason for the bar disciplinary proceedings against him is that he has had success in protecting the public against the marketing of adult entertainment to children, not discipline. (2d Amended Complaint, ¶ 87). He alleges, in a conclusory fashion, that Judge Tunis has denied Plaintiff due process (2d Amended Complaint, ¶ 88) and also alleges that she has violated his right to equal protection by denying discovery relevant to the defense of selective prosecution. (2d Amended Complaint, ¶ 89). He alleges that Judge Tunis labeled Plaintiff's defensive pleadings "propaganda" and allegedly refused to recuse herself, without providing a basis for such refusal. (2d Amended Complaint, ¶ 90). She also allegedly denied Plaintiff a continuance based on the existence of a serious medical condition in his family. (2d Amended Complaint, ¶ 91). She has allegedly denied Plaintiff any meaningful discovery and has refused to address the allegedly SLAPP (Strategic Litigation Against Public Participation) nature of the proceedings. (2d Amended Complaint, ¶ 92). Judge Tunis has allegedly collaborated with The Florida Bar to deny Plaintiff his basic procedural and other constitutional rights. (2d Amended Complaint, ¶ 94). Therefore, Plaintiff requests an injunction against Judge Tunis halting the ongoing disciplinary proceedings against him under 42 U.S.C. § 1983 and Pulliam v. Allen, 466 U.S. 522 (1984). (2d Amended Complaint, ¶¶ 95-99). He also requests attorney's fees against Judge Tunis, personally, pursuant to 42 U.S.C. § 1988. (2d Amended Complaint, ¶¶ 95-99).

MOTION TO DISMISS

This action should be dismissed against Judge Tunis based upon the following grounds:

1. Abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

2. Abstention pursuant to Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

3. Abstention pursuant to Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941).

4. There is no claim for an injunction against a judicial officer under 42 U.S.C. § 1983.

5. Judicial Immunity.

6. Qualified Immunity in Judge Tunis' individual capacity.

7. The Amended Complaint fails to state a cause of action.

MEMORANDUM IN SUPPORT

1. Younger Abstention Applies.

The Supreme Court, in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) held that the federal courts cannot enjoin pending criminal prosecutions in state courts except in extraordinary circumstances where irreparable injury would otherwise occur.

The Supreme Court, in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), determined that a three-part test should be applied to determine if Younger abstention is appropriate: (1) if state proceedings are ongoing, (2) if the state proceedings implicate important state interests, and (3) if the state proceedings afford adequate opportunity to raise federal questions. Once these elements are met, the federal court must abstain, except in the most extraordinary circumstances. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976); Old Republic Union Ins. Co. v. Tillis Trucking Co., 124 F.3d 1258, 1261 (11th Cir. 1997). We know this can be applied to Bar Disciplinary

Proceedings where indeed, Middlesex, itself, involved attorney disciplinary proceedings. Rooker-Feldman. All that is required under the Younger abstention doctrine is "the opportunity to present their federal claim in the state proceedings." Judice v. Vail, 430 U.S. 327, 337 (1977).

Plaintiff's inference that Pulliam v. Allen, 466 U.S. 522 (1984) somehow overruled Younger (2d Amended Complaint, ¶¶ 95-97, 99), is unavailing where Younger is only mentioned twice in the decision, both times in footnotes and both times with approval. It was not a case in which Younger abstention was an issue where it was limited to judicial immunity for attorney's fees after successfully obtaining an injunction. No appeal of the injunction was taken and there is no indication that Younger abstention was ever raised as a defense, in Pulliam.

Therefore, since Florida Bar disciplinary proceedings against the Plaintiff are ongoing, Younger abstention applies.

2. Abstention pursuant to Burford v. Sun Oil May Also Be Appropriate.

Federal courts should invoke Burford abstention to avoid interfering with a state's efforts to "establish coherent policy with respect to a matter of substantial public concern." Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 746 (3d Cir. 1982), cert. denied 456 U.S. 990, 73 L. Ed. 2d 1285, 102 S. Ct. 2270 (1982). Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) established the principle that federal courts should exercise their discretionary power to refuse to hear cases that would impair the independence of state governments in carrying out their domestic policy. Id. at 318, 63 S.Ct. at 1099. Thus, Burford abstention is appropriate when exercise of federal review of the question in a case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. See Rindley v. Gallagher, 929 F.2d 1552 (11th Cir. 1991) (quoting Colorado

River Water Conservation Dist. v. United States, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). A case concerning to what extent attorneys may criticize Judges with impunity would certainly appear to be such a matter. Therefore, Burford abstention may well be applicable, as well.

3. **Pullman Abstention Applies.**

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971. That is especially desirable where the questions of state law are enmeshed with federal questions. Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 . . .
>
> In such case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily. Railroad Commission of Texas v. Pullman Co., supra, 323 U.S. 104–105, 65 S.Ct. 154. (other citations omitted).

City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 79 S.Ct. 455, 456-57, 3 L.Ed.2d 562 (1959).

Here, where there are obvious issues of discretion to grant or deny continuances, motions to recuse and state discovery issues (2d Amended Complaint, ¶¶ 89-94), Pullman abstention applies.

4. **There Is No Claim For An Injunction Against A Judicial Officer Pursuant to 42 U.S.C. § 1983.**

Further, the statute the Plaintiff is relying on exempts judicial officers from being the subject of injunction unless a declaratory judgment that they are violating is already in place. § 1983 provides for an action against persons who deprive citizens of federal constitutional rights, "...except that in any action

brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." The United States D.C. Circuit, in interpreting this language, held:

> We agree with Superior Court appellants that the District Court erred in holding that appellees might be able to obtain injunctive relief. 42 U.S.C. § 1983, as amended in 1996 by the Federal Courts Improvement Act, explicitly immunizes judicial officers against suits for injunctive relief. The statute states that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983 (2000)). Neither statutory limitation appears to apply in this case, and appellees' complaint says nothing to the contrary.

Roth v. King, 449 F.3d 1272, 1286 (D.C. Cir. 2006).

This has specifically been applied to state judicial officers. See Smith v. City of Hammond, Indiana, 388 F.3d 304, 307 (7th Cir. 2004) (held to bar injunctive action against judge of state's city court).

Plaintiff's inference that Pulliam v. Allen, 466 U.S. 522 (1984) has somehow rendered the above statutory language impotent (2d Amended Complaint, ¶¶95-97, 99) is inapplicable where Pulliam is a 1984 case and the Federal Court Improvement Act, adding the above language, was enacted in 1996.

There can be no claim for an injunction against Judge Tunis.

5. Judicial Immunity Applies To Any Damage Claims Or Attorney's Fees.

The law is "firmly settled" that judges are absolutely immune from civil liability for damages 'for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.'" Wahl v. McIver, 773 F.2d 1169, 1172 (11th Cir. 1985), quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1871).

Judicial immunity, like other types of official immunity, is an immunity from the actual lawsuit and cannot be negated by claims of malice or bad faith. Mireles, 502 U.S. at 11, 112 S.Ct. at 288 (citations omitted). Judicial immunity is overcome only when a judicial officer is not acting within his or her capacity, or when the judicial officer acts completely without any jurisdiction. Mireles, 502 U.S. at 11-12, 112 S.Ct. at 288 (citations omitted). "Such immunity applies 'however erroneous the act may have been and however injurious in its consequences it may have proved to the plaintiff.'" Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985) (quoting Bradley, 13 Wall. at 347). Determination of whether an act is "judicial," depends on "'the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectation of the parties, i.e., whether they dealt with the judge in his judicial capacity.'" Mireles, 502 U.S. at 12, 112 S.Ct. at 288 (quoting Stump v. Sparkman, 435 U.S. 349, 362, 98 S.Ct. 1099, 1108, 55 L.Ed.2d 331 (1978) and citing Forrester v. White, 484 U.S. 219, 227-29, 108 S.Ct. 538,544-45 98 L.Ed.2d 555 (1988)). The United States Supreme Court, explaining its ruling in a case involving a suit against officials of the Department of Agriculture, explained:

> We think the Court of Appeals placed undue emphasis on the fact that the officials sued here are . . . employees of the Executive Branch. Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities . . .
>
> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested . . . *controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus*.

Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913 57 L.Ed.2d 895 (1978) (first citations omitted; then citing Bradley at 13 Wall., at 348-349) (emphasis added).

As the Eleventh Circuit has stated:

> The Supreme Court has set forth a two-part test for determining when a judge is entitled to immunity from money damages liability when sued under section 1983. Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). The first part of the test is whether the judge dealt with the plaintiff in a judicial capacity. Id. at 362, 98 S. Ct. at 1107. If the judge was not dealing with the plaintiff in a judicial capacity, then

> there is no immunity. If the judge was dealing with the plaintiff in his judicial capacity, however, the second part of the test is whether the judge acted in the " 'clear absence of all jurisdiction.' " Id. at 357, 98 S. Ct. at 1105 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351, 20 L. Ed. 646 (1872).

Simmons v. Conger, 86 F.3d 1080, 1084-1085 (11th Cir. 1996).

It should be noted that judicial immunity is an immunity from suit and not just from the ultimate assessment of damages. Mireles v. Waco, 502 U.S. 9, 11, 116 L.Ed.2d 9, 112 S.Ct. 286 (1991). Plaintiff's claim for attorney's fees against Judge Tunis, "personally" (Amended Complaint, pg. 14) may well be deemed a claim for damages and, therefore, be barred by judicial immunity. See Supreme Court of Virginia v. Consumers Union of United States, Inc. 462 U.S. 1137, 103 S.Ct. 3124, 77 L.Ed.2d 1375, 1377 (1983) (Justice Burger, dissenting) (noting that an award of attorney's fees is no less a threat to judicial independence than an award of damages).

Further, even were that not true, 42 U.S.C. § 1988 provides:

> the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, **except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees,** unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988 (emphasis added).

Thus, it has been held that:

> Furthermore, 42 U.S.C. § 1988(b) precludes the award of attorney's fees against a judicial officer "for an act or omission taken in such officer's judicial capacity . . . unless such action was clearly in excess of such officer's jurisdiction." ... Thus, the district court did not abuse its discretion in finding that Shelton's claim for attorney's fees also must fail.

Shelton v. Seay, 1999 U.S. App. LEXIS 32062 (10th Cir. 1999) (unpublished case).

6. Qualified Immunity Applies In Judge Tunis' Individual Capacity.

Qualified immunity will apply to give the government agent the benefit of the doubt so long as the conduct was not so obviously illegal in the light of then-existing law that only an incompetent or one who was knowingly violating the law would have committed the acts concerned. See Crosby v. Paulk, 187 F.3d 1339 (11th Cir. 1999), *rehearing and rehearing en banc denied by* 226 F. 3d 650 (2000); GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1366 (11th Cir. 1998). Intent and motivation are insignificant to the wholly objective standard. See Crosby, supra, at 1344.

Once qualified immunity is asserted, the plaintiff bears the burden of demonstrating that the federal rights allegedly violated were clearly established. Flores v. Satz, 137 F.3d 1275, 1277 (11th Cir. 1998); Foy v. Holston, 94 F.3d 1528 (11th Cir. 1996). This burden cannot be met by generally stating constitutional rights. Crosby, supra, at 1345; Harbert International, Inc. v. James, 157 F.3d 1271, 1283-85 (11th Cir. 1998). The Plaintiff must establish more than legal truisms, he or she must demonstrate that the law fixed the contours of the right so clearly that a reasonable official would have understood his or her acts were unlawful. Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1040-41 (11th Cir. 1996), cert. denied, 519 U.S. 870, 117 S.Ct. 185, 136 L.Ed.2d 123 (1996). This Court has described the application of qualified immunity as follows:

> That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. (Footnote omitted) Harlow, 457 U.S. at 818, 102 S.Ct. at 2738 (officials "generally are shielded from liability for civil damages"); Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir.1989) ("The Harlow decision sets up a bright-line test that is a powerful constraint on causes of action under section 1983."); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323-24 (11th Cir.1989) (when "no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where [First Amendment case law] would lead to the inevitable conclusion that the [act taken against] the employee was unlawful"). Unless a government agent's act is so obviously wrong, in

> the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. See Malley v. Briggs, 475 U.S. 335, 341-43, 106 S.Ct. 1092, 1096-97, 89 L.Ed.2d 271 (1986). Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity.

Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994).

Here, the Plaintiff has done no more than allege that Judge Tunis has made rulings that he believes violated his constitutional rights. (Amended Complaint). Where his attorney's fees claim against her, personally, could certainly be deemed a claim against her in her individual capacity, qualified immunity applies to protect her from such allegations.

7. The Amended Complaint Fails To State A Cause of Action.

Plaintiff has failed to allege any act or omission that Judge Tunis has done with sufficient specificity to determine whether Plaintiff's rights were violated or not. (See, 2d Amended Complaint, ¶¶85-99). While it is true that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, (Conley v. Gibson, 355 U.S. 41 (1957)), factual allegations supporting a claim "must be pleaded with sufficient clarity so as to 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.'" Peterson v. Atlanta Housing Authority, 998 F.2d 904, 912 (11th Cir. 1993) (emphasis supplied by Circuit Court) quoting Conley, 355 U.S. at 47. Conclusory allegations and unwarranted deductions of fact need not be accepted as true. Id., citing Assoc. Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974). Moreover, when no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate. Marshall County Bd. of Educ. v. Marshall

County Gas Distr., 992 F.2d 1171, 1174 (11th Cir. 1993).

Here, Plaintiff has failed to allege that Judge Tunis has done anything except rule against him in matters that he believed resulted in violation of his constitutional rights, primarily by allegedly denying him discovery and denying continuances. (2d Amended Complaint, ¶¶85-99). It is submitted that such allegations are insufficient to state a cause of action.

Further, regarding the injunction claim (which appears to be the only remedy specifically requested against Judge Tunis), Plaintiff has failed to state a claim. In order to prevail on a motion for injunctive relief pursuant to Federal Rule of Civil Procedure Rule 65, the Plaintiff must demonstrate the following four factors: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. See McDonald's Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998). The Eleventh Circuit has also stated that the granting of an injunction requires demonstration that there is no adequate remedy at law. See Keener v. Convergys Corp., 342 F.3d 1264, 1269 (11th Cir. 2003) (permanent injunction requires success on the merits, continuing irreparable harm and no adequate remedy at law).

"A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." Id. at 1306. A weakness in proof on one of the four factors may not be remedied by demonstrating strength in another. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983) (movant bears burden of persuasion on each factor in preliminary injunction test).

Courts will not grant injunctive relief if the plaintiff demonstrates only a mere possibility of injury. See Baxter Int'l, Inc. v. Morris, 976 F.2d 1189, 1194 (8th Cir. 1992) ("[i]njunctive relief must be based on a real apprehension that future acts are not just threatened but in all probability will be committed"). Here, the Plaintiff's allegations are insufficient to even allege the possibility that these factors could be fulfilled.

CONCLUSION

Based upon the above arguments and authorities, the Second Amended Complaint should be dismissed.

Dated: August 20, 2007
Fort Lauderdale, FL

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 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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United States District Court, Southern District of Florida

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