UNITED STATES DISTRICT COURT
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.

THE FLORIDA BAR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, The Florida Bar ("the Bar"), moves to dismiss the Second Amended Complaint on the following grounds:

- The Court should dismiss pursuant to the Younger abstention doctrine in that Plaintiff asks this Court to interfere with an ongoing Bar disciplinary proceeding.

- The Court is barred by the Eleventh Amendment to the United States Constitution from awarding monetary damages or equitable relief against The Florida Bar.

- The Florida Bar is afforded absolute immunity from liability in the performance of its disciplinary responsibilities.

- The Second Amended Complaint fails to state a claim upon which relief can be granted.

The more particular grounds for this motion and supporting authority are set forth in the following memorandum of law.

MEMORANDUM OF LAW

Defendant, The Florida Bar, acting as an arm and agent of the Florida Supreme Court, regulates the practice of law in Florida. Included within The Florida Bar's duties is the authority to enforce the rules of professional conduct and to discipline persons practicing within the State of Florida that violate such rules. Plaintiff, Mr. Thompson, a member of The Florida Bar, is subject to the Bar's rules of professional conduct and the Bar's disciplinary authority.

I. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO THE YOUNGER ABSTENTION DOCTRINE.

The doctrine of abstention announced in *Younger v. Harris*, 401 U.S. 37 (1971), requires a federal district court to abstain from assuming jurisdiction when: (1) there is an ongoing state criminal, civil or administrative proceeding; (2) the state court provides an adequate forum to hear the claims raised in the federal complaint; and (3) the state proceedings involve important state interests or policies. "*Younger* abstention is not discretionary; it must be invoked once the three conditions are met, absent extraordinary circumstances." *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160,1163 (10th Cir. 1999). The doctrine applies to actions for declaratory as well as injunctive relief. *Samuels v. Mackell*, 401 U.S. 66 (1971).

The factors all weigh in favor of abstention in the case at bar. First, Mr. Thompson cannot dispute that there is an ongoing disciplinary proceeding as it is referenced throughout the Second Amended Complaint. *See* Second Amended

Complaint, ¶¶ 10, 12, 15, 21, 35. Federal courts are required to abstain from interfering with state lawyer disciplinary proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982). Second, Florida's disciplinary procedures provide extensive due process protections, see Rules 3-7.3 through 3-7.8, *Rules Regulating the Florida Bar*, and there is adequate opportunity to raise federal constitutional issues in the course of such proceedings. See *The Florida Bar v. Daniel*, 626 So.2d 178 (1993); *State ex rel. Florida Bar v. Grant*, 85 So.2d 232 (1956). Finally, the United States Supreme Court has specifically recognized that a State has "an extremely important interest in maintaining and assuring the professional conduct of the attorneys licensed" and has expressly held that attorney disciplinary proceedings are subject to the *Younger* abstention doctrine. *Middlesex,* 457 U.S. 423, 434 (1982).

The Second Amended Complaint purports to set forth allegations to support a bad faith exception to abstention. While, the Supreme Court has recognized several exceptions to the *Younger* doctrine, the bad faith exception is a narrow one requiring more than mere conclusory allegations to support his request for relief. *Kugler v. Helfant*, 421 U.S. 117, (1975); *Grandco Corporation v. Rochford*, 536 F.2d 197 (1976); *Carbone v. Zollar*, 845 F.Supp. 534 (N.D. Ill. 1993).

Mr. Thompson makes conclusory allegations that the Bar has denied his due process rights during the course of the disciplinary proceeding; improperly proposed a psychiatric evaluation in the context of mediation/settlement discussions; and, denied his due process, equal protection and first amendment rights. *See* Second Amended Complaint, ¶¶ 76, 65-79, 84(a) - (i). Such allegations are insufficient to permit federal court intervention.

Bad faith in the context of the *Younger* doctrine refers to proceedings brought solely for the purpose of suppressing an individual's rights with no real hope of ultimate success. *Younger,* 401 U.S at 48. The factual allegations of the Second Amended Complaint do not support an inference that the disciplinary proceedings were motivated by bad faith or with intent to harass. When a case falls within the *Younger* doctrine, the appropriate disposition is dismissal. *Aiona v. Judiciary of Hawaii*, 17 F.3d 1244 (9th Cir. 1994); *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353 (9th Cir. 1986).

II. THE FLORIDA BAR IS ENTITLED TO ELEVENTH AMENDMENT AND ABSOLUTE IMMUNITY.

A. Eleventh Amendment Immunity

The Eleventh Amendment precludes suits by citizens against their own States in federal court. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). A "state" for Eleventh Amendment purposes includes, inter alia, certain actions against state instrumentalities. *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003)(citing *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000)). The law is well settled that The Florida Bar is an arm of the state entitled to Eleventh Amendment protection when regulating and engaging in the disciplinary process of attorneys licensed in the State of Florida. *Kaimowitz v. The Florida Bar*, 996 F.2d 392, 393 (11th Cir. 1993); *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993); *Geer v. Harkness*, 1344 Fed. Appx. 312, 314 n.2 (11th Cir. 2005). The Eleventh Circuit's decision in *Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993), is instructive. In *Kaimowitz* the court fully adopted the District Court's

memorandum which held that the Eleventh Amendment prohibited actions against a state, but also prohibited actions against a state's agencies and other arms, including the Florida Bar. See *Id.* at 1153, 1155. Consequently, this Court, like the *Kaimowitz* court lacks subject matter jurisdiction. Dismissal with prejudice is warranted as no set of facts can state a claim or create jurisdiction against The Florida Bar.

While the Eleventh Amendment generally bars claims seeking monetary damages, the Eleventh Amendment has been held to apply to equitable relief. *E.g.*, *Badillo v. Thorpe*, 158 Fed. Appx. 208, 212 n.6 (11th Cir. 2005); *Rosario v. American Corrective Counseling Services, Inc.*, 2006 WL 3313845 (M.D. Fla.).

B. Absolute Immunity

Even if the Eleventh Amendment were not applicable, dismissal is warranted. States no longer need to rely exclusively on Eleventh Amendment immunity to avoid liability in Section 1983 cases because "states and state officials acting in their official capacities are not 'persons' subject to liability under 42 U.S.C. § 1983." *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989)("Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties"). Thus, The Florida Bar is absolutely immune for alleged violations of constitutional rights under Section 1983.

III. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Complaint seeks declaratory relief pursuant to 42 U.S.C., Section 1983 for asserted violations of the plaintiffs rights under the First Amendment to the United States

Constitution. In order to establish that the court has jurisdiction under Section 1983 and that the plaintiff has a claim upon which federal relief can be granted, the Complaint must allege "highly specific facts" showing the denial of constitutional rights. *Pugliano v. Staziak*, 231 F.Supp. 347 (W.D. Pa. 1964); *Roberts v. Barbosa*, 227 F.Supp. 20 (S.D. Cal. 1964); *Hoge v. Bolsinger*, 211 F.Supp. 199 (W.D. Pa. 1962); *Crawford v. Lydick*, 179 F.Supp. 211 (W.D. Mich. 1959). It is insufficient for the plaintiff to state "vague and conclusionary allegations." *Powell v. Workmen's Compensation Board*, 327 F.2d 131 (2nd Cir. 1964); *Dunn v. Gazzola*, 216 F.2nd 709 (1st Cir. 1954). In *Powell* as in the case at bar, the plaintiff sought to state a claim under 42 U.S.C., Sections 1983 and 1985. The Court stated:

> A complaint in a case like this must set forth the facts showing some intentional and purposeful depravation of constitutional rights. [citation omitted]. This complaint does contain some general allegations, framed in broad language closely paralleling that used in Sections 1983 and 1985(3), that defendants successfully conspired to deprive plaintiff of its rights. But plaintiff was bound to do more than merely state vague and conclusionary allegations respecting the existence of a conspiracy. It was incumbent upon him to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the commission of the claimed conspiracy.

Powell, supra, at 137.

The Complaint makes conclusory allegations that the Florida Bar violated Mr. Thompson's due process rights by violating Florida Rules of Civil Procedure and Rules Regulating The Florida Bar, specifically by refusing to recuse a Florida Bar Governor, denying discovery, processing unsworn complaints and processing Alabama Bar Complaints. In fact, the theme of the Second Amended Complaint is putative errors of

state law. *See* Second Amended Complaint, ¶¶ 11, 13, 15, 23, 61, 62, 64, 73, 74, 81, 82, 84. However, Section 1983 cannot be invoked to litigate alleged state law errors.

It has long been understood that a state may violate its own law without violating the United State Constitution, *e.g.*, *Gryger v. Burke,* 334 U.S. 728, 731 (1948): "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." Furthermore, precedent instructs that claims that are, in essence, state law claims, cannot be given constitutional "window dressing" in order to circumvent this basic limitation of Section 1983 actions. *See, e.g. Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988)(rejecting "the contention that the Constitution requires a state to obey its own law. A reader could see in the phrase 'due process of law' a requirement of 'obedience to law,' and there is some historical support for such a view...The phrase does not have such a meaning for the contemporary [Supreme] Court, however, for that body has rejected the equivalence repeatedly, e.g., *Barney v. City of New York*, 1993 U.S. 430 (1904); *Hebert v. Louisiana*, 272 U.Ss. 312, 316 (1926); *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *Davis v. Schere*, 468 U.S. 183, 193-96 (1984)"). In this regard, *Archie* further instructed that

> A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules. Indeed, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Id. at 1217 (internal quotation marks and citations omitted); *accord, e.g. Goodrich v.*

Newport News Sch. Bd., 743 F.2d 225, 227 (4th Cir. 1984)("The enforcement of state regulations is to be done through the state court system and not in an action under § 1983").

This well settled teaching warrants dismissal of Thompson Section 1983 claims.

A. Neither Rule 4.8.2(a) Nor Rule 4-8.4(d) Violate The First Amendment To The United States Constitution.

Mr. Thompson challenges the constitutionality of Rule 4-8.2(a) and Rule 4-8.4(d) ("Rules") both facially and as applied. The Rules are wholly consistent with the First Amendment. In fact, the facial constitutionality of these Rules and similar bar rules has consistently been upheld against similar attacks. See, *e.g., Howell v State Bar of Texas*, 843 F.2d 205 (5th Cir. 1988); *The Florida Bar v. Saylor*, 721 So. 2d 1152 (Fla. 1998); *The Florida Bar v. Van Zamft*, 814 So.2d 385 (Fla. 2002); *Mississippi Bar v. Lumumba*, 912 So.2d 871 (Miss. 2005).

Harper v. Office of Disciplinary Counsel, 113 F.3d 1234 (6th Cir. 1997) (unpublished) is instructive. The petitioner in *Harper* was seeking to enjoin the enforcement of bar rules, comparable to Rules 4-8.2(a) and 4-8.4(d), on the grounds that the rules violated her First Amendment right to freedom of speech and Fourteenth Amendment right to due process.[1] Specifically, the petitioner argued that the rules were overbroad because they could be used to punish constitutionally protected speech. In

[1] Due to the pending state disciplinary action, the District Court decided to abstain from the action. The petitioner challenged that decision, arguing that under *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982), "extraordinary circumstances" existed that would permit the district court to entertain jurisdiction; the *Harper* court disagreed with the petitioner. See *Harper* at *2 and 6. While the *Harper* court analyzed the abstention argument, its overbreadth and vagueness discussion are also instructive.

rejecting this overbreadth argument, the *Harper* court recognized that the rule merely required criticisms to be truthful and accurate. *Id.* at 3.

The "truthful and accurate" requirement in *Harper* is consistent with Rule 4-8.2(a), which prohibits statements "that the lawyer knows to be false" or that is made with "reckless disregard as to its truth or falsity;" and Rule 4-8.4(d), which prohibits conduct that is "prejudicial to the administration of justice." In reaching its conclusion, the *Harper* court noted that the U.S. Supreme Court had upheld similar provisions to "maintain the dignity," and to "promote public confidence." *Id.* at 5, relying on *Parker v. Levy,* 417 U.S. 733 (1974).

Like, the rule in *Harper*, Rules 4-8.2(a) and 4-8.4(d) are not overbroad or vague or constitutionally infirm.

B. The Complaint Fails To State Necessary Elements For Declaratory Judgment.

Under Florida law, a party seeking declaratory relief must establish the following elements: there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 404 (Fla. 1996); *City Of*

Hollywood v. Petrosino, 864 So.2d 1175, 1177 (Fla. 4th DCA 2004); *State v. Florida Consumer Action Network*, 830 So.2d 148, 151 (Fla. 1st DCA 2002).

In determining whether an issue is fit for judicial determination, the court must determine "whether it is faced with an abstract question or a concrete controversy." *Efron By and Through Efron v. U.S.*, 1 F.Supp.2d 1468, 1470 (S.D.Fla. 1998) (denying requested declaratory relief where "[a]t least three contingencies not yet met must be satisfied before [plaintiff] could possibly suffer any injury and before a controversy could arise), citing *Browning-Ferris Industries of Alabama, Inc. v. Alabama Department of Environmental Management*, 799 F.2d 1473, 1478 (11th Cir. 1986). In the declaratory judgment context, the analysis boils down to "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Enfron,* 1 F.Supp.2d at 1470. In other words, the injury in question must be "immediate or imminently threatened" and not conjectural, hypothetical or abstract. *Id.* citing *National Treasury Employees Union v. United States,* 101 F.3d 1423, 1427 (D.C.Cir. 1996); *Wilderness Society v. Alcock,* 83 F.3d 386, 390 (11th Cir. 1996).

In the instant case, Mr. Thompson seeks broad declaratory relief regarding "all Florida Bar Rules, as framed and/or as applied, whose effect is to limit, chill, or infringe in any fashion the rights of lawyers to criticize the judicial system or any judges therein..." Yet, he has not demonstrated that he has an "immediate or imminently threatened" injury. It appears that the only immediate or imminently threatened injury is the need to defend a disciplinary prosecution. "The imminence of such a prosecution

even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity..." *Beal v. Missouri Pacific Railroad Corp.,* 312 U.S. 45, 49 (1941). Moreover, the few relative facts alleged under his request for declaratory judgment, do not show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Because, Mr. Thompson has failed to establish the elements necessary to request declaratory judgment, this relief should not be granted.

C. The Complaint Fails To State Necessary Elements For A Request For Injunctive Relief.

Mr. Thompson requests this Court issue an injunction prohibiting the Bar's ongoing disciplinary proceeding. Permanent injunctive relief is only appropriate where: 1) a plaintiff is successful on the merits; 2) there is no available remedy at law; and 3) the balance of equities favor granting such relief. *Travellers Intern. AG v. Trans World Airlines, Inc.*, 722 F. Supp. 1087 (S.D.N.Y. 1989). The standard for permanent injunctive relief is essentially the same as that for preliminary injunctive relief except that the plaintiff must show *actual* success on the merits instead of *a likelihood* of success. *Klay v. United Healthgroup, Inc.*, 376 F. 3d 1092, 1097 (11th Cir. Fla. 2004) (recognizing that "most courts do not consider the public interest element in deciding whether to issue a permanent injunction"). Mr. Thompson failed to show actual success on the merits and has therefore failed to state a claim for permanent injunctive relief.

Mr. Thompson does not allege that Florida law precludes him from asserting his federal claims during state court review of the disciplinary proceeding. Instead, he alleges that the Florida Supreme Court will only initiate the review after a trial on the

merits and the referee's report is submitted. *See* Second Amended Complaint, ¶45. Despite these allegations, the Florida Supreme Court's review does provide a meaningful and adequate alternative legal remedy for Mr. Thompson with respect to the disciplinary proceedings. *See Huffman v. State*, 813 So.2d 10,11 (Fla. 2000).

Florida's disciplinary proceedings offer adequate opportunity for review of Mr. Thompson's constitutional challenges. Florida's proceedings provide him with an opportunity to appeal the referee's report and recommendation, and seek review by the Florida Supreme Court, including if the referee were to rule against Mr. Thompson's constitutional claims. *See* Fl. Bar Rule 3-7.7(a)(1) and (c)(5). Because the disciplinary proceeding has not been concluded, Mr. Thompson may raise his constitutional challenges to the state supreme court. *See Majors v. Engelbrecht*, 149 F.2d 709, 729 ("[s]ubsequent judicial review is a sufficient opportunity" to raise constitutional challenges).

IV. CONCLUSION

For the foregoing reasons, The Florida Bar respectfully requests that this Court grant its Motion to Dismiss.

s/ Karusha Y. Sharpe
BARRY RICHARD
FLORIDA BAR NUMBER 0105599
KARUSHA Y. SHARPE
FLORIDA BAR NUMBER 0540161
GREENBERG TRAURIG, P.A.
101 EAST COLLEGE AVENUE
TALLAHASSEE, FL 32301
TELEPHONE (850) 222-6891
FACSIMILE (850) 681-0207

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to the following:

John B. Thompson, Esq.
1172 South Dixie Hwy., Suite 111
Coral Gables, Florida 33146

Charles M. Fahlbusch, Esq.
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
Civil Litigation Division
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301

s/ Karusha Y. Sharpe
Attorney

TAL 451429446v1 8/20/2007