

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 07-21256-CIV-JORDAN

JOHN B. THOMPSON)
)
Plaintiff)
)
vs.)
)
THE FLORIDA BAR, et al)
)
Defendants)
_____)

OMNIBUS ORDER

Mr. Thompson filed this lawsuit against The Florida Bar and Judge Dava Tunis seeking injunctive and declaratory relief and damages in response to certain disciplinary proceedings initiated by the Bar against him. In light of Mr. Thompson's unopposed motion for leave to amend his complaint a third time, I address the issues raised by the parties as to the second amended complaint only briefly.

First, as I explained to the parties at the hearing on August 23, 2007, the Florida Bar is not a proper defendant in this lawsuit. The Florida Bar is an arm of the Florida Supreme Court and an agency of the State of Florida. *See Dacey v. Florida Bar, Inc.*, 414 F.2d 195, 198 (11th Cir. 1969). Mr. Thompson himself alleges this fact in his second amended complaint. *See* Second Amended Complaint at ¶ 2 (the Bar is "an arm of the government of the State of Florida"). As an agency of the State of Florida, the Bar is not susceptible to suit under 42 U.S.C. § 1983 because it is not a "person" under the statute. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989) (holding that states are not "persons" within the meaning of § 1983, and therefore cannot be sued for any relief pursuant to § 1983, and further stating that "our holding here . . . applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes"). *See also Taylor v. Department of Public Safety*, 142 Fed.Appx. 373, 2005 WL 1635263 at *1 (11th

Cir. 2005) (affirming dismissal of § 1983 suit against the Georgia Department of Public Safety because state agencies are not “persons” for purposes of § 1983).¹

Furthermore, any other claims that Mr. Thompson has raised, or may raise, against the Florida Bar itself are barred by the Eleventh Amendment. As explained by the Eleventh Circuit in *Kaimowitz v. The Florida Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993):

The Eleventh Amendment prohibits federal courts from exercising subject matter jurisdiction in suits brought against a state by a citizen of that state. The amendment applies even when a state is not named as a party of record, if for all practical purposes the action is against the state. Thus, the Eleventh Amendment extends to state agencies and other arms of the state. [Accordingly,] [t]he Eleventh Amendment prohibits actions against state courts and state bars.

(internal citations and quotations omitted). *See also Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“[I]n the absence of consent[,] a suit in which the state or one of its agencies or department[s] is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought.”). Therefore, Mr. Thompson cannot proceed on any claims directly against the Florida Bar in this lawsuit.

Second, as the record now stands, I would abstain from any claims that Mr. Thompson has raised against Judge Tunis under the doctrine announced by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). I understand that *Younger* and its progeny provide for a narrow bad faith exception to the abstention doctrine, *see Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982), and that Mr. Thompson seeks to proceed under this exception. Accordingly, I specifically gave the parties an opportunity to submit evidence on the issue of bad faith. In particular, I invited the parties to submit evidence of Mr. Thompson’s disciplinary history with the Florida Bar, which, according to Mr. Thompson, shows that the Bar has engaged in historic and continued efforts to infringe upon his First Amendment rights through unwarranted disciplinary

¹ As I told the parties at oral argument, *Will* does not necessarily preclude Mr. Thompson from obtaining the injunctive relief that he seeks. In fact, the Supreme Court specifically recognized in a footnote in *Will* that a lawsuit for injunctive relief can go forward under the *Ex parte Young*, 209 U.S. 123, 159-160 (1908), fiction: “a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Will*, 491 U.S. at 71, n.10.

actions because the Bar's representatives disagree with his conservative ideology. The only evidence that I received in response to my order was the Florida Bar's record of a 1992 disciplinary proceeding against Mr. Thompson in which he received a public reprimand from the Florida Supreme Court after pleading guilty to violations of Rule 4-8.4(d) of the Florida Rules of Professional Conduct and agreeing to pay \$3000 in costs. This adjudication certainly does not support my exercise of jurisdiction based on alleged bad faith.² Instead of providing his own evidence of disciplinary proceedings or lawsuits that were allegedly pursued by the Bar without a hope of success, Mr. Thompson continues to allude to such bad faith prosecutions in his pleadings. Such filings by Mr. Thompson are clearly insufficient to meet his burden in proving an exception to *Younger* abstention. See *Phelps v. Hamilton*, 59 F.3d 1058, 1066 (10th Cir. 1995) ("Under *Younger*, intervention cannot be predicated on mere allegations; rather, *the federal plaintiff must prove bad faith* or harassment before intervention is warranted.")(emphasis added).³ And, therefore, on the current record, I would abstain from hearing the remaining claim for injunctive relief against Judge Tunis. But since Mr. Thompson has now moved to file a third amended complaint, and the defendants have agreed to his filing of the same, the second amended complaint is no longer at issue, and I express no view on what my ruling on *Younger* abstention will be with respect to the third yet-unfiled amended complaint.

Mr. Thompson's unopposed motions for leave to file a third amended complaint [D.E. 64,65] are GRANTED. By September 17, 2007, Mr. Thompson shall file a copy of the third amended complaint pursuant to which he intends to proceed in this action. Mr. Thompson is advised that further amendments to his complaint will not be permitted without good cause, as he has already been

² Mr. Thompson has moved to strike the Bar's filing of the 1992 disciplinary proceeding. His motion to strike [D.E. 79] is DENIED. The Bar is permitted to file such evidence, and in fact, was specifically asked to do so at the August 23, 2007, hearing, as was Mr. Thompson. If Mr. Thompson believes that the evidence filed by the Bar is incomplete or otherwise incorrect, he was free to supplement the evidence.

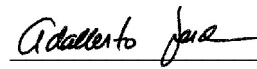
³ Mr. Thompson also filed a motion for leave to file his psychiatric evaluation as evidence of the Florida Bar's bad faith. While I do not see the relevance of this evidence, the motion [D.E. 56] is granted, and Mr. Thompson is free to argue its relevance when abstention is litigated as to the third amended complaint.

given multiple opportunities to amend his complaint, and it is unfair to require the defendants to file and re-file new motions to dismiss each time.

Mr. Thompson's motions for a court-appointed mediation [D.E. 7], for a preliminary injunction [D.E. 14], to appoint a mediator and for a status conference [D.E. 23], and to appoint a mediator [D.E. 61] are DENIED as premature. After Mr. Thompson files the operative third amended complaint, and the parties have had an opportunity to brief *Younger* abstention or other bases for dismissal, then Mr. Thompson may re-file his requests.

The Florida Bar's motion to dismiss the second amended complaint [D.E. 58] is GRANTED. Judge Tunis' motion to accept her memorandum in opposition to the motion for a preliminary injunction [D.E. 48] is GRANTED. Judge Tunis' motion to dismiss the second amended complaint [D.E. 53] is DENIED AS MOOT, in light of my order granting Mr. Thompson's motion for leave to file a third amended complaint.

DONE and ORDERED in chambers in Miami, Florida, this 6th day of September, 2007.



Adalberto Jordan
United States District Judge

Copy to: All counsel of record