C. Vernon MASON, Plaintiff,
v.
DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION of the Supreme Court of the State of New York, First Judicial Department, Office of the Chief Counsel, Defendant.

No. 89 CIV. 3598 (JES).

United States District Court, S.D. New York.

Aug. 21, 1989.

Stephanie Y. Moore, William M. Kunstler, New York City, Ronald L. Kuby, of counsel, for plaintiff.

Stroock & Stroock & Lavan, New York City, James G. Greilsheimer, Alan M. Klinger, Joseph J. Giamboi, of counsel, for defendants.

MEMORANDUM OPINION AND ORDER

SPRIZZO, District Judge.

*1 Plaintiff C. Vernon Mason brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiff seeks to preliminarily and permanently enjoin defendant Departmental Disciplinary Committee ('DDC') from proceeding with an investigation into plaintiff's allegedly improper conduct as an attorney. Defendant has cross-moved to dismiss the complaint pursuant to Younger v. Harris, 401 U.S. 37 (1971). For the reasons that follow, defendant's motion is granted and plaintiff's motion is denied.

FACTS

The following facts are undisputed.

Plaintiff C. Vernon Mason is an attorney admitted to practice and practicing law in the First Judicial Department of New York State. Defendant DDC is the entity charged with the responsibility of investigating allegations of attorney misconduct in the First Judicial Department. See N.Y. Comp. Code Rules & Reg. tit. 22 § 603.4.

After receiving a letter from five New York Assemblymen in June of 1988, see Complaint, Exhibit A at 236; Affidavit of Hal R. Lieberman ('Lieberman Aff.') at ¶5, the DDC, through its then Chief Counsel Michael Gentile, wrote a letter to the Attorney General of the State of New York, Robert Abrams, requesting his assistance in the investigation of possibly improper conduct by plaintiff in connection with his representation of Tawana Brawley. See id. at ¶6; N.Y. Comp. Code Rules & Reg. tit. 22 § 603.4(c). In addition, the DDC indicated it would stay its investigation pending completion of a grand jury investigation into the Brawley case. See Lieberman Aff. at ¶8.

On October 6, 1988, the Attorney General publicly released the grand jury's report and a complaint detailing allegations of plaintiff's potentially unethical conduct. See id. at ¶9. Thereafter, on October 14, 1988, the DDC mailed a copy of the Attorney General's complaint to plaintiff and requested a response to the allegations contained therein within twenty days. See id.

After plaintiff's requests for an extension of time to respond to the complaint were denied, plaintiff answered the charges on November 4, 1988, and was advised by the DDC that he could supplement his answer by January 9, 1989. See id. at ¶12 n.1. In addition, the DDC notified plaintiff that Stephanie Moore would not be permitted to represent him in the disciplinary proceeding because she is not admitted to practice in New York. [FN1]

In January and February of 1989, a controversy regarding the handling of DDC investigations arose involving the DDC's then Chief Counsel Michael Gentile and the Chief Judge of the Appellate Division, First Department, Justice Francis Murphy. See Complaint at ¶26. Plaintiff contends that this controversy is related in some fashion to his pending disciplinary investigation. See id. at ¶¶29-30. Mr. Gentile later resigned from his position with the DDC and, after conducting an investigation, the Justices of the First Department found that Justice Murphy had not engaged in any improper conduct. See id. at ¶47.

DISCUSSION

*2 Plaintiff now contends that the institution of disciplinary proceedings against him violates his

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First Amendment rights, and that the manner in which the disciplinary investigation was initiated and is being conducted violates his due process rights under the Fourteenth Amendment. Defendant argues that this Court should abstain from taking jurisdiction over this action and dismiss plaintiff's complaint under Younger v. Harris, 401 U.S. 37 (1971).

Younger v. Harris, requires that, consistent with principles of federalism and comity, federal courts refrain from interfering with ongoing state criminal proceedings. The Younger doctrine has since been extended to encompass other non-criminal proceedings, see, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and in particular has been held applicable to attorney disciplinary proceedings, see Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982); Anonymous v. Assoc. of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975); Erdman v. Stevens, 458 F.2d 1205 (2d Cir. 1972), so long as those proceedings afford an adequate opportunity to raise constitutional challenges. See Middlesex, supra, 457 U.S. at 432.

Plaintiff does not and cannot claim that under New York law he cannot obtain effective judicial review of his constitutional challenge to the disciplinary proceedings. [FN2] See Erdman, supra, 458 F.2d at 1211. Plaintiff does contend, however, that defendant's bad faith and other extraordinary circumstances make abstention inappropriate. However, while it is true that a showing of bad faith or extraordinary circumstances could justidy federal judicial relief not withstanding the pendency of state judicial proceedings, see Middlesex, supra, 457 U.S. at 435, plaintiff had failed to demonstrate that such extradordinary circumstances or bad faith are present here.

Plaintiff first argues that because the DDC sought the Attorney General's assistance in pursuing its investigation, and because the Attorney General publicly desseminated his complaint, the DDC has acted impartially and in bad faith. Even asuming, however, that these allegations evidence some impropriety, they are not sufficient to show the bad faith required by Younger. Younger's bad faith exception requires that the proceedings have no basis in fact or be brought solely for purposes of harassment. See Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975).

Plaintiff also argues that the controversy between Justice Murphy and Mr. Gentile somehow involved the DDC's investigation of his conduct, and that this controversy, coupled with the Appellate Division's subsequent investigation of the controversy, has rendered the DDC and the Appellate Division irretrievably biased against him. This bare allegation falls far short of the showing of bias necessary to make Younger abstention inappropriate. [FN3] See Collins v. County of Kendall, 807 F.2d 95, 99 (7th Cir. 1986). Moreover, any such bias can be the basis of a motion to recuse any member of the DDC or the Appellate Division, and New York law requires recusal for actual or apparent bias. See N.Y. Jud. Law § 14 (McKinney 1983); Code of Judicial Conduct, Canons 2 & 3, reprinted in, N.Y. Jud. Law App. (McKinney 1975). In addition, plaintiff may also move to transfer the venue of the proceedings to another Department of the Appellate Division.

*3 Finally, plaintiff argues that the DDC's refusal to grant an extension of time to respond to the charges, and its refusal to accept Ms. Moore as his representative, evidence impartiality and bad faith. These arguments are unpersuasive. A mere disagreement between plaintiff and the DDC with respect to the exercise of the DDC's discretion, without more, is a totally insufficient predicate for a claim of bias sufficient to make Younger abstention inappropriate.

CONCLUSION

In sum, plaintiff has failed to show that he cannot fairly raise his constitutional claims in the State proceedings, and has failed to show the bad faith or extraordinary circumstances necessary to make Younger abstention inappropriate. [FN4] Thus, this Court is constrained to defer to the state disciplinary proceedings and dismiss plaintiff's complaint. Defendant's motion to dismiss is granted and plaintiff's motion for a preliminary injunction is denied. The clerk is directed to dismiss the complaint and close the above-captioned action.

It is SO ORDERED.

Dated: New York, New York

FN1. Defendant's actions later became the subject of two Article 78 petitions. One petition challenged the denial of plaintiff's requests for an extension and the DDC's decision not to allow Ms. Moore to represent him. See Complaint at ¶19. The second petition sought to have the complaint dismissed on grounds similar to those alleged in the instant action. See id. at 23. By order dated February 22, 1989, the Appellate Division, First Department, granted plaintiff a sixty day extension of time to respond, affirmed on the issue of Ms. Moore's representation and denied the motion to dismiss the disciplinary complaint without opinion. See id. at ¶¶39-41. Leave to appeal was denied by the New York Court of Appeals on May 5, 1989. See id. at ¶49.

FN2. Plaintiff does argue that if he receives a letter of caution from the DDC, he will not be permitted to raise his constitutional claims. However, a letter of caution is the lightest sanction which the DDC may impose, and carries with it virtually no adverse consequences. See N.Y. Comp. Code Rules & Reg. tit. 22 § 603.9(b). That circumstance, along with the merely speculative possibility that such a sanction will be imposed, is not enough to preclude Younger abstention.

FN3. Plaintiff's reliance upon Gibson v. Berryhill, 411 U.S. 564 (1973) is misplaced. In Berryhill, the Court's finding that a biased tribunal prevented plaintiff from raising constitutional claims was based upon a clear showing that the tribunal had a pecuniary interest in the outcome of the proceedings. See id. at 578-79. No such showing has been made here.

FN4. Merely alleging a fairly unusual set of factual circumstances is not the showing required by Younger. Instead Younger requires a showing of circumstances that are extraordinary 'in the sense of creating an extraordinarily pressing need for immediate federal equitable relief.' Kugler, supra, 421 U.S. at 125.

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