UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DORIS L. SASSOWER,

Plaintiff,

-against-

Hon. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants.

94 Civ. 4514 (JES)
Pro Se

MEMORANDUM OF LAW

Preliminary Statement

This memorandum is submitted on behalf of defendants, Honorable Guy Mangano, Presiding Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York, and the Associate Justices thereof (defendant "Justices"), Gary Casella and Edward Sumber, Chief Counsel and Chairman, respectively, of the Grievance Committee for the Ninth Judicial District, the Grievance Committee for the Ninth Judicial District ("Grievance Committee"), and the present members thereof, Special Referee Max Galfunt (defendant "referee"), and G. OLIVER KOPPELL,

former Attorney General of the State of New York (collectively "State defendants"), in support of their motion to dismiss for failure to prosecute and comply with a Court Order.

FACTS

On June 20, 1994, plaintiff pro se filed her complaint. Plaintiff brings this action under 42 U.S.C. § 1983, alleging that defendants conspired to deprive her of her constitutional rights when defendant State Appellate Justices ordered that her license to practice law be suspended until she comply with their earlier Order that she submit to a psychiatric exam. Plaintiff asks this court to declare null and void her suspension from the practice of law in the State of New York as well as all other disciplinary orders and the provisions of the statutes and regulations under which defendant Justices ordered her suspension, to declare her as an attorney in good standing in the State of New York, and to direct defendants to pay her damages, attorney's fees and costs.

On January 9, 1995 defendants answered the complaint. On January 19, 1995 defendants moved for dismissal under Fed. R. Civ. P. 12(c), on the grounds of, among others, collateral estoppel for litigating in state court the claims she presents in this action.

On June 23, 1995, plaintiff cross-moved for summary judgment and sanctions. On October 10, 1995, defendants filed a statement in opposition to plaintiff's Rule 3(g) Statement and supporting affidavit, and memorandum in reply to plaintiff's motion for summary judgment and in opposition to plaintiff's motion for sanctions. On September 28, 1995, plaintiff moved, by order to

show cause, for a preliminary injunction and order temporarily restraining defendant Justices from enforcing her suspension from the practice of law or from presiding over any action involving her, pending the outcome of the litigation.

The Court reserved decision until October 27, 1995.

By Order, dated October 3, 1995, the Court stated that it "will reserve decision on plaintiff pro se's application for a temporary restraining order until it rules on the cross-motions for summary judgment scheduled for oral argument on October 27, 1995 ...," and otherwise set dates for the filing of papers.

On October 27, 1995, the Court denied plaintiff's motion for recusal she filed the day before and heard oral argument on defendants' motion on the pleadings.

On November 9, 1995, the Court ordered plaintiff to "submit to the Court copies of all documents filed in state court proceedings relating to complaints filed against plaintiff pro se, the suspension of plaintiff pro se's license to practice law and the constitutionality of the proceedings therein, on or before January 2, 1995, and it is further ordered that neither party shall file supplemental affidavits or memoranda of law without leave of Court." Order, dated November 9, 1995.

By letter, dated December 27, 1995, plaintiff wrote to request an explanation from the Court why the Court directed, by November 9, 1995 Order, her to submit copies of documents of certain state proceedings. By letter, dated February 9, 1996, plaintiff requested clarification of the Court's November 9th Order

and apprised the Court of the prejudice she believes she suffers from the Court's failure to rule on her Order to Show Cause and preliminary injunction and TRO, threatening to burden the Court with another Order to Show Cause if she does not hear from the Court in three days.

On February 13, 1995, I contacted the Court, by telephone, and asked your scheduling clerk Linda Kotowski of available dates for a conference to move for sanctions against plaintiff under 41(b). Ms. Kotowski asked me to confer with plaintiff regarding the selection of a date for the conference that would be mutually convenient for both parties. When I contacted plaintiff, by telephone, to confer with her over the selection of a date for a pre-motion conference, she refused to cooperate, speaking to me in loud tones, and with threats and insults.

By letter, dated February 23, 1996, plaintiff wrote to protest my alleged favored treatment by the Court, failure of the Court to respond to her letters, and the prejudice she suffers because the Court has not acted upon her Order to Show Cause, stating, "[i]f the Court will not do its duty to protect me by granting me the urgently-required injunctive relief, I ask that this letter be accepted as a renewal of my previous motion for this Court's recusal."

To this date, plaintiff has failed to comply with the Order of this Court.

ARGUMENT

POINT I

THE COURT SHOULD DISMISS THE COMPLAINT FOR PLAINTIFF'S FAILURE TO COMPLY WITH A COURT ORDER AND FAILURE TO PROSECUTE

Under Rule 41(b) of the Fed. R. Civ. P., the district court is authorized to dismiss an action if the plaintiff fails to prosecute his claim. Link v. Wabash Railroad Co., 370 U.S. 626, 629-33 (1992); Lyell Theater Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982). Rule 41(b) provides that "[f]or failure of the plaintiff to prosecute or to comply with ... any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant."

Although dismissal is "a harsh remedy to be utilized only in extreme situations," Theilman v. Rutland Hospital, Inc., 455 F.2d 853, 855 (2d Cir. 1972), the authority of the district court to grant the dismissal sanction is "vital to the efficient administration of judicial affairs and provides meaningful access for other prospective litigants to overcrowded courts." Lyell Theatre Corp. v. Lowes, 682 F.2d at 42. Indeed, the power to dismiss an action for failure to prosecute is inherent in the jurisdiction of the district court and may be exercised sua sponte or on motion, whenever necessary "to achieve the orderly and expeditious disposition of cases." Link v. Wabash Railroad Co., 370 U.S. at 630-31; Lyell Theater Corp. v. Lowes Corp., 682 F.2d at 41; Theilman v. Rutland Hospital, Inc., 455 F.2d at 855.

Thus, a plaintiff, even one who appears pro se, "is charged with the exercise of 'reasonable diligence' in prosecuting the action." Moore v. Telfon Communications Corp., 589 F.2d 959, 967 (9th Cir. 1978). A failure to prosecute justifying dismissal "can evidence itself either in an action lying dormant with no significant activity to move it or in a pattern of dilatory tactics ... Such conduct may warrant dismissal after merely a matter of months, Shaw v. Estelle, 542 F.2d 954 (5th Cir. 1975), or may stretch out over a period of years, Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), cert denied, 393 U.S. 1056 (1969)". Lyell Theatre Corp. v. Loews Corp. 682 F.2d at 42-3.

In this Circuit, a district court's dismissal for failure to prosecute "will be reviewed only for abuse of discretion." Jackson v. City of New York, 22 F.2d 71, 75 (2d Cir. 1994), citing Nita v. Connecticut Dep't of Envtl. Protection, 16 F.3d 482, 485 (2d Cir. 1994). See also Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 666 (2d Cir. 1980). In Jackson, this Court concluded that a dismissal for failure to comply with a court order should be assessed in "light of the record as a whole" and listed five factors that should be considered upon appeal, namely "[1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and

protecting a party's right to due process and a fair chance to be heard ... and [5] whether the judge has adequately assessed the efficacy of lesser sanctions." Jackson v. City of New York, 22 F.3d at 74, citing Alvarez v. Simmons Mkt. Research, Inc., 839 F.2d 930, 932 (2d Cir. 1988).

In light of the record as a whole, plaintiff's disregard of the Court's Order of November 9th, the fact that she is an attorney who is representing herself in this action, and her evident disrespect for this Court, the Court should dismiss the complaint in this case.

First, plaintiff admittedly failed to comply with the November 9th Order of the Court for a period of over two months. Additionally, she took no steps to contact the Court to obtain an extension of time to comply with the Court's order. She attempts to excuse her behavior by brazenly attempting to require the Court to first explain its actions before producing the documents the Court requested. See Sassower letters, dated December 27, 1995, February 9, 1996, and February 23, 1996. That her noncompliance is intentional, and not merely negligent, is evident by the statements in her letters:

> I wish to make it perfectly clear that I am not averse to providing a copy of the state court disciplinary file that the Court has directed me to produce.... However, with all due respect, I believe I have a right to know what legal purpose is intended to be served by the Court's direction and the legal authority for same.

Sassower letter, dated December 27, 1995.

She affirmatively refuses to comply with the Court Order unless the

Court explains to her why it requires her to produce the documents it requests. This conduct is improper for the untutored pro se litigant let alone one who believes herself worthy of bar membership. Compare Peart v. City of New York, 992 F.2d 458, 461 (2d Cir. 1993) (factor of duration of failure to prosecute is not relevant where plaintiff's counsel failed to comply with one order directing her to file pre-trial materials and another order directing her to appear for trial, "and otherwise demonstrated a lack of respect for the court").

Second, although the Court did not warn the plaintiff specifically that failure to comply with its November 9th Order would result in dismissal, plaintiff raised the issue of sanctions against me early in the litigation, and the Court stated that it would entertain that issue at a later time. Therefore, plaintiff, having affirmatively sought a ruling on the issue of sanctions, should not be surprised by a sanctions ruling against her for her failure to comply with the Court Order. See Chira v. Lockhead Aircraft Corp., 634 F.2d at 667, "[t]he language of Rule 41 makes [appellant's] failure to comply with [the district judge's] order a clear basis on which to affirm the dismissal" for failure to prosecute.

In light of plaintiff's blatant disregard of the Court's Order, that factor alone supports dismissal of the action. To hold otherwise would reward plaintiff's contumacious conduct, undermine the authority of the court and permit litigants to disregard its directions at will. However, the remaining three Jackson factors

also support the district court's decision to dismiss the complaint.

Prejudice to defendants by reason of plaintiff's unreasonable delay can be presumed. Lyell Theater Corp. v. Loews Corp., 682 F.2d at 43. As set forth in Moore v. Telfon Communications Corp., 589 F.2d at 967 "[f]ailure to prosecute diligently alone justifies dismissal, even where actual prejudice to the defendant is not shown." See also Peart v. City of New York, 992 F.2d at 462 ("prejudice resulting from unreasonable delay may be presumed as a matter of law..."). Even absent such a presumption, defendants are subject to the prejudice inherent in having a lawsuit pending against them for over one and one half years.

Additionally, the fourth Jackson factor has been met because the need to alleviate the court's congested calendar, and to make time for those actions being actively litigated, outweigh plaintiff's right to due process and to be heard on a patently frivolous action. Plaintiff's contumacious conduct is entirely plaintiff's own. For example, plaintiff chides the Court for its, "prejudicial disregard of [her] rights and its favored treatment of Assistant Attorney General Weinstein ..., [its] continued callous indifference ... [and failure] to do its duty." See Sassower letter, dated February 23, 1996, pp.1-4. Indeed, in Cunningham v. United States of America, 295 F.2d 535, 536 (9th Cir. 1961), the Court admonished the plaintiff for a similar ad hominem attack upon the trial judge and upheld dismissal of the case for failure to

prosecute. And, as set forth in Maiorani v. Kawasaki, 425 F.2d 1162, 1163 (2d Cir.), cert denied, 399 U.S. 910 (1970), "the parties to other cases awaiting trial have their rights too."

Finally, when the Court considers less drastic alternatives, it should nevertheless impose the sanction of dismissal because plaintiff's failure to comply wit h the Order is willful, her statements to the Court disrespectful, and plaintiff is an attorney, who should know better than to believe she can intentionally violate a court Order with impunity. The plaintiff must learn that she must adhere to certain standards of conduct that apply to any litigant who comes before the Court, but especially to attorneys. In addition, the Court need not consider the consequences of dismissal on an unwitting client, because plaintiff represents herself.

The Court should not allow plaintiff to cure her failure to comply with the Court Order prior to dismissing the action. As the Second Circuit has held, "because of the deterrence principle involved in dismissal for failure to prosecute, a 'plaintiff's hopelessly belated compliance should not be accorded great weight.' Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979)." Lyell Theatre Corp. v. Loews Corp., 682 F.2d at 43. "Any other conclusion would encourage dilatory tactics, and compliance with ... orders would come only when the backs of counsel and the litigants were against the wall." Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d at 1068. Accordingly, the Court should dismiss the

complaint for failure of the plaintiff to comply with an Order of the Court and for failure to prosecute.

POINT II

PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION AND TRO SHOULD BE DENIED.

Plaintiff's motion for a preliminary injunction should be denied because she failed to show the requisite elements for granting this extraordinary relief. In this Circuit, the moving party for a preliminary injunction bears the burden of establishing: "(1) irreparable harm and (2) (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 579-80 (2d. Cir. 1989). However, where, as here, "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." Id. at 580; See also Union Carbide Agricultural Products Co. v. Costle, 632 F.2d 1014, 1018 (2d. Cir. 1980), cert. den. 450 U.S. 996, 101 S. Ct. 1698 (1981); Medical Society of the State of New York v. Toia, 560 F.2d 535, 538 (2d Cir. 1977).

Here, plaintiff moves for a preliminary injunction, but does not seek to maintain the status quo. Rather, plaintiff asks this Court to enjoin the enforcement of a suspension Order that has been in effect since June 14, 1991, and to enjoin the defendant Justices from adjudicating any litigation in which plaintiff is involved. However, plaintiff cannot demonstrate her entitlement to this extraordinary relief. Specifically, she has not shown, and cannot show, that she will suffer any more harm than she has for over four years and that she has a likelihood of success on the merits of her claims. Indeed, plaintiff fails to articulate any cognizable irreparable injury that she may suffer by allowing the continued existence of the suspension and there is no merit to her claims at all. Moreover, the doctrine of laches counsels this Court to refuse to grant what plaintiff seeks now, that has been in existence for over four years, namely, her suspension from the practice of law.

POINT III

TO THE EXTENT PLAINTIFF CHALLENGES THE FACIAL VALIDITY OF THE STATUTE AND REGULATIONS WHICH EMPOWER THE APPELLATE DIVISION TO SUSPEND PLAINTIFF UNDER THE CIRCUMSTANCES OF THIS CASE, THE COURT SHOULD DISMISS THAT CHALLENGE BECAUSE, EVEN IF IT WAS NOT PREVIOUSLY RAISED IN STATE COURT, PLAINTIFF COULD HAVE, BUT CHOSE NOT TO

Federal courts are foreclosed from adjudicating Constitutional issues that were raised, or could have been raised in state proceedings. See Turco v. Monroe County Bar Association,

554 F.2d 515, at 519 (2d Cir. 1977); Migra v. Warren City School District Board of Education, 465 U.S. 75, 84 (1984).

In Turco v. Monroe County Bar Association, a disbarred attorney brought an action, under 42 U.S.C. § 1983, against the Bar Association, and Justices of the Appellate Division, contending, in part, that he was denied due process of law because he was not afforded an evidentiary hearing on whether the facts and circumstances surrounding his plea of guilty to a misdemeanor established unprofessional conduct. 554 F.2d 515, at 519 (2d Cir. 1977). The defendants moved to dismiss on the grounds of lack of jurisdiction and res judicata. Id.

The defendant disciplinary committee filed a petition with the Appellate Division against Turco after he plead guilty to two misdemeanor charges. Id., at 518. Annexed to the petition were transcripts of the guilty plea proceedings on each conviction, other charges against Turco, and the expected testimony of the government witness. Id. Turco requested a full evidentiary hearing to allow him to prove that he was not guilty of the charges in the conviction. Id. The Appellate Division denied that request, found him guilty of professional misconduct, and denied his request for a hearing to prove his innocence of the charges to which he had pleaded, but did grant Turco a hearing in mitigation of the discipline to be charged. Id.

Turco challenged the Appellate Division's denial of an evidentiary hearing before it appointed a Referee, by filing a notice of appeal to the Court of Appeals as of right and by motion

for leave to appeal. Id., at 519. Both were denied, and Turco petitioned for certiorari. While Turco's petition for certiorari was pending, and before it was denied, he filed an action in federal district court. The district court dismissed the action. Turco appealed. Appellees argue on appeal that the action is barred by doctrines of res judicata, judicial estoppel and full, faith and credit.

The Court held that since all the constitutional issues raised in this action were raised in the New York Court of Appeals and determined to be without merit, then those claims are barred from consideration by the federal district court under the doctrines of res judicata and collateral estoppel.

The Court stated that "if the general question were before us res nova, we would consider the due process argument as entirely frivolous. Each of these points was raised in the Appellate Division, however, and decided adversely to the petitioner." Id., at 520. The Court held that to the extent that Turco's contentions lacked constitutional significance, they are not cognizable in federal courts, and to the extent they possess such significance, they have already been determined adversely to Turco on the merits. Id.

Turco claims that the review of his constitutional claims in both the State courts and the Supreme court is "illusory" and that to bar his claims on the doctrine of res judicata is to prevent full consideration of his claims in any forum. In response, the court stated there is no reason to assume that the

attorney's constitutional rights will not be protected by the Appellate Division, or if necessary by the New York State court of Appeals. Id., at 520 (quoting Erdmann v. Stevens, 458 F.2d 1205, 1211 (2d Cir.), cert. denied, 409 U.S. 889 (1972)). Moreover, the Court was not persuaded by Turco's argument that because he raised his due process arguments at an involuntary bar proceeding in state court, he should be allowed to raise them now in federal court, citing Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 416 U.S. 906 (1974), in which the Court applied collateral estoppel in a section 1983 case to a constitutional determination in state court. See also Tang v. Appellate Division, 487 F.2d 138, 141 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

Similar to the plaintiff's allegations in Turco that the Appellate Division violated his rights to due process when they refused him an evidentiary hearing prior to disbarring him, here, plaintiff challenges the Orders of defendant Appellate Division, which allegedly directed her to submit to a psychiatric exam without any findings and then suspended her for failure to comply with the Order. Like the Court in Turco, this Court should dismiss plaintiff's similar constitutional claims.

The Turco Court explicitly stated, that, "[w]e do not deal here, therefore, with the slippery question involving section 1983 actions where the state litigation was involuntary as to the petitioner, and where the constitutional points could have been raised but were not. In such a state of facts the Supreme Court

still has to render a definitive ruling.

However, in 1984, the Supreme Court did, indeed, render a definitive ruling, holding that pursuant to the Full Faith and Credit Clause of the Constitution and the implementing statute, 28 U.S.C. § 1738, principles of claim preclusion are fully applicable where a plaintiff attempt to litigate in federal court, under § 1983, a claim that would be barred in state court because of a prior state court proceeding. Migra, 465 U.S. at 84. Migra requires a court to give to a state court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Id. at 84. New York State has adopted a transactional analysis in dealing with estoppel issues, which means that the "would-be" federal litigant is estopped from raising in federal district court, not only theories that she had already raised in state court, but also theories she could have raised in state court, as long as it involved the same transaction of events. See Def.'s br., at 21.

Importantly, the Court noted that "[d]ismissal by a New York State court because the asserted federal constitutional issues were not issues which rise to the dignity of constitutional questions is tantamount to a dismissal of the constitutional issues on the merits. And we must assume that the Court of Appeals' denial of an appeal as of right here, as well as of discretion, determined that the constitutional issues specifically raised were insubstantial on the merits." Id., at 521 (citation omitted).

Here, plaintiff challenged the constitutionality of her

suspensions up to the New York State Court of Appeals, and by petition for certiorari to the Supreme Court. To the extent she seeks to make the same challenges to her suspension in this Court as she did in state court, and that she could have made in state court, she is estopped from doing so under Turco and Migra; this includes constitutional challenges to state statutes and regulations, either in general or as applied. Additional authority for the proposition that applied challenges to the constitutionality of state statutes and regulations that were raised in state court are not cognizable in federal court can be found in the Rooker-Feldman doctrine.

Furthermore, plaintiff challenges her suspension from the practice of law for a lack of findings. However, "section 1983 does not extend the right to litigate in a federal district court evidentiary questions which have been adjudicated on the merits in State proceedings, upon the claim that there was no evidence to support the State action." Mildner v. Gulotta, 405 F.Supp. 182, 196 (1975), aff'd, 425 U.S. 901 (1976).

Accordingly, plaintiff's complaint should be dismissed with prejudice and further sanctions assessed against her that the Court, in its discretion believe are called for under the circumstances.

CONCLUSION

THE COMPLAINT, PRELIMINARY INJUNCTION AND TRO SHOULD BE DISMISSED, AND SANCTIONS ASSESSED AGAINST PLAINTIFF

Dated: New York, New York
March 7, 1996

Respectfully submitted,

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