Alton H. MADDOX, Jr., Plaintiff,
v.
Milton MOLLEN as Presiding Justice of the Appellate Division, Second Judicial Department, Guy J. Mangano, William C. Thompson, Lawrence J. Bracken, Richard A. Brown, Charles B. Lawrence, Joseph J. Kunzeman, Geraldine T. Eiber, Sybil Hart Kooper, Arthur D. Spatt, Thomas R. Sullivan, Stanley Harwood, Vincent R. Balletta, Jr., Albert M. Rosenblatt, as Associate Justices of the Appellate Division Second Judicial Department, Defendants.

No. CV-89-4181.

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

March 28, 1990.

MEMORANDUM AND ORDER

GLASSER, District Judge:

*1 On January 5, 1990, the plaintiff, now appearing pro se served upon the Attorney General of the State of New York an amended complaint seeking a declaratory judgment and an order that would (1) invalidate Section 90 of the New York Judiciary Law; (2) set aside a reprimand previously imposed by the Grievance Committee for the Second and Eleventh Judicial Districts, and (3) enjoin a pending investigation of the plaintiff arising out of his conduct in connection with an investigation in Dutchess County concerning the allegation by Tawana Brawley of a sexual attack upon her.

The defendants, the Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, filed this motion pursuant to Rules 12(b)(1) and (6) of the Fed.R.Civ.P. and for sanctions pursuant to Rule 11. The motion was returnable on March 16, 1990. On March 15, 1990 the plaintiff informed this court's chambers via telephone that a stipulation will be filed adjourning the return date of the motion. On the morning of March 16, 1990, the plaintiff appeared personally in chambers and advised that counsel for the defendants had consented to an adjournment. Shortly after the departure of the plaintiff, defendants' counsel appeared in court ready to proceed upon the motion. When informed of the foregoing, he advised that he never signed any stipulation nor did he consent to an adjournment. He was advised to return at 2:30 p.m. that day. In the interim the plaintiff's office was phoned and a message left requesting that he appear at 2:30 p.m. No response to that phone call was received, nor did the plaintiff appear. Counsel for the defendant did appear and in a detailed statement on the record, reiterated that he neither signed a stipulation nor consented to an adjournment. Indeed, no stipulation was ever filed. The court then informed counsel for the defendant that he will be heard on his motion or if he elected, could rest upon his papers. He elected the latter course and the court deemed the motion submitted. No papers in opposition were filed. A summary of the facts as distilled from the submissions in support of this unopposed motion, follows.

On December 11, 1987, the Grievance Committee for the Second and Eleventh Judicial Districts duly filed a charge against the plaintiff, alleging that for the reasons stated therein he was guilty of professional misconduct as defined by Rules Governing the Conduct of Attorneys, § 691.2 in that he violated Disciplinary Rules 7-106(C)(6) and 1-102(A)(5) and (6) of the Code of Professional Responsibility. That charge stemmed from the plaintiff's conduct on July 11, 1984 while appearing on behalf of a client in the Supreme Court of the State of New York, New York County. A disciplinary proceeding was conducted, evidence was adduced and on September 6, 1988 the Grievance Committee voted to reprimand the plaintiff. He was advised of that action by letter dated September 13, 1988. The plaintiff thereafter moved in the Appellate Division, Second Department, to vacate and set aside the decision of the Grievance Committee. That motion was denied by an order of the court dated January 27, 1989.

*2 On January 26, 1988, Governor Cuomo, by Executive Order, directed Attorney General Robert Abrams to supersede the District Attorney of Dutchess County and conduct a Grand Jury investigation into the alleged abduction and assault of Tawana Brawley. That allegation and the events surrounding it were widely reported in the print and visual media and achieved considerable notoriety. A Grand Jury was, accordingly, empanelled and upon the conclusion of its investigation issued a report

which concluded that the charges made by Ms. Brawley and others had no basis in fact. Based upon that report, Attorney General Abrams, on October 6, 1988, filed complaints with the Disciplinary Committee for the First Judicial Department against C. Vernon Mason, Esq. and with the Grievance Committee for the Second and Eleventh Judicial Districts against Alton H. Maddox, Jr., Ms. Brawley's legal advisors, in which he asserted that each of them had violated at least four Disciplinary Rules of the Code of Professional Responsibility. See Defendants' Appendix at tab 29.

Based upon that complaint, the Grievance Committee for the Second and Eleventh Judicial Districts commenced an investigation to determine if there is probable cause to believe that the plaintiff is guilty of professional misconduct. A similar investigation was commenced by the Disciplinary Committee of the First Judicial Department against C. Vernon Mason who also sought to enjoin that Committee from continuing its investigation by instituting an action for that purpose in the United States District Court for the Southern District of New York. On August 24, 1989, Judge Sprizzo of that court dismissed Mason's complaint and on January 16, 1990 the United States Court of Appeals for the Second Circuit affirmed that dismissal. Mason v. Department Disciplinary Committee, Docket No. 89-7918 (2d Cir. Jan. 16, 1990). That Court agreed with Judge Sprizzo that the complaint did not warrant an exception to the abstention doctrine enunciated in Younger v. Harris, 401 U.S. 37 (1971) in the context of lawyer disciplinary matters. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

The plaintiff has repeatedly refused to appear before the Grievance Committee and respond to questions as directed. He has, instead, filed this complaint as amended alleging eleven causes of action which have already been broadly summarized in part in the opening paragraph of this decision. His first claim seeks to set aside his reprimand; his second, third and fourth claims allege a deprivation of due process in violation of the Fifth and Fourteenth Amendments in being required to appear before the Grievance Committee to give sworn testimony without notice of the charges against him, in a proceeding closed to the public; his fifth through eleventh claims attack the constitutionality of New York Judiciary Law § 90(2) on a wide variety of grounds. For the reasons that follow the defendants' motion to dismiss the complaint is granted.

Discussion

A. The "Reprimand" Issue.

*3 Plaintiff's claim that his reprimand should be set aside has no merit. A determination of disbarment by a state court is entitled to great deference and recognition. A disciplinary determination of less severity by a state court, namely a reprimand is surely entitled to no less deference and recognition. In re Rosenthal, 854 F.2d 1187 (9th Cir.1988). In Selling v. Radford, 243 U.S. 46 (1917), the Court decided that the judgment of a state court in attorney disciplinary matters should be recognized unless the state procedure was wanting in due process from a failure of notice and an opportunity to be heard, suffered from an infirmity of proof to justify the finding of professional misconduct or for some other reason offends fundamental notions of right and justice. 243 U.S. at 51. A careful review of the minutes of the proceedings culminating in a decision to reprimand compel the conclusion that the state determination must be recognized. Defendants' Appendix at tab 5; Affidavit of Robert H. Straus.

B. New York Judiciary Law § 90(2).

As has been noted, the plaintiff challenges the constitutionality of New York Judiciary Law § 90(2) for various reasons. In his Fifth Cause of Action he alleges that the statute on its face and as applied is susceptible of sweeping and improper application to protected speech in violation of the First and Fourteenth Amendments. His Sixth Cause of Action alleges that the statute is overbroad and encompasses speech protected by the First, Sixth and Fourteenth Amendments. His Seventh Cause of Action alleges that the statute denies the plaintiff a full and fair evidentiary hearing prior to a suspension to practice law based on a failure to cooperate with a grievance committee pursuant to 22 NYCRR § 691.4 thus violating the Fifth and Fourteenth Amendments. His Eighth Cause of Action alleges that the statute violates the Fifth and Fourteenth Amendments in that he is compelled either to divulge client confidences or be disciplined for failing to do so. His Ninth Cause of Action alleges that the statute is

void for vagueness. His Tenth Cause of Action alleges that the statute is not reasonably and rationally related to a valid legislative purpose and therefore violates the Fifth and Fourteenth Amendments. His Eleventh Cause of Action alleges that the statute violates the First, Fifth and Fourteenth Amendments in that it places burdensome requirements on attorneys subject to third-party complaints and thus has a chilling effect on freedom of privacy and association between the attorney being investigated and his non-complaining clients.

New York Judiciary Law § 90(2) provides as follows:

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

*4 Subdivision (6) of the statute makes explicit the obligation to observe the basic due process requirements of notice and an opportunity to be heard.

At the outset it is useful to remember that statutes are presumed to be constitutional and when enacted were intended to be in harmony with state and federal constitutions. The challenger of those hornbook principles must shoulder the burden of establishing the contrary. See, e.g., McKinney's Statutes § 150(b) and the many cases cited there. In the case of New York Judiciary Law § 90, the constitutionality of that statute was affirmatively decided and the presumption validated. Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y.1975), aff'd 425 U.S. 901 (1976) contains a cogent analysis of § 90 and in sustaining its constitutionality, requires no elaboration. The bases upon which the plaintiff challenges the constitutionality of the statute will, nevertheless, be discussed briefly.

The claim that § 90 as construed and applied or as it may be construed and applied, will violate constitutionally protected speech is unpersuasive. That lawyers cannot assert a constitutional right to speak as they wish in court is not disputed. See, e.g., United States v. Giovanelli, Docket No. 89-1274 (2d Cir. Feb. 15, 1990). The plaintiff relies on In the Matter of the Justices of the Appellate Division, First Department v. Erdmann, 33 N.Y.2d 559, 347 N.Y.S.2d 441 (1973) for the proposition that a lawyer may not be disciplined for statements made out of court. It should be noted, however, that the New York Court of Appeals had occasion to observe in that case that "[p]erhaps persistent or general courses of conduct, even if parading as criticism, which are degrading to the law, the Bar, and the courts, and are irrelevant and grossly excessive, would present a different issue."

The power, indeed the obligation, to discipline attorneys when appropriate is not limited to in court conduct or statements. More than one hundred years ago, the United States Supreme Court taught that:

... the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courthouse demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.... But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. (emphasis added)

Bradley v. Fisher, 13 Wall. 335 (1871). See, also, Matter of Malone, 105 App.Div. 455, 480 N.Y.S. 2d 603, 606 (3rd Dep't 1984) (It is clear that this court's power to discipline an attorney "extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of

the Bar.") It would be an affectation of research to multiply the citation of cases applying the same principle.

*5 The plaintiff's claim that a requirement that he cooperate with the Grievance Committee is invidious, is specious. Matter of Adler, 102 App.Div.2d 1010, 477 N.Y.S. 2d 525 (3rd Dep't 1984) ("... we would reiterate the long-established principle that full and forthright cooperation with the Committee on Professional Standards is essential to the proper performance of its function and such cooperation is required of attorneys.")

The plaintiff's seventh claim that § 90(2) fails to provide a full and fair evidentiary hearing is one that has been rejected in Mildner v. Gulotta, supra, at 194, and plainly has no merit.

His tenth claim that § 90(2) is unconstitutional on its face in that it is not rationally related to a valid legislative purpose is a claim which denies the universal recognition of the power of the state to regulate the practice of law and the conduct of those engaged in that practice.

The plaintiff's other claims have been considered and have no merit.

Finally, the plaintiff's application for an order enjoining the Grievance Committee from continuing the investigation it commenced is denied. Younger v. Harris, 401 U.S. 37 (1971); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Mildner v. Gulotta, supra; Mason v. Departmental Disciplinary Committee, supra.

For the foregoing reasons the defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. is granted.

The defendants' have also moved for the imposition of sanctions against the plaintiff in accordance with Rule 11, Fed.R.Civ.P. A cursory examination of the controlling authorities, only some of which have been cited in the course of this determination, could have left little doubt that the pleading filed was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Rule 11. A reading of the affidavits submitted in support of this motion, together with the appendix of prior proceedings leads to the inevitable conclusion that the only purpose to be served by the filing of this complaint was to harass and cause unnecessary delay and expense. Given a finding that a violation of Rule 11 exists, this court cannot ignore the command of the Rule: "sanctions shall be imposed." Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir.), cert. denied, 484 U.S. 918 (1987); O'Malley v. N.Y.C. Transit Authority, Docket No. 89-7450 (2d Cir. Feb. 20, 1990). The defendants' motion pursuant to Rule 11 is, therefore, granted. The Defendants shall submit an affidavit setting forth the reasonable expenses incurred because of the filing of the pleading, including the basis upon which a reasonable attorney's fee may be awarded. Such an affidavit shall be filed and served on or before April 6, 1990. The plaintiff may file and serve a response on or before April 16, 1990 and a hearing, if requested by either party, will be held on April 20, 1990 at 9:30 a.m.

*6 SO ORDERED.

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