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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TY CLEVENGER, Plaintiff, vs. **GREGORY P. DRESSER, STACIA L. JOHNS, KIMBERLY G. KASRELIOVICH and THE STATE BAR OF CALIFORNIA** Defendants	**Case No. 3:17-cv-2798-WHA** **Motion to Permit Discovery and Response to Motion to Clarify the Record** DATE: July 27, 2017 TIME: 8:00 a.m. DEPT: Courtroom 8 JUDGE: Judge William Alsup

NOW COMES Ty Clevenger, the Plaintiff, moving the Court to permit discovery and further responding to the MOTION TO CLARIFY THE RECORD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (Doc. No. 24) as set forth below:

Introduction

On June 2, 2017, the Court denied the PLAINTIFF'S REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (Doc. No. 3) (hereinafter "TRO MOTION") based on two representations by Suzanne Grandt, Counsel for the Defendants: (1) that the Plaintiff could assert his claims for First Amendment Retaliation and selective prosecution in the State Bar Court, and (2) the Plaintiff would be able to conduct discovery in the State Bar Court. After the June 1, 2017

hearing, and with only cursory legal research, the Plaintiff discovered that both assertions are false as a matter of law. The Plaintiff twice demanded that Ms. Grandt and her supervisors / co-counsel take corrective action, and on June 9, 2017 the Defendants filed their MOTION TO CLARIFY THE RECORD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (Doc. No. 24) (hereinafter "MOTION TO CLARIFY"). That document neither corrects nor clarifies anything. As things stand, the Plaintiff will not be able to assert his constitutional claims in the State Bar Court, nor will he be allowed to conduct discovery, therefore he moves the Court to permit him to conduct discovery in this case.

Argument

At the June 1, 2017 hearing, the Court suggested that it was inclined to permit the Plaintiff to depose Defendant Gregory Dresser. *See* Transcript, 15-16 (attached as an exhibit to the MOTION TO CLARIFY). Ms. Grandt countered that the Plaintiff would be permitted to assert all of his First Amendment and selective retaliation claims in the State Bar Court, and that the Plaintiff would be able to conduct discovery in the state bar proceeding. *Id*. at 18-20. That argument carried the day for the Defendants, because the Court stated as follows toward the end of the hearing:

> All right. Here's the answer. I'm ruling from the bench. Motion for Preliminary Injunction denied. And the main reason I'm denying it is because Ms. Grandt has represented to me that plaintiff will be able to take all the discovery necessary or that he wishes. He will have a fair opportunity in the state bar court to subpoena appropriate people to show that he's being retaliated against. And if that turns out not to be true, you may come back and see me and maybe we will give a preliminary injunction at that point.

Id. at 22. On June 6, 2017, the Plaintiff sent a letter to Ms. Grandt's supervisor and co-counsel, Vanessa Holton, General Counsel of the State Bar of California, noting that Ms. Grandt's statements to the Court were false. *See* June 6, 2017 Letter from Ty Clevenger to Vanessa Holton (Exhibit 1); *see also* June 6, 2017 emails transmitting the letter to Vanessa Holton and Suzanne

Grandt (Exhibit 2) as well as Robert Retana (Exhibit 3).[1] By the Defendants' own admission, they intend to bring charges against the Plaintiff under CALIFORNIA BUSINESS & PROFESSIONS CODE § 6049.1, which pertains to discipline imposed in other jurisdictions. *See* April 5, 2017 Letter from Stacia Johns to Ty Clevenger (attached to the TRO Motion as Exhibit 10). That section plainly indicates that any such disciplinary proceeding "shall be limited to the following" issues:

> (1) The degree of discipline to impose.
>
> (2) Whether, as a matter of law, the member's culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline in the State of California under the laws or rules binding upon members of the State Bar at the time the member committed misconduct in such other jurisdiction, as determined by the proceedings specified in subdivision (a).
>
> (3) Whether the proceedings of the other jurisdiction lacked fundamental constitutional protection.

BUSINESS & PROFESSIONS CODE § 6049.1(b). Accordingly, the Bar Court is *without authority* to consider whether the Defendants are selectively prosecuting the Plaintiff or prosecuting him in retaliation for his First Amendment activities. Furthermore, "the parties need not be afforded an opportunity for discovery unless the State Bar Court department or panel having jurisdiction so orders upon a showing of good cause." *Id*. at § 6049.1(c). This comports with State Bar Court Rule 5.352, which states that the Bar Court "may allow formal discovery on a showing of good cause and then only on the terms and conditions ordered." That's hard to reconcile with the notion "that plaintiff will be able to take all the discovery necessary or that he wishes." Transcript at 22.

While Ms. Grandt might be able to persuade her own clients not to oppose a request for discovery in the State Bar Court, she obviously cannot commit the Bar Court to permitting discovery. And as a practical matter, how could any court find "good cause" to permit discovery when that court is prohibited *by law* from considering the subject matter of the proposed

[1] The undersigned declares under penalty of perjury under the laws of the United States, and as witnessed by his signature below, that all exhibits to this document are true and correct copies of the originals that are described in this document.

discovery?[2] Even if the Bar Court chose to permit discovery anyway, it would not be able to grant any relief on First Amendment or selective prosecution grounds, BUSINESS & PROFESSIONS CODE § 6049.1(b), and that flatly contradicts Ms. Grandt's unequivocal statements to this Court that the Plaintiff could assert all of his claims in State Bar Court. *See* Transcript, 18-20.

On June 8, 2017, Deputy General Counsel Robert Retana (also Ms. Grandt's supervisor and co-counsel in this case) responded to the Plaintiff's June 6, 2017 letter to Ms. Holton, and he attempted to defend Ms. Grandt's statements to the Court at the June 1, 2017 hearing as "accurate." *See* June 8, 2017 Letter from Robert Retana to Ty Clevenger (Exhibit 4). Mr. Retana seemed to suggest that the Plaintiff could raise his First Amendment retaliation and selective prosecution claims *for the first time on appeal* if he sought review from the California Supreme Court. *Id*. In other words, the Plaintiff would first need to be tried by the State Bar Court and recommended for disbarment, then the State Bar Court review panel would need to uphold the recommendation, and then *maybe* the California Supreme Court might grant review, *maybe* it might let the Plaintiff raise those arguments for the first time on appeal, and *maybe* it might let the Plaintiff conduct discovery in support of those arguments. Even if that was true, it's a far cry from what Ms. Grandt told this Court, *i.e.*, that the Plaintiff could assert all of his claims *in the State Bar Court*. And it does not appear to be true. The Plaintiff is not aware of a single case in the last fifteen years wherein the California Supreme Court granted relief of any kind to a defendant in a State Bar Court proceeding, so it is hard to imagine that it would suddenly permit the Plaintiff to raise issues *de novo* and conduct discovery at the appellate level.

[2] Lest Ms. Grandt argue that her false statements were merely good-faith mistakes made during the heat of oral argument, the Court should consider the motion to dismiss that she filed on May 30, 2017, *i.e.*, two days before the June 1, 2017 hearing. In at least three instances in that document, she told this Court that the Plaintiff could bring his selective prosecution and First Amendment retaliation claims in the State Bar Court. *See* MOTION TO DISMISS (Doc. No. 17) at 6, 8, and 13.

Furthermore, even if Ms. Grandt and Mr. Retana could guarantee discovery and full review in the California Supreme Court, that arrangement would be constitutionally insufficient. The potential punishment from a bad-faith or retaliatory prosecution is not the only constitutional harm. On the contrary, the retaliatory prosecution is an irreparable injury in and of itself, regardless of whether the Defendant is ultimately subjected to discipline. *See* MOTION FOR TRO at 9-11 (citing cases); *see also Wilson v. Thompson*, 593 F.2d 1375, 1382–83 (5th Cir. 1979). In other words, if the Defendants are permitted to subject the Plaintiff to months or years of retaliatory prosecution (and involuntary suspension) before he can conduct discovery or assert his affirmative defenses, that will be an irreparable injury *per se*.

Elsewhere in his letter, Mr. Retana cited three inapposite Bar Court cases to suggest that the Plaintiff's First Amendment and selective retaliation claims could be considered by that court, and that it had the discretion to permit discovery. *See* June 8, 2017 Letter (Exhibit 4) at 2, citing *In Matter of Aulakh*, No. 92-O-12971, 1997 WL 412515, at *4 (Cal. Bar Ct. June 30, 1997); *Matter of Frazier*, No. 84-O-12333, 1991 WL 207109, at *4 (Cal. Bar Ct. Oct. 10, 1991); and *Matter of Harney*, No. 90-O-14277, 1995 WL 170223, at *10 (Cal. Bar Ct. Apr. 4, 1995). All three of those cases were *regular* disciplinary proceedings that were initiated by the state bar to establish "guilt" or "innocence," *id*., ergo *none* of them were reciprocal disciplinary proceedings brought under BUSINESS & PROFESSIONS CODE § 6049.1(b), where rules are different and the subject matter of the proceeding is greatly narrowed. In other words, Mr. Retana mixed apples and oranges, and it's hard to imagine that he did that by accident.

On June 8, 2017, the Plaintiff responded to Mr. Retana's letter by email, with copies to Ms. Grandt and Ms. Holton. *See* June 8, 2017 Email from Ty Clevenger to Robert Retana, et al. (Exhibit 5). That email flagged the issues identified above:

> You are implicitly saying that I must go through the entire State Bar Court proceeding, be recommended for disbarment, appeal that to a review panel, and then *maybe* the Supreme Court will entertain my First Amendment arguments for the very first time and *maybe* it will permit discovery for the very first time. Can you point me to a single case where either such thing has ever happened? In fact, can you point me to a single case in the last ten years where the California Supreme Court granted any kind of relief from a review panel decision?

Id. Mr. Retana did not respond to the email (and the foregoing questions have yet to be answered). Instead, Ms. Grandt sent an email on June 9, 2017 stating as follows: "After a careful review of the June 1, 2017 Oral Argument transcript... we felt it was necessary to clarify the State Bar Court rules for the Court. As such, the attached motion was filed today." June 9, 2017 Email from Suzanne Grandt to Ty Clevenger (Exhibit 6). The MOTION TO CLARIFY speaks for itself, and it does not clarify much of anything. On the contrary, it's made to look as if Ms. Grandt, et al. have taken corrective action when in reality they have not.

Rather than continue with endless evasions, Ms. Grandt, Mr. Retana, Ms. Holton, and the Defendants should be directed to answer two "yes or no" questions:

(1) Can the Plaintiff assert his claims for First Amendment Retaliation and selective prosecution *in the State Bar Court* in a Section 6049.1 proceeding?

(2) Can the Plaintiff conduct discovery *in the State Bar Court* in a Section 6049.1 proceeding?

If the answer to either question is "yes", then they should be ordered to explain how that is possible under California law and whether it has ever happened in the history of the California Bar. Better yet, the Court may wish to ask these questions in a forum with minimal opportunity for equivocation, *i.e.*, face-to-face, on the record, and under oath at a hearing.[3] The Defendants should further be directed to respond to the following interrogatories / requests for production:

[3] If such a hearing is convened, the Plaintiff respectfully moves the Court to order the Defendants or their counsel to pay the Plaintiff's travel and related costs pursuant to 28 U.S. Code § 1927 or the Court's inherent authority. The Plaintiff does not make a great deal of money as a civil rights lawyer, and travel between New York and San Francisco creates significant financial hardship.

(1) Identify all cases (if any) in the last fifteen years wherein the California Supreme Court granted favorable relief to a defendant / respondent in a State Bar Court proceeding.

(2) Identify all cases (if any) in the last fifteen years wherein the California Supreme Court permitted a defendant / respondent in a BUSINESS & PROFESSIONS CODE § 6049.1 case to assert a First Amendment retaliation or selective prosecution claim for the first time on appeal.

(3) Identify all cases (if any) in the last fifteen years wherein the California Supreme Court permitted a defendant / respondent in a BUSINESS & PROFESSIONS CODE § 6049.1 case to conduct discovery at the appellate level.

(4) Identify all cases (if any) in the last fifteen years wherein the California Bar sought more severe discipline in a BUSINESS & PROFESSIONS CODE § 6049.1 proceeding than what was imposed by the underlying jurisdiction.

(5) Identify all cases (if any) in the last fifteen ten years wherein the California Bar prosecuted an inactive member for acts that occurred in another jurisdiction in which the attorney was admitted to practice.

(6) Identify all instances (if any) in the last ten years wherein the California Bar (1) was made aware of discipline against a member (active or inactive) in another jurisdiction and (2) chose not to bring disciplinary charges against that member in California.

(7) Identify all instances (if any) in the last ten years wherein the California Bar (1) was made aware of court sanctions against a member (active or inactive) and (2) chose not to bring disciplinary charges against that member in California.

(8) Produce all communications (or records of communications) exchanged between personnel of the Office of Chief Trial Counsel ("OCTC") and any third party since September 1, 2012 regarding Ty Clevenger, his grievance against Cydney Batchelor, or any of his blog posts. This request includes, but is not limited to, communications between OCTC personnel and other employees or officers of the California Bar.

(9) Produce all communications (or records of communications) sent or received by Cydney Batchelor since April 1, 2016 regarding Ty Clevenger, his blog posts, or his grievance against her.

(10) Produce all documents, records, or communications (or records of communications) indicating why the California State Bar did not prosecute Ty Clevenger after the State Bar of Texas settled its claims against him in 2014.

(11) Produce all documents, records, or communications (or records of communications) indicating why the California State Bar is seeking to disbar Ty Clevenger now.

(12) Identify all State Bar Court cases wherein the defendants / respondents were similarly situated to Ty Clevenger. Alternatively, identify the five State Bar Court cases that you contend are most comparable to the proposed case against Ty Clevenger.

(13) When did the Defendants in this case first seek documents or evidence from the U.S. District Court for the District of Columbia regarding its disciplinary case against Ty Clevenger.

The Plaintiff further moves the Court to grant him permission to depose the Defendants after they have responded to the foregoing interrogatories and requests for production.

Finally, the Plaintiff seeks permission to subpoena and depose two non-party witnesses. The Plaintiff incorporates by reference the verified FIRST AMENDED COMPLAINT (Doc. No. 48) of Wade Robertson in *Wade Anthony Robertson v. Richard A. Honn, et al.*, Case No. 17-cv-01724-JD (N.D. Cal.), and he would direct the Court's attention to paragraph 811 on page 201:

> In a letter dated May 25, 2016, written by Defendant Elizabeth Parker and Leah Wilson of the State Bar to the Bar's Governance in the Public Interest Task Force, they discussed the de-unification proposal and the attached a "Matrix of Actions Advocated and Other Issues for Consideration." In that matrix, it was disclosed that the proposal that the State Bar Court be dissolved and the discipline system absorbed into the California Superior and Appellate courts was because the State Bar Court was "housed with the prosecuting agency, leading judges to be partial to prosecution." The de-unification proposal, and that letter and matrix were scheduled to be heard at the June 14, 2016, board meeting of the State Bar Board of Trustees but at that time its consideration was continued until the subsequent June 23, 2016, Board meeting.

The Defendants contend that the Plaintiff's constitutional rights can be protected by the State Bar Court, but it seems that the State Bar's own personnel think otherwise. The Plaintiff therefore wishes to investigate whether he can receive a fair hearing in the State Bar Court.

Conclusion

The MOTION TO CLARIFY has clarified nothing. The State Bar Court cannot protect the Plaintiff's constitutional rights, therefore the Defendants should be directed to respond to the foregoing interrogatories and requests for production, and the Plaintiff should be permitted to

depose the Defendants, Elizabeth Parker, and Leah Wilson. The Plaintiff has conferred with counsel for the Defendants, and they oppose this motion.

Respectfully submitted,

/s/ Ty Clevenger
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