NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

JOHN BABIGIAN,

Petitioner,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT McGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can an attorney be disciplined without notice or a hearing?

2. Is due process required in the investigation of an attorney?

3. Did the District Court err in holding that members of the New York Bar Association's Grievance Committee enjoyed absolute judicial immunity for their conduct during preliminary investigations?

4. Did the District Court err in failing to address the Petitioner's constitutional attack on N.Y. Judiciary Law § 90(10), which gives the Appellate Division unbridled discretion to

keep secret or to divulge at will, all or any part of papers, records or documents generated in a disciplinary action?

5. If sanctions are mandatory under Rule 11 where there are material misrepresentations of the record, failure to cite controlling adverse authority, and frivolous arguments, can a court dismiss the complaint under Rule 12(b) by adopting verbatim all the movants' contentions of the law and the facts?

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The opinion of the Court of Appeals for the Second Circuit, Babigian v. The Association of the Bar of the City of New York, No. 90-7163 (2d Cir. 1990), and the opinion of the District Court, Babigian v. The Association of the Bar of the City of New York, No. 88-Civ-1123 (S.D.N.Y. 1990), are both unreported. Both opinions are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 19, 1990. The jurisdiction of this Court to review the judgment of the Second Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this action are 42 U.S.C. § 1983 (1981); N.Y. Jud. Law § 90(10) (McKinney 1983); and Fed. R. Civ. P. 12(b). These provisions are reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

In 1973, a disciplinary punishment called a letter of admonition was imposed without any notice or a hearing afforded to petitioner. In 1974-75 a preliminary investigation of petitioner ended without any further proceedings.

In 1986, without recourse to the mandated New York Judiciary Law § 90(10), petitioner gained access to his disciplinary file and removed without permission

secret documents which indicated that the punishment was imposed in bad faith, and that the preliminary investigation was instituted and conducted in bad faith (J.A. 27-30; J.A. 96-99; J.A. 100, para. 77; J.A. 101, para. 81).

The above documents form the key evidentiary basis for this action for Civil Rights violations, tort actions, and actions for declaratory relief expunging petitioner's disciplinary record, and attacking the constitutionality of certain disciplinary rules, and New York Judiciary Law § 90(10).

No answers have been filed in this action, commenced in February 1988. Despite requests, the court has never held a conference with the parties (J.A. 396-97).

Between May 16, 1988, and July 11, 1988, three Rule 12(b)(16) motions to dismiss this action were filed by the defendants. The court did not signify any intent to convert to a Rule 56 summary judgment motion.

No affidavits in compliance with Rule 56 were filed by defendants. Petitioner opposed all the motions to dismiss with personal affidavits and extensive memoranda of law (J.A. 216-59, 361-95, 408-39) and also a writ of mandamus (J.A. 439-507).

The evidentiary complaint is 145 pages in length (J.A. 6-150). The supplemental complaint is less than two pages, containing five allegations (J.A. 150-51). Defendants did not move to strike. The court did not hold any

evidentiary hearings on the key issues of long-arm jurisdiction and the statute of limitations.

Petitioner's notice for depositions was aborted by an order of the court dated March 21, 1989 (J.A. 508). The above order was not based on a hearing (J.A. 440).

On December 6, 1989, petitioner's writ of mandamus, to compel the court to render decisions on the motions to dismiss, was denied without opinion (J.A. 5, 439-507).

On January 4, 1990, petitioner filed a complaint against the court for its failure to render a decision; the court complied on January 11, 1990, with a decision dismissing all eight causes of action in the complaint, and the sup-

plemental complaint against the State defendants (J.A. 538-51).

After oral argument on July 18, 1990, the Second Circuit Court of Appeals affirmed summarily the next day on July 19, 1990.

Federal jurisdiction in the court of first instance was based on 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343.

REASONS FOR GRANTING THE WRIT

I. AN ATTORNEY CANNOT BE DISCIPLINED WITHOUT NOTICE OR A HEARING.

In 1973 Petitioner received a disciplinary punishment called a letter of admonition (J.A. 34-35). It was issued in bad faith (J.A. 31-33).

An admonition is discipline imposed without a hearing. Rule 603.9 of the Appellate Division: First Department of the State of New York. It may be considered in determining whether to impose discipline, and the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney. Matter of Wanderman, 100 A.D.2d 309, 474 N.Y.S.2d 111 (1984). The admonition, while not imposed by the court, can lead to a court-imposed punishment against an attorney. Matter of Halpern, 556 N.Y.S.2d 896 (1990).

An attorney's disciplinary proceeding is quasi-criminal in nature and requires the procedural due process, including fair notice of the charge. In re Ruffalo, 390 U.S. 544, 550-51 (1968).

There was, and is, no right to appeal plaintiff's letter of admonition (J.A. 36, 43). Rule 605.8(c) of the Appellate Division: First Department.

When an attorney is wholly passive and unaware of any wrongdoing, the imposition of discipline without notice and a hearing is not warranted by any compelling interest of the State to regulate the practice of law. Goldberg v. Kelly, 397 U.S. 254 (1970).

II. DUE PROCESS IS REQUIRED IN THE INVESTIGATION OF AN ATTORNEY.

As indicated, supra, due process is required in attorney disciplinary proceedings. In re Ruffalo, supra.

There are no rules or regulations regarding the investigation of an attorney in a formal proceeding before the

Departmental Disciplinary Committee in New York City.

To sustain the above would require the untenable contention that the State's interest in the discipline of attorneys justifies an investigation based on mere whim or caprice without good-faith probable cause.

In petitioner's case, counsel claimed he informed me by telephone that a general investigation had been commenced (J.A. 106-107). A glance at the graphic subpoenas served on petitioner indicates the consequences of unbridled investigative powers (J.A. 86, J.A. 112).

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT MEMBERS OF THE NEW YORK BAR ASSOCIATION'S GRIEVANCE COMMITTEE ENJOYED ABSOLUTE JUDICIAL IMMUNITY FOR THEIR CONDUCT DURING PRELIMINARY INVESTIGATIONS.

Throughout the proceedings before the Grievance Committee, the Committee members and the Committee's counsel maintained that they were not conducting a disciplinary proceeding, but rather were conducting only an informal preliminary inquisition or investigation (J.A. 104).

In the district court and the court of appeals, the Respondents maintained that the action was barred by absolute immunity. Without citation to any authority other than Respondents' memorandum, the court held "that the Bar association defendants are entitled to absolute immunity from damage claims

arising out of plaintiff's section 1983 and pendent state law claims. See Memorandum in Support of Defendant's Motion to Dismiss, at 33-42, 88 Civ. 1123 (JMC) (S.D.N.Y. June 30, 1988)." It is clear, therefore, that the district court failed to conduct its own analysis of the issue, preferring instead to rely solely on nine pages of the Respondents' memorandum.

The Supreme Court has previously addressed the character of the investigatory stage of a disciplinary proceeding in the State of New York. In Anonymous v. Baker, 360 U.S. 287 (1959), the court characterized this investigatory function as follows:

> An understanding of the nature of the proceedings before the Special Term is first necessary. In New York the traditional powers of the courts over the admission, discipline,

and removal of members of the bar is placed by law in the Appellate Division of the State Supreme Court. N.Y. Judiciary Law, § 90. When the Appellate Division is apprised of conditions calling for general inquiry it usually appoints, as here, a Justice of the Supreme Court, sitting at Special Term, to make a preliminary investigation. The duties of such a justice are purely investigatory and advisory, culminating in one or more reports to the Appellate Division upon which future action may then be based. In the words of Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term thus simply constitute a "preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right * * * a quasi administrative remedy whereby the court is given information that may move it to other acts thereafter * * *." People ex rel. Karlin v. Culkin, 248 N.Y. 465, 479, 162 N.E. 487, 492, 60 A.L.R. 851.

Id. at 290-91 (emphasis added).

The Committee's function in the instant case was quite similar to the function described by this Court in Anonymous v. Baker, supra. Thus, it is clear that the Committee functioned in an administrative, rather than judicial capacity, and that the district court erred in dismissing the complaint on the basis of absolute judicial immunity.[1]

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[1]Even if the members of the Grievance Committee were acting in a judicial capacity, they would not be immune from suit for prospective relief or for attorney's fees under 42 U.S.C. § 1988. Pulliam v. Allen, 466 U.S. 522 (1984). Furthermore, if the members of the Grievance Committee had been acting to enforce the Bar Code, and are thus appropriately treated as prosecutors, they would still be "amenable to suit for injunctive and declaratory relief." Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 734-37 (1980). Since such relief was requested in the Petitioner's complaint, the court's dismissal of the complaint in its entirety on the basis of absolute immunity was clearly in error.

The subpoena served on petitioner states, in pertinent part, "to give testimony in a pending preliminary investigation of a complaint[.]" The Bar Association defendants quote the full text of their Rule 603.12 regarding preliminary investigations (J.A. 196). Their Procedures for the Grievance Committee clearly indicate that the preliminary investigative stage was involved (J.A. 38-39). The preliminary nature of the proceedings is graphically set forth in paragraph 87 of the complaint (J.A. 105-106).

The Bar Association defendants failed to cite Anonymous v. Baker, supra. In their Reply Memorandum, they opined that petitioner's citation of the above was "blatantly wrong" (J.A. 267-68). The

court's ruling that they enjoyed absolute judicial immunity is an abuse of discretion since petitioner cited the case in the opposition memorandum of law (J.A. 222-23). The whole point on absolute judicial immunity was again presented to the court in petitioner's Writ of Mandamus (J.A. 474-78).

Pursuant to the ethical duty of counsel to direct the court's attention to the conduct of opposing counsel, petitioner pointed out to the circuit court the ethical lapse of counsel, who argued absolute immunity but did not refer to Anonymous v. Baker, supra. Mylett v. Jeane, 910 F.2d 296, 301 (5th Cir. 1990); In re Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976). The circuit court panel did not respond to petitioner's accusation on

the above, as well as the failure of counsel to cite controlling authority on the issue of post-deprivation remedies. Nor did the panel question counsel. The next day, the circuit court summarily affirmed the district court's decision, including the holding that the Bar Association defendants enjoyed absolute judicial immunity. (Appendix at 2-4.)

IV. THE DISTRICT COURT ERRED IN FAILING TO ADDRESS THE PETITIONER'S CONSTITUTIONAL ATTACK ON N.Y. JUD. LAW § 90(10), WHICH GIVES THE APPELLATE DIVISION UNBRIDLED DISCRETION TO KEEP SECRET OR TO DIVULGE AT WILL, ALL OR ANY PART OF PAPERS, RECORDS, OR DOCUMENTS GENERATED IN A DISCIPLINARY ACTION.

As an examination of the district court's opinion reveals, the court utterly failed to address the Petitioner's

third and fourth causes of action which sought a declaration that N.Y. Jud. Law § 90(10) (McKinney 1983) was unconstitutional, and sought expungement of the Petitioner's disciplinary file (J.A. 144-46).

The statute provides that all papers, records, and documents relating to any complaint or investigation relating to the conduct or discipline of an attorney "shall be sealed and deemed private and confidential." N.Y. Jud. Law § 90(10) [reproduced in its entirety in Appendix]. The statute further provides that "the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents." Id. Further-

more, it is left to the presiding justice whether or not notice should be given to the persons or attorneys affected by any disclosure of material. Id. As the Petitioner has alleged, this statute gives the Presiding Justice of the Appellate Division unfettered control over the investigative files of attorneys (J.A. 145). Under the authority of this statute, an attorney may be subject to investigation and discipline without having the opportunity to see the contents of his disciplinary file. Indeed, this is exactly what happened in the Petitioner's case.

Plaintiff simply asked Gentile for permission to examine the investigative file; N.Y. Jud. Law § 90(10) was not mentioned in plaintiff's letter. Plaintiff

did not request a reexamination of the file from Gentile; he requested copies of enumerated documents in the investigative file to present to Judge Murphy as part of a formal complaint against the Grievance Committee members.

Plaintiff's application under N.Y. Jud. Law § 90(10) to Judge Murphy did not present a case or controversy that could be acted upon by the court of appeals or the United States Supreme Court. In re Summers, 325 U.S. 561, 566-69 (1944). The application did not challenge the validity of N.Y. Jud. Law § 90(10); it was a ministerial request, not a request for judicial determination. Feldman v. Gardner, 213 U.S. App. 119, 661 F.2d 1295, 1315-16 (n.179 discussing Ktsanes v. Underwood, 552 F.2d 740 (7th Cir.

1977), cert. denied, 435 U.S. 933 (1978)) (D.C. Cir. 1981), vacated, 460 U.S. 462 (1983); Rapp v. Committee On Professional Ethics & Conduct, 504 F. Supp. 1092, 1097-98 (S.D. Iowa 1980); Application of L.B. & W. 4217, 238 F.2d 163 (9th Cir. 1956); Matter of Baker, 693 F.2d 925 (9th Cir. 1982); United States v. Melendez-Carrion, 811 F.2d 780, 781 (2nd Cir. 1987). There simply was no procedure for plaintiff to follow. In re Berkan, 648 F.2d 1386, 1389-90 (1st Cir. 1981).

Hence the supplemental complaint is based upon the initial conduct of Judge Murphy and Gentile rejecting plaintiff's complaint, the denial of further access to the investigative file, all the allegations of the complaint (which are deemed true for this motion), the motion

to dismiss by the State defendants which clearly indicates that they have ratified the conduct of the Bar Association defendants, and their conduct in obstructing plaintiff's complaint and covering up the acts of the Bar Association defendants. All the foregoing constitute a continuing tort action and violations of 42 U.S.C. § 1983.

Judge Murphy made the following comment regarding access to disciplinary files in the Roy Cohn case, In the Application of New York News, Inc., 113 A.D.2d 92, 495 N.Y.S.2d 181, 182 (1985):

> "'In the Committee's hundred year history, during which thousands of attorneys have appeared before it, the Committee has been nationally recognized as a model of integrity and industry. In any case, if the Committee were to have been established but a year ago, a good reputation for integrity

and competence is essential to its work as this Court's prosecutorial nominee. In that reputation, the public has a stake. . . .'"

"'When it is shown that a respondent in a pending disciplinary proceeding has publicly accused the disciplinary instrumentality of this Court of having been constituted of incompetents who prosecuted him for a political purpose, upon meritless charges, with the intent of 'smearing' him, good cause has been proved for entry of an order opening the records of that proceeding for public examination. As it cannot lie in the mouth of such a respondent that he may accuse the Committee member of disbarrable offenses by them in their prosecution of him, and yet keep the record of that proceeding beyond public examination upon a claim of statutory confidentiality, it could not have been the Legislature's intent that a respondent's right to confidentiality would extend beyond his making of such an attack upon the Committee's members[.]'"

Plaintiff has standing to sue the State defendants individually for Civil

Rights violations. Javits v. Stevens, 382 F. Supp. 131, 135 (S.D.N.Y. 1987); Evans v. Lynn, 537 F.2d 571, 577-78 (2d Cir. 1975) (inaction as breach of affirmative duties); Smith v. Meese, 821 F.2d 1484, 1493-96 (11th Cir. 1987).

The action taken by the Grievance Committee against the Petitioner stemmed from the Petitioner's lawful exercise of his first amendment rights in advertising his legal research service (J.A. 7, paras. 1, 67 et seq.). As this court has noted, nonmisleading advertising by an attorney falls within the scope of first amendment protection. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1982).

Under N.Y. Jud. Law § 90(10), the Grievance Committee is given the ability,

which it exercised in the case at bar, to fabricate complaints and other material, place them in an attorney's file, and use the file as a basis for disciplinary proceedings. Under N.Y. Jud. Law § 90(10), the investigated attorney has no recourse to challenge the material in the file, because, as in the instant case, the attorney can be denied access to the file. Thus, the law can and is used to further the Grievance Committee's function as a "lawyers protective guild" (J.A. 399), and has a chilling effect on the first amendment rights of attorneys.

The district court failed to address this question raised in the Petitioner's complaint, yet the court dismissed the complaint in its entirety. This is

clearly an error which is plain from the record.

In addition, the court failed to address the Petitioner's cause of action for expungement of his disciplinary file. It is well established that the "federal courts have the equitable power 'to order the expungement of government records where necessary to vindicate rights secured by the Constitution or by statute.'" Fendler v. United States Bureau of Prisons, 846 F.2d 550, 554 (9th Cir. 1988); Shanbarger v. District Attorney of Renssellaer County, 547 F.2d 770 (2d Cir. 1976), cert. denied, 430 U.S. 968 (1977); Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975). The district court's failure to address the expungement issue, or to set forth its reasons for declining

to exercise its equitable powers in this regard, was clearly erroneous and an abuse of the court's discretion.

V. IF SANCTIONS ARE MANDATORY UNDER RULE 11 WHERE THERE ARE MATERIAL MISREPRESENTATIONS OF THE RECORD, FAILURE TO CITE CONTROLLING ADVERSE AUTHORITY, AND FRIVOLOUS ARGUMENTS, A COURT MAY NOT DISMISS THE COMPLAINT UNDER RULE 12(b) BY ADOPTING VERBATIM ALL THE MOVANTS' CONTENTIONS OF THE LAW AND THE FACTS.

The court's decision adopts verbatim an entire memorandum of law, 30 pages in length, plus 44 pages verbatim from the other memoranda of law by the defendants (J.A. 549-51). No reference whatsoever is made to any contention of fact or law made by petitioner in his affidavits or memoranda of law.

Such uncritical acceptance of the movants' factual and legal contentions is a blatant departure from the proper standard on a Rule 12(b) motion to dismiss, and the practice has been condemned by the federal courts. In DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990), the court of appeals stated that the district court had acted improperly in accepting the reasons set forth in the defendant's brief on a Rule 12(b) motion to dismiss. In condemning this practice, the court stated as follows:

> The judge accepted the "reasons set forth in E & W's briefs" in the district court. Even if we had copies of these briefs (no one supplied them to us), they would be inadequate. A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a

> neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. E.g., Walton v. United Consumers Club, Inc., 786 F.2d 303, 313-14 (7th Cir.1986); In re X-Cel, Inc., 776 F.2d 130 (7th Cir.1985). Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

Clearly, the district court in the instant case was guilty of this practice. Furthermore, the court of appeals made no attempt to review independently whether the contentions in the movant's memoranda

relied upon by the district court were accurate.

The Supplemental Complaint Clearly States A Cause Of Action.

The court states that the supplemental complaint "contains no specific factual allegations" and in the same sentence continues: "reads in pertinent part as follows: 'Defendants Gentile, Reynolds and Murphy conspired to block an investigation of plaintiff's complaints against the Grievance Committee defendants, and wilfully refuse to grant plaintiff further access to his investigatory file in order to deny plaintiff the evidence required to sustain this action'" (J.A. 548). The court also ignored the final paragraph 159 which states: "The motion for summary judgment against

plaintiff filed by defendants Gentile, Reynolds and Murphy is false and frivolous, and constitutes gross malpractice and intentional negligent misrepresentation" (J.A. 151). Paragraph 155 incorporates the complaint; attention is directed to 144 of the complaint (J.A. 145). There is no pleading requirement of stating facts sufficient to constitute a cause of action, but only that there be a short and plain statement of a claim showing that the pleader is entitled to relief. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944). Depositions of the State defendants were scheduled with notice to the court, which chose to abort them (J.A. 508). The court should have noted the judicial tumult regarding the State defendants (J.A. 509-10, 515-21).

The relationship of Reynolds with the Bar Association defendant Patrick Wall is alleged in paragraphs 156 and 157 (J.A. 150). Under the circumstances, each defendant has sufficient notice of what he is charged with. Goldman v. Belden, 754 F.2d 1059, 1070 (2d Cir. 1985).

It is submitted that even a cursory examination of opposing memoranda of law will indicate the abuse of discretion by the court in adopting verbatim the conclusions of moving counsel (J.A. 327-57, J.A. 361-91).

In deciding a pretrial motion to dismiss a complaint for lack of personal jurisdiction, the court has certain options. It may determine the motion on the basis of affidavits. Here there were no affidavits or even a statement of

facts by Florida counsel, simply his arguments in his memorandum of law, which have no probative value for granting motions. Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24, 25 (2d Cir. 1988); Sardo v. McGrath, 186 F.2d 20, 23 (D.C. Cir. 1952).

Even if submitted in affidavit form, statements not based on personal knowledge and thus amounting to hearsay are not sufficient to warrant a motion to dismiss even under Rule 56. Kamen v. American Telephone & Telegraph Co., 791 F.2d 1006, 1011 (2d Cir. 1986).

The court may permit discovery, and, indeed, the court cannot dismiss for want of jurisdiction without discovery. Alliance of American Insurers v. Cuomo, 854 F.2d 591, 597 (2d Cir. 1988). Finally,

the court may conduct an evidentiary hearing on the merits of the motion, but until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting matter presented by the moving party to defeat the motion. Marine Midland Bank N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981).

The arguments or statements of counsel must be warranted by the record. Estate of Detwiler v. Offenbechner, 728 F. Supp. 103, 135 (S.D.N.Y. 1989).

The allegations of the complaint establish an actual conspiracy against appellant (Complaint, J.A. 58-60; J.A. 61-65; J.A. 44-46; J.A. 47-57; J.A. 66-68; J.A. 95, paras. 72, 73; J.A. 100, para. 77; J.A. 101, para. 81; J.A. 103 (4), (5); J.A. 106, para. 89; J.A. 114

(h); J.A. 107, para. 92; J.A. 109(15), (16), (17); J.A. 111, paras. 93, 94, 96; J.A. 115-17; J.A. 118, paras. 99, 100; J.A. 123, paras. 111, 112; J.A. 124-29; J.A. 137, para. 119.

Even accepting the claim of Florida counsel that the only contacts with New York were two (unspecified) letters, there is still a prima facie action for an intentional tort against The Florida Bar. Calder v. Joines, 465 U.S. 783, 789 (1984); Fox v. Boucher, 794 F.2d 34, 35 (2d Cir. 1986); David v. Weitzman, 677 F. Supp. 95, 99 (S.D.N.Y. 1987) discussing Brown v. Flowers, 688 F.2d 328 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

The court's own decision in Ghazoul v. International Management Services,

Inc., 398 F. Supp. 307 (S.D.N.Y. 1975), is dispositive of the issues of a prima facie showing of jurisdiction. The court held that a conspiracy between a party, who is never present in New York, and a co-conspirator who carries out the tortious activities in New York, subjects the out-of-state conspirator to long-arm jurisdiction in New York pursuant to N.Y. Civ. Prac. L. & R. § 302(a)(2) (McKinney 1990). Ghazoul v. International Management Services, Inc., supra, 398 F. Supp. at 310.

The court pointed out:

> "Where 'determination of factual disputes central to the assertion of jurisdiction may be dispositive of questions of liability as well [as jurisdiction], the plaintiff need only show "threshold" jurisdiction sufficient to demonstrate the fairness of allowing the suit to continue. The parties are

> not bound by the court's jurisdictional findings of fact when the case comes to trial on the merits'."

Id. at 309 (quoting Hatfield v. Power Chemical Co., 382 F. Supp. 388, 390 (D. Md. 1974)).

The court and all counsel have overlooked the key conspiratorial allegation of paragraph 77 of the complaint, which states and appears as follows:

> "77. Also, unbeknownst to plaintiff, prior to February, 1986, Norman Faulkner on November 6, 1974, again wrote to Bonomi, stating that plaintiff's fee schedule for legal research reports was a fraud, and that immediate action should be taken against plaintiff in New York. The above letter is in plaintiff's investigative file."

(J.A. 100.)

The aforementioned paragraph of the complaint clearly establishes an infer-

ence of conspiracy between Bonomi and the Florida defendants. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Firman v. Abreu, 691 F. Supp. 811, 813-14 (S.D.N.Y. 1988). See excellent analysis of civil rights conspiracy in Hampton v. Hanrahan, 600 F.2d 600, 620-24 (7th Cir. 1979).

In a subsequent case, citing its decision in Ghazoul v. International Management Services, Inc., supra, 398 F. Supp. at 309, the court in American Contract Designers v. Cliffside, Inc., 458 F. Supp. 735, 737, stated:

> "In deciding the instant motion, the Court has relied on the affidavits of the parties to establish jurisdictional facts. . . . These are for the most part undisputed, but where there is a dispute the Court has set forth the respective contentions of the parties, mindful of the fact that it

> must consider the pleadings and affidavits in the light most favorable to the plaintiff[.]"

(Citations omitted.)

The court's findings of fact regarding the Florida complaints are clearly erroneous, and they are adopted verbatim from the Bar Association's moving papers. The court states "Morris Gutt . . . notified plaintiff by letter of the complaint and requested that plaintiff set forth his position" (J.A 542). Gutt simply announced that a Florida complaint had been received, did not specify in any way the precise nature of the complaint, misrepresented the complaint as from a private attorney in Florida, and requested appellant to set forth his position, not on any Florida complaint, but on Bonomi's admonitory letter (J.A. 66-68, J.A. 72-

73). The court then states that "the hearing plaintiff had requested began on November 13, 1974, and continued on December 4, 1974, and January 29, 1975," implying that appellant requested a hearing on the Florida complaint. Appellant requested a hearing on Bonomi's admonitory letter (J.A. 72, 73; J.A. 122, para. 106). There was no hearing on the Florida complaint because it was never placed on the record during the meeting, despite petitioner's request for specification of its nature (J.A. 103(4)(5), J.A. 114(h), J.A. 115-18). Petitioner never saw the first Florida complaint until after the meetings were completed, and the Bar Association revealed it as an exhibit in their answer to petitioner's federal action (J.A. 123, para. 111).

The court states:

> [I]t is clear from plaintiff's complaint that he did know the identity of the author of the Florida Bar complaint. Finally, in regard to the letter from Bonomi to counsel for the Florida Bar which allegedly stated that action would be taken against plaintiff, plaintiff fails to explain how such a letter would give rise to claim. Furthermore, it is unclear how plaintiff's lack of awareness of such a letter until 1986 prevented plaintiff from having knowledge of the facts necessary to commence the instant action."

(J.A. 546, 547.)

The Bar Association said the same thing: "Finally as to item 5, the letter from John Bonomi to counsel for the Florida Bar which purportedly stated that action would be taken against the plaintiff, plaintiff does not attach this letter to the complaint. His pleading fails to explain how the fact or exist-

ence of such a letter would in any way give rise to a claim, or how plaintiff's lack of awareness of such a letter until 1986 prevented him from otherwise having full knowledge of all pertinent facts necessary to file the type of action the plaintiff has now commenced against the defendants" (J.A. 174).

While petitioner knew the identity of the author and his first complaint, he did not know until 1986 that the same author had written a second complaint letter which charged petitioner with fraud. That second complaint letter, and Bonomi's reply, that they should get together in New Orleans to discuss petitioner's activities, is concrete proof of a conspiracy. The second letter is also proof of a reckless rendition of an opin-

ion. Also, that second complaint letter belies the defense of good-faith probable cause which petitioner faced in 1975. Duchesne v. Sugarman, 566 F.2d 817, 831-32 (2d Cir. 1977).

The above--as will be demonstrated with the rest of the court's findings--clearly indicates that the court uncritically accepted all the defendants' version of the facts and the law, and ignored the allegations of the complaint and petitioner's opposition papers.

This action was filed in February 1988. Although requested twice by petitioner, the court has never held a conference with petitioner and opposing counsel.

Chief Justice Burger wrote in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974):

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

The Court then went on to quote from Conley v. Gibson, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

(Emphasis added.)

An abuse of discretion is found when an appellate court is convinced that there was the commission of an error of law, a judgment clearly against logic, or a conclusion against the reasonable and probable deductions to be drawn from the disclosed facts. Coca Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 315 (2d Cir. 1982).

Where a court uncritically accepts findings and conclusions of counsel after announcing a proposed decision in that party's favor, the finding is clearly

erroneous. Anderson v. City of Bessemer, 470 U.S. 564, 572 (1985). The abuse of discretion standard implies that the judge must actually exercise his discretion. United States v. United States Currency in the Amount of $103,387.27, 863 F.2d 555, 561 (7th Cir. 1988). An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered. Id. at 561. The clearly erroneous standard of review applies to all findings without distinction between subsidiary and ultimate facts. Marine Transport Lines, Inc. v. International Organization of Masters, Mates & Pilots, 878 F.2d 41, 45 (2d Cir. 1989). It is improper for the court to dismiss an action on the basis of inferences unfavorable to the

nonmoving party. Beyah v. Coughlin, 789 F.2d 986, 990 (2d Cir. 1986).

The court's failure to consider its own decision is a manifest disregard of the applicable law. Fried, Krupp, GmbH v. Solidarity Carriers, Inc., 674 F. Supp. 1022, 1026 (S.D.N.Y. 1987); Karovos Compania Naviera, S.A. v. Atlantica Export Corp., 588 F.2d 1, 8 (2d Cir. 1978).

This Court has roundly condemned the procedure of adopting in toto all the findings of fact and of law submitted by one party. International Controls Corp. v. Vesco, 490 F.2d 1334, 1341 n.6 (2d Cir.), cert. denied, 417 U.S. 932 (1974). The rationale is stated in Russo v. Central School District, 469 F.2d 623, 628 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973) as follows:

> "Findings that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite closer scrutiny, especially when the case concerns fundamental constitutional freedoms. . . . The need for precision and clarity in fact-finding and the use of cold conclusory statements as a shield to prevent penetrating the absence of facts is made more significant because of the 'clearly erroneous' standard, for while errors of law are always correctable by an appellate court, errors of fact rarely are, unless an appellant can scale the high wall which that standard places before him. It stands to reason that unless due care is given to the process of fact finding, the reliability of the district court's conclusions will be subject to question, thus compelling a reviewing court to scrutinize the findings with a sharper eye than is ordinarily appropriate."

(Citation and footnote omitted.)

In United States v. Forness, 125 F.2d 928, 942 (2d Cir.), cert. denied, City of Salamanea v. United States, 316 U.S. 694 (1942), Judge Frank wrote:

> "The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principle."' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding;

> for such lack of due care is less likely to reveal itself than lack of scruples, which we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standard."

(Footnotes omitted.)

The court echoes the Attorney General's opinion that the statute of limitations bars a constitutional attack on the present disciplinary rules. The New York Court of Appeals disagrees. Kirn v. Noyes, 31 N.Y.S.2d 90, 92-93, 262 A.D.2d 581, 583, appeal denied, 263 A.D.2d 905 (1942). Also, tolling of the statute of limitations applies for fraud and breach of trust. Ernst v. Ernst, 40 Misc. 2d

934, 941, 243 N.Y.S.2d 917, 924 (1973); In re Tarbells Estate, 99 N.Y.S.2d 902, 905 (1950).

The statute of limitations as to all parties is not applicable, as there is a material issue of fact as to whether the State defendants have ratified the Bar Association's acts, and whether a continuing tort is now involved. Rochon v. FBI, 691 F. Supp. 1548, 1564 (D.D.C. 1988); Pope v. Bond, 641 F. Supp. 489, 499-500 (D.D.C. 1986); Cohen v. Goodfriend, 642 F. Supp. 95, 101 (E.D.N.Y. 1986); Richards v. New York State Department of Correctional Services, 572 F. Supp. 1168, 1176 (S.D.N.Y. 1983).

The uncertainty as to the true state of any material fact defeats a motion to dismiss. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). Once a material issue of fact is found to exist, the motion must be denied and the case must proceed to trial. United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982).

The definition of an unresolved factual issue is one that a reasonable fact-finder could decide in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Defendants must carry a heavy burden before the court can dismiss plaintiff's fraud and concealment allegations without trial. Defendants must show that even when all ambiguities in the evidence are resolved, and all inferences drawn in favor of plaintiff, there are no material issues genuinely in dispute. Schering

Corp. v. Home Insurance Co., 712 F.2d 4 (2d Cir. 1983); Heyman v. Commerce & Industry Co., 524 F.2d 1317 (2d Cir. 1975). Since the allegations of bad faith, fraud, and misrepresentation are actually documented in the complaint, the doctrine of equitable estoppel is an issue for the jury, and not the judge. Music Research, Inc. v. Vanguard Recording Society, 547 F.2d 192, 194-95 (2d Cir. 1976); cf. Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 60-61 (2d Cir. 1986).

The issue of the statute of limitations should not be decided on a motion for summary judgment. Renda v. Frazer, 100 Misc. 2d 511, 419 N.Y.S.2d 857, 863, aff'd, 75 A.D.2d 490, 429 N.Y.S.2d 944 (1974); Schmidt v. Kay, 555 F.2d 30, 37

(2d Cir. 1977). Much less should a motion to dismiss under Rule 12(b)(6). Competitive Associates, Inc. v. Fantastic Fudge, Inc., 58 F.R.D. 121, 123 (S.D.N.Y. 1973). Even with affidavits by movants, which is not present here, it is still an issue of fact on a motion to dismiss. Hanna v. United States Veterans Administration Hospital, 514 F.2d 1092, 1094-95 (3d Cir. 1975).

Actual knowledge on petitioner's part in the present action is too inherently factual to provide a basis for dismissal. Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979); Friedman v. Meyers, 482 F.2d 435, 439 (2d Cir. 1973); Yeadon v. New York City Transit Authority, 719 F. Supp. 204, 209-10 (S.D.N.Y. 1989). The same is true for

due diligence. Barrett v. United States, 689 F.2d 324, 329-30 (2d Cir. 1982). The burden is on the defendants to come forth with any facts that due diligence would have discovered the evidence where the same defendants have concealed the very cause of action. Richards v. Mileski, 662 F.2d 65, 70-71 (D.C. Cir. 1981).

It is sufficient for fraudulent concealment when a conspiracy is by its nature self-concealing. State of New York v. Hendrickson Brothers, Inc., 840 F.2d 1065, 1083-85 (2d Cir.), cert. denied, 109 S. Ct. 128 (1988). Mere non-disclosure may be enough if there is a fiduciary duty or other affirmative obligation to make disclosure. Glazer Steel Corp. v. Toyomenka, Inc., 392 F. Supp. 500, 503 (S.D.N.Y. 1974).

All the above considerations are set forth in Socialist Workers Party v. Attorney General of United States, 642 F. Supp. 1357, 1413 (S.D.N.Y. 1986) (J.A. 229-32).

There is also the issue of the public policy of allowing the most prestigious Bar Association to bar petitioner from claiming his rights when the availability of the concealment defense was obtained by them in such an unworthy manner, and would not only grant them a windfall to which they are not entitled, but will encourage other bar associations and disciplinary bodies to mislead the court deliberately. Stone v. Williams, 891 F.2d 401, 405 (2d Cir. 1989). The statute of limitations does not apply where an attorney's professional miscon-

duct is involved. Matter of O'Hara, 63 A.D.2d 500, 408 N.Y.S.2d 70, 72 (1st Dep't 1978).

Should attorneys who commit crimes in conducting disciplinary proceedings be allowed to avail themselves of the statute of limitations?

Post-Deprivation Procedures

The court states "Plaintiff did not take any further judicial action by way of an Article 78 proceeding or otherwise" (J.A. 543). The court does not specify precisely what legal action could be taken prior to the filing of charges. Nor does the Bar Association specify any procedural steps, being content to cite Marino v. Ameruso, 837 F.2d 45, 47 (2d Cir. 1988), which does not involve a

disciplinary proceeding (J.A. 202). Petitioner's opposition Memorandum of Law clearly made the point that until charges are made, forget it (J.A. 236-38). The same point was recently made in Mason v. Departmental Disciplinary Committee, 894 F.2d 512 (2d Cir. 1990).

The citation of Marino is frivolous. Marino made no showing of inadequate state procedures.

When counsel cited the Marino case before the circuit court, petitioner called it to the attention of the court to no avail.

There were no charges made against petitioner after the investigation. Let the respondents specify what state procedures were available to petitioner.

As the foregoing discussion shows, the court clearly failed to apply the proper standard on a Rule 12(b) motion to dismiss. Furthermore, the court's deviation from this standard and the court of appeals' sanctioning of this deviation are so profound that the exercise of this Court's supervisory powers is justified.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, or in the alternative the case should be remanded for further proceedings.

Respectfully submitted,

John H. Babigian
Pro se

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

JOHN BABIGIAN,

Petitioner,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT McGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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