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MARIA CANDELARIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HOWARD M. THALER and WILLIAM B. FALOW,

Plaintiffs,

- against -

GARY L. CASELLA, individually and in his official capacity as Chief Counsel to the Grievance Committee for the Ninth Judicial District, MARYANN YANARELLA, individually and in her official capacity as a staff attorney to the Grievance Committee for the Ninth Judicial District, the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, MARTIN H. BROWNSTEIN, individually and in his official capacity as Deputy Clerk of the Supreme Court of the State of New York, Appellate Division Second Department, LINDA CLERK, individually and in her official capacity as Deputy Clerk of the Supreme Court of the State of New York, Appellate Division Second Department, DIANA MAXFIELD KEARSE, individually and in her former official capacity as Principal Law Assistant to Guy Mangano, Justice of the Supreme Court of the State of New York, Appellate Division Second Department,

Defendants.

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MEMORANDUM AND ORDER

CV 93-4061 (RJD)

Appearances:

For Plaintiffs:
Ronald Cohen
233 Broadway, Suite 3501
New York, NY 10279

For Defendants:
G. Oliver Koppell
Attorney General of the State of New York

P-049

By: Abigail I. Peterson
Assistant Attorney General
State of New York Department of Law
120 Broadway
New York, NY 10271

DEARIE, District Judge.

Plaintiffs, both attorneys, brought this action pursuant to 42 U.S.C. § 1983, alleging that their due process rights were violated when the Supreme Court of the State of New York, Appellate Division Second Department ("Appellate Division") authorized the commencement of state disciplinary proceedings against them based on "ex parte communications." Plaintiffs seek a preliminary injunction of the disciplinary proceedings, access to any such communications, and ten million dollars in damages.

Defendants move to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. Plaintiffs' cross-motion for preliminary injunction is denied, and defendants' motion to dismiss is granted. This Court lacks subject matter jurisdiction over this case and is, in any event, compelled to abstain.

BACKGROUND

Plaintiffs' current difficulties began in 1987. Upon complaints that plaintiffs had participated in fraudulent real estate transactions, the Grievance Committee for the Ninth Judicial District ("Grievance Committee"), began an investigation pursuant to section 691.4 of the New York Rules of Court.[1] Defendants now allege that plaintiffs perjured themselves before the Grievance Committee and submitted false and misleading information in response to the complaints. In November, 1990, the Grievance Committee recommended that plaintiffs be suspended from practicing law[2] and

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[1] Section 691.4(c) of the New York Rules of Court provides in relevant part: "Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court . . ." McKinney's New York Rules of Court § 691.4(c) (1993).

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[2] Section 691.4(l)(1) of the New York Rules of Court provides in relevant part:

> An attorney who is the subject of an investigation, or of charges by a grievance committee of professional misconduct . . . may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct

requested authorization to commence formal disciplinary proceedings.[3] At that time, defendants had not yet filed charges of professional misconduct.

On June 10, 1991, the Appellate Division authorized disciplinary proceedings against plaintiffs and temporarily suspended them from practicing law. On August 19, 1991, the Appellate Division granted plaintiffs' motion for reargument, but only to the extent of vacating their interim suspensions.

> immediately threatening the public interest. (2) The suspension shall be made . . . after notice of such application has been given to the attorney . . . . The court shall briefly state its reasons for its order of suspension . . . .

McKinney's New York Rules of Court § 691.4(l)(1) (1993).

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[3] Section 691.4(e) of the New York Rules of Court provides that:

> Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee . . . forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

McKinney's New York Rules of Court § 691.4(e) (1993).

Plaintiffs allege that in suspending them initially, the Appellate Division had relied on various "ex parte communications" from defendants Gary Casella, Chief Counsel to the Grievance Committee, and Maryann Yanarella, staff attorney to the Grievance Committee. Mr. Falow claims that on or about December 10, 1992, upon examination of the Appellate Division court file on his case, he discovered a letter dated May 23, 1991 from Ms. Yanarella to Diana Maxfield Kearse, the principal law assistant of the Presiding Justice of the Appellate Division, which stated in its entirety: "Enclosed, as per your request, is the information on the above referenced attorney [William B. Falow]." (Ex. A to Falow Affidavit). Although the content of the referenced "enclosures" has not been disclosed to the Court, defendants maintain that plaintiffs are not entitled to the material. (Yanarella Affidavit, ¶ 4). Plaintiffs also claim that the Deputy Clerk of the Appellate Division said that "secret files" were being maintained on them at the Clerk's Office. Defendants deny that plaintiffs were denied access to any "private files." Finally, plaintiffs' allegation that the Committee staff attorney admitted to the existence of

ex parte orders is apparently unfounded.[4]

In December, 1992, Mr. Falow moved the Appellate Division to dismiss the disciplinary proceedings, alleging that the authorization for those proceedings, having been obtained via "ex parte communications," violated due process. In January, 1993, Mr. Thaler similarly moved. The Appellate Division denied both motions, and the New York Court of Appeals denied plaintiffs' request for leave to appeal the denial of the motions. On May 8, 1992, plaintiffs were served with formal charges of professional misconduct, the specific nature of which were not disclosed in parties' papers. A special referee has been appointed to hear the disciplinary cases against each plaintiff. There is no claim that the referee has been shown any so-

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[4] Plaintiffs quote Ms. Yanarella as stating in her affirmation of December 28, 1992: "Upon information and belief, such orders have never been released to respondents." (Pl.'s Mem. Opp. Motion to Dismiss, at 14-15). However, plaintiffs have taken Ms. Yanarella's words out of context. Ms. Yanarella was referring to an Order to Disclose that had been issued by the Second Department pursuant to section 90(10) of the New York Judiciary Law. Section 90(10) clearly provides that such orders may be made without notice to the persons or attorneys to be affected thereby. N.Y. Judiciary Law § 90(10) (McKinney 1983).

called "secret" materials.

On September 1, 1993, plaintiffs filed a complaint in this Court, arguing that defendants' use of "ex parte communications" to secure authorization to commence disciplinary proceedings and the delay before the filing of formal charges violated plaintiffs' due process rights, and that section 691.4 of the New York Rules of Court is facially unconstitutional. Plaintiffs sought a temporary restraining order barring the prosecution of disciplinary proceedings and an order giving plaintiffs access to the "secret," "confidential and private" files. On September 8, 1993, the Court denied the motion for a temporary restraining order. Plaintiffs now seek a preliminary injunction of the disciplinary proceedings, access to any "ex parte communications," and ten million dollars in damages.

Defendants move the Court for an order dismissing the complaint for lack of jurisdiction and for failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

DISCUSSION

I. Subject Matter Jurisdiction

Essentially plaintiffs seek review of the Appellate Division's denial of their constitutional claims. The Court lacks subject matter jurisdiction to undertake such a review, and this action is dismissed. Defendants cite District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) for the proposition that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the Supreme] Court." Feldman, 460 U.S. at 482. Because federal courts lack jurisdiction to review "final" state judgments, they certainly lack jurisdiction to review the Appellate Division's non-final determination in the pending state proceedings here.

If this Court were to rule on the merits of plaintiffs' motion for preliminary injunction, it would necessarily revisit the due process claims that were considered and rejected by the Appellate Division. The Court would then, in essence, be exercising appellate

rather than original jurisdiction over the federal question of due process, in direct contravention of the jurisdictional limits on this Court recognized by the Supreme Court in Feldman and Rooker. Because this Court lacks subject matter jurisdiction, defendants' motion to dismiss the complaint is granted.

II. Abstention

Assuming arguendo that the Court has jurisdiction over this case, the complaint must be dismissed on Younger abstention grounds.

In determining whether to enjoin state attorney disciplinary proceedings, the Court is bound by the "strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432-35 (1982) (citing Younger v. Harris, 401 U.S. 37, 41 (1971)). See also Anonymous v. Ass'n of the Bar of the City of New York, 515 F.2d 427 (2d Cir.), cert. denied, 423 U.S. 863 (1975); Mildner v. Gulotta, 405 F.Supp. 182, 196 (E.D.N.Y. 1975), aff'd, 425 U.S. 901 (1976). Federal courts should abstain from interfering

with ongoing state disciplinary proceedings where the latter afford adequate opportunity to raise the constitutional claims. Middlesex, 457 U.S. at 435. The questions in this case, as in Middlesex are:

> [F]irst, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the [state court] constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 432 (emphases omitted).

The pending disciplinary proceedings are "ongoing" state judicial proceedings because they are awaiting the hearing and recommendation of the special referee. The proceedings implicate the State's "extremely strong interest in maintaining and assuring the professional conduct of the attorneys it licenses." Middlesex, 457 U.S. at 435.

> States traditionally have exercised extensive control over the professional conduct of attorneys. The ultimate objective of such control is "the protection of the public, the purification of the bar and the prevention of a re-occurrence." The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.

Id. at 434 (citations omitted). The State's strong interest in regulating the attorneys admitted to its bar counsels this Court to abstain from interfering in the ongoing state proceedings. See Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972); Mildner, 405 F.Supp. at 192.

Abstention is particularly warranted in this case because plaintiffs have every adequate opportunity to present their constitutional argument in state court. See Juidice v. Vail, 430 U.S. 327, 335 (1977). Plaintiffs may raise their constitutional arguments before the special referee and oppose any adverse findings of the referee before the Appellate Division. Furthermore, plaintiffs may appeal as of right any adverse determination of the Appellate Division to the New York Court of Appeals. 29 N.Y. Judiciary Law § 90(8) (McKinney's 1983);[5] 7B N.Y. Civ. Prac. L. & R.

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[5] Section 90(8) of the New York Judiciary Law provides in relevant part:

> Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section . . . shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon

§ 5601(b)(1).[6] Implicit in plaintiffs' argument for federal intervention is the absurd proposition that the New York Court of Appeals will be insensitive to their cries of constitutional foul. There is no basis upon which to assume that the state courts will be less protective of plaintiffs' rights than will the federal courts. Turco v. Monroe Cty. Bar Ass'n, 554 F.2d 515, 520 (2d Cir.) (citing Erdmann v. Stevens, 457 F.2d at 1211), cert. denied, 434 U.S. 834 (1977).

Finally, the case for abstention is made even stronger by the injunctive nature of the relief requested by plaintiffs. Federal courts are generally

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> questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.

29 N.Y. Judiciary Law § 90(8) (McKinney's 1983).

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[6] Section 5601(b)(1) of the New York CPLR provides that: "An appeal may be taken to the court of appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States . . . " 7B N.Y. Civ. Prac. L. & R. § 5601(b)(1).

prohibited from enjoining state court proceedings,[7] and may do so in actions brought pursuant to 42 U.S.C. § 1983 only in exceptional circumstances such as where irreparable injury is "'great and immediate.'" Mitchum v. Foster, 407 U.S. 225, 230 (1972) (quoting Younger v. Harris, 401 U.S. at 46, 53-54). See also Perez v. Ledesma, 401 U.S. 82, 85 (1971). In this case, plaintiffs have not shown "immediate" and "great" irreparable injury. Indeed, they may suffer no injury at all. Plaintiffs have long since been restored to the practice of law. The only injuries that plaintiffs face pending the outcome of the disciplinary proceeding are incidental to every attorney disciplinary proceeding brought lawfully and in good faith, and therefore do not constitute "extraordinary" or "immediate and irreparable harm." See Younger, 401 U.S. at 49.

Because the Court abstains from enjoining the

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[7] Section 2283 of title 28 of the United States Code provides that: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1993).

pending attorney disciplinary proceedings, this case is dismissed. See Gibson v. Berryhill, 411 U.S. 564, 577 (1973) ("Younger v. Harris contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts."). E.g. Anonymous v. Bar Assoc. of Erie County, 515 F.2d 435 (2d Cir.) (affirming district court's dismissal of complaint in civil rights action arising from attorney disciplinary proceedings, where the dismissal was based on Younger abstention doctrine), cert. denied, 423 U.S. 840 (1975).[8]

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[8] Because this action is dismissed, the Court need not address defendants' alternative argument for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, plaintiffs' cross-motion for preliminary injunction is denied, and defendants' motion to dismiss the complaint is granted. The Clerk of the Court is directed to enter judgment for defendants.

SO ORDERED.

Dated: Brooklyn, New York
May 18, 1994

RAYMOND J. DEARIE
United States District Judge