UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Ekaterina Schoenefeld

Plaintiff,

-against-

08 CIV. 3269 (NRB)

The State of New York, the Attorney General of the State of New York Andrew M. Cuomo, in his official capacity, the New York Supreme Court Appellate Division, Third, Department, Justices of the New York Supreme Court Appellate Division, Third Department, Michael J. Novac, clerk of the New York Supreme Court Appellate Division, Third Department, in his official capacity, the New York Supreme Court Appellate Division, Third Department Committee on Professional Standards and its members in their official capacity, and Thomas C. Emerson, Chairperson of the Committee on Professional Standards, in his official capacity.

Defendants.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Ekaterina Schoenefeld

Plaintiff,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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EKATERINA SCHOENEFELD,

08 Cv. 3269 (NRB)

Plaintiff,

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

----------x

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF
STATE DEFENDANTS' MOTION TO DISMISS
THE AMENDED COMPLAINT

Preliminary Statement

Plaintiff Ekaterina Schoenefeld, Esq. (hereafter "Plaintiff") brings this action on her own behalf pursuant to 42 U.S.C. § 1983 as against the State of New York, the Attorney General of the State of New York Andrew M. Cuomo, in his official capacity, the New York Supreme Court Appellate Division, Third, Department, the Justices of the New York Supreme Court Appellate Division, Third Department, Michael J. Novac, clerk of the New York Supreme Court Appellate Division, Third Department, in his official capacity, the New York Supreme Court Appellate Division, Third Department Committee on Professional Standards and its members, and Thomas C. Emerson, Chairperson of the Committee on Professional Standards, in his official capacity. (hereafter "defendants" or "State defendants"). Plaintiff seeks action against thirty-six

defendants.[1] Plaintiff asserts three claims under 42 U.S.C. § 1983 alleging that the statute on its face and as applied violates her rights under the privileges and immunities clause, the equal protection clause, and the commerce clause of the U.S. Constitution. On September 29, 2008, defendants filed a motion to dismiss the Amended Complaint in this action for improper venue pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a), or, in the alternative, for an order pursuant to 28 U.S.C. § 1404(a) transferring venue from the Southern District to the Northern District of New York on the grounds that Plaintiff's claim does not satisfy the requirements of 28 U.S.C. §1391(b).

Venue of this action is proper only in the Northern District because all of the defendants reside in Albany, which is in the Northern District, and enforcement of Judiciary Law §470 would occur in the Third Department, which is also located in the Northern District. In addition, Plaintiff does not reside in the Southern District. Thus, there is not a sufficient connection with the Southern District which would make it a proper venue.

On October 29, 2008, Plaintiff filed an opposition to defendants' motion to dismiss. In her opposition to State Defendants' motion to dismiss, Plaintiff fails to prove that venue is proper under 28 U.S.C. § 1391(b). She alleges that 28 U.S.C. §1391(b)(1) is satisfied because the Attorney General of the State of New York ("Attorney General") has an official residence in the Southern District. The Attorney General, however, is not a proper party, thus his official residence is insufficient to satisfy 28 U.S.C. §1391(b)(1). Additionally, the other 35 defendants reside in Albany. Since, a defendant, who is also a proper party, does not reside in the Southern

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[1] The thirty-six defendants include: 21 members of the Committee on Professional Standards, 11 Justices of the Appellate Division, Third Department, The clerk of the Appellate Division, Third Department, The Attorney General of the State of New York, The New York Supreme Court Appellate Division, Third Department, and the State of New York. See 22 NYCRR § 806.3.

District, Plaintiff does not satisfy 28 U.S.C. §1391(b)(1).

Plaintiff also fails to satisfy 28 U.S.C. §1391(b)(2). She asserts that since she has allegedly declined matters that would require her to practice in State courts throughout New York including New York City, the harm in this cause of action occurs in the Southern District and thus satisfies 28 U.S.C. §1391(b)(2) . Economic effects alone, however, are not sufficient to establish that a substantial part of the events giving rise to the claim occurred in the chosen venue. Additionally, Plaintiff claims that the possibility that a State court judge, located within the Southern District, could enforce Judiciary Law §470 against her establishes a sufficient connection with the Southern District. The hypothetical action of a non-party potential actor in the Southern District is not related to the defendants' enforcement of Judiciary Law §470, and thus, is not part of the substantial events giving rise to this claim against the named defendants.

This memorandum of law is respectfully submitted in further support of the motion by the State defendants to dismiss the Amended Complaint, or in the alternative transfer the complaint, on the grounds that plaintiff has filed the claim in the improper venue.

Statement of Relevant Allegations

The Court is respectfully referred to the statement of facts provided in State Defendants' memorandum of law, dated September 29, 2008 ("State Def. Memo"), which is incorporated herein, and the Declaration of Kate C. Burson executed September 29, 2008 as well as the exhibits annexed thereto. For the purposes of the motion to dismiss only, the facts asserted by the plaintiffs are assumed to be true.

ARGUMENT

PLAINTIFF FAILS TO PROVE THAT THE SOUTHERN DISTRICT IS A PROPER VENUE

A. PLAINTIFF'S CLAIM DOES NOT SATISFY 28 U.S.C. §1391(b)(1) REQUIREMENTS

In her opposition, Plaintiff asserts that her claim satisfies §1391(b)(1) because the Attorney General is a proper party, and he has an official residence in the Southern District. See Plaintiff's Opposition at pp. 5, 7-8. The Attorney General is not a proper party, and by naming the Attorney General, who is the only defendant who arguably has an official residence in the Southern District, the Plaintiff is trying to circumvent 28 U.S.C. §1391(b)(1). Where thirty-five of the thirty-six defendants reside in the Northern District, it is essential that the one remaining party with a residence in the Southern District be a proper party to establish venue under 28 U.S.C. §1391(b)(1). See e.g. Cheeseman v. Carey, 485 F. Supp. 203, 210 (S.D.N.Y. 1980); Gunn v. Mathis, 157 F. Supp. 169, 177 (W.D. Ark. 1957) (stating that under 28 U.S.C. §1392, the residence of the party used to establish venue, must be a proper party.) To be a proper party, the defendant must have the authority to provide the requested relief. See Rule 20(a)(2) of Fed. R. Civ. P.; Benson v. RMJ Sec. Corp., 683 F. Supp. 359, 378 (S.D.N.Y. 1988). This is not the case here. An injunction against the Attorney General would not provide the plaintiff with the relief sought, because the Attorney General does not have any authority or role in the enforcement of Judiciary Law §470.[2] The responsibility for enforcement of Judiciary Law § 470

[2] Additionally, for the Attorney General to be a proper party, there must be a sufficient nexus, independent of the general duty to enforce state laws, between the Attorney General and Judiciary Law § 470. As discussed throughout, this nexus does not exist because the Attorney General has no authority or role in the enforcement Judiciary Law § 470. See Judiciary Law § 90. N.Y. County Lawyers' Ass'n v. Pataki, 188 Misc. 2d 776 (Sup. Ct. NY. Co. 2001), aff'd sub. Nom. N.Y. County Lawyers' Ass'n v. State, 294 A.D. 2d 69 (1st Dep't 2002); Gras v. Stevens, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976).

lies with the State court system either in disciplinary proceedings, when a complaint is filed against an attorney in the appellate division where she is registered, or when raised by opposing counsel in a legal action before a State court justice. See Judiciary Law §90; Lichtenstein v. Emerson, 251 A.D.2d 64 (1st Dep't 1998).

Plaintiff asserts that Judiciary Law §476-a authorizes the Attorney General to enforce Judiciary Law §470. See Plaintiff's Opposition at p. 9. Judiciary Law § 476-a authorizes the Attorney General to maintain an action against an individual who

> commits any act...prohibited by law as constituting the unlawful practice of the law. The Term 'unlawful practice of law"...shall include, but is not limited to, (a) any act prohibited by penal law sections two hundred seventy, two hundred seventy-a, two hundred seventy-e, two hundred seventy-one, two hundred seventy-five, two hundred seventy-five-a, two hundred seventy-six, two hundred eighty or fourteen hundred fifty-two, or (b) the practice of law by a party not licensed or admitted to practice law in New York, or (c) any act punishable by the supreme court as criminal contempt under §750-b.

See Judiciary Law §476-a(1). The enumerated sections in Judiciary Law § 476-a(1)(a) were repealed by Penal Law § 500.05 in 1967 and replaced with Judiciary Laws §§ 478, 479, 483, 484, 490, 491, 495.[3] See N.Y. Judiciary Law § 476-a(1)a (McKinney 2005).

There is no evidence to support the claim that Judiciary Law §476-a(1) applies to Judiciary Law §470. Even though the statute states that the "'unlawful practice of law'...is not limited to..." the statutory provisions listed therein, there is no case law or legislative history that would provide credence to an argument that §470 was meant to be included under §476-a(1). The history, nature, and language of Judiciary Law §470 provide support for the argument that

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[3] Plaintiff asserts that the Attorney General has "adopted a much broader interpretation of this section" by using §476-a(1) to bring actions for violations of Judiciary Laws §§ 478, 485, and 495. She also asserts that none of these sections are specifically listed in § 476-a(1). See Plaintiff's Opposition P. 10. Both of these statements are patently false. Judiciary Law §476-a(1)(a) includes a footnote stating that the enumerated penal sections have been repealed and that for purposes of §476-a(1), Judiciary Laws §§ 478, 479, 483, 484, 490, 491, 495 replaced them. See N.Y. Judiciary Law § 476-a(1)a (McKinney 2005).

violation of §470 does not constitute the "unlawful practice of law" for purposes of §476-a. First, Judiciary Law §470 was not created to sanction attorneys for unlawful practices of law. The statute that later became Judiciary Law §470 was enacted in 1866 to carve out an exception to the then existing state residency requirement for attorneys.[4] See L. 1866, ch 175. It did this by allowing non-residents in adjoining states who were admitted or licensed in New York, and thus qualified, to practice law in the State. Conversely, Judiciary Law § 476-a was among the laws created to prevent the ignorant, inexperienced, and unscrupulous from practicing law in New York. See People v. Divorce Associated & Publishing, Ltd., 95 Misc. 2d 340, 342 (Sup. Ct. N.Y. Co.1978). This is not the behavior addressed in Judiciary Law §470. Judiciary Law §470 applies only to non-resident attorneys who are licensed to practice law in New York but have not established a New York business address, not individuals who are not licensed to practice law in New York.

Second, despite the fact that Judiciary Law §470 existed when Judiciary Law §476-a was amended in 1967, it was not included in the enumerated Judiciary Laws that replaced the repealed penal laws in §476-a(1). [5] Moreover, unlike the statutes enumerated in Judiciary Law §476-a1(a), Judiciary Law §470 does not specifically ban any particular action, it applies only to attorneys who have been licensed and admitted to practice law in New York, and violation of the provision is not a criminal act. See Judiciary Law §470. Finally, Since Judiciary Law §476-a creates a civil remedy for criminal statutes,(see People v. Romero, 91 N.Y.2d 750, 758 (N.Y. 1998)), and Judiciary Law §470 is an existing civil statute, including it in "unlawful practice of

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[4]It was initially found in §60 in the Code of Civil Procedure. See N.Y. Judiciary Law § 470 (McKinney 2005).

[5] Judiciary Law §476-a was enacted in 1962, but it is derived from Civil Practice Act §1221-a which was added in 1935. See N.Y. Judiciary Law § 476-a (McKinney 2005).

law" under Judiciary Law §476-a(1) would be redundant.

Since Judiciary Law §476-a does not apply to Judiciary Law §470, the Attorney General has no authority or role in the enforcement of Judiciary Law §470. As a result, an injunction against the Attorney General would not provide Plaintiff with the relief sought. Thus, the Attorney General is not a proper party, and his alleged official residence in the Southern District is insufficient to establish venue in the Southern District under 28 U.S.C. §1391(b)(1).

B. PLAINTIFF'S CLAIM DOES NOT SATISFY 28 U.S.C. §1391(b)(2) REQUIREMENTS

Plaintiff asserts that a substantial part of the events giving rise to the claim occur in the Southern District and are sufficient to establish venue in the Southern District under 28 U.S.C §1391(b)(2). See Plaintiff's Opposition p. 11. 28 U.S.C. §1391(b)(2) states that venue can lie in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred..." 28 U.S.C. §1391(b)(2)."When a plaintiff relies on § 1391(b)(2) to defeat a venue challenge, a two-part inquiry is appropriate. First, a court should identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims. Second, the court should determine whether a substantial part of those acts or omissions occurred in the district where the suit was filed.'" Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 432 (2d Cir. N.Y. 2005) (citations omitted). "To determine whether Plaintiffs have satisfied their burden of proving venue under § 1391(b), courts evaluate Defendants' actions as well as the nature of the dispute." See Astor Holdings, Inc. v. Roski, U.S. Dist. LEXIS 758 (S.D.N.Y. Jan. 15, 2002). Finally, courts are "to take seriously the adjective 'substantial' and are required to construe the venue statute strictly." See Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2d Cir. N.Y. 2005)

(citations omitted).

Here, the nature of the claim is a constitutional challenge. Plaintiff brings this claim to challenge the constitutionality of the statute and to prevent enforcement against her. Enforcement against Plaintiff by the 35 defendants would occur in Albany, where there plaintiff is registered as an attorney and the defendants reside and perform their duties. Thus, the substantial part of the events giving rise to the claim would occur in Albany, which is in the Northern District.

Plaintiff asserts that a substantial part of the events giving rise to the claim occur in the Southern District. First, she alleges that the actual harm occurs in the Southern District. See Plaintiff's Opposition p. 12. She claims that but for Judiciary Law §470, she would practice law in the state courts located in the Southern District, and since she has turned down a case in New York City, the Southern District is the place where the harm has occurred thus establishing a substantial connection between the events that gave rise to the claim and the Southern District. [6] However, "[w]hile [the] locus of harm suffered is a factor to consider, the case law does not support the theory that venue is proper on economic effects inquiry alone."See Astor Holdings, Thus, the fact that Judiciary Law §470 may prevent her from practicing in all State courts in New York, including those located within the Southern District, does not alone fulfill the substantiality requirement.

Plaintiff argues that the harmful effects of Judiciary Law §470 she allegedly experiences in the Southern District are sufficient to establish venue by relying on Kirk v. N.Y. State Dep't of

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[6] Plaintiff provides no credible evidence to prove she turned down any cases. She also fails to provide evidence that the case turned down in New York City was in the jurisdiction of the Southern District and not the Eastern District. Additionally, Plaintiff implies that she has turned down cases in New York State outside of New York City. See Plaintiff's Declaration ¶ 3. Thus, any alleged harm possibly occurred in the jurisdiction of one or more of the other federal district courts.

Educ. Dist. LEXIS 24322 (W.D.N.Y. 2008). See Plaintiff's Opposition p. 12. Plaintiff's facts, however, are distinguishable from those of the plaintiff in Kirk. The plaintiff in Kirk resided in and had his only actual and ongoing veterinarian practice in the selected venue, and thus experienced direct economic harm in that venue alone. See *Id.* Even with those factors, the Kirk court stated, "the link between the Plaintiff's claim and this District is tenuous." See *Id.* Here, the plaintiff does not reside in the venue at issue. Additionally, she has indicated, without proof, that she has turned down possible cases in New York outside of the Southern District. See Plaintiff's Declaration ¶ 3. Thus, unlike in Kirk, the plaintiff's alleged harm occurs in districts outside of the selected venue. Considering the Kirk plaintiff's connection was "tenuous," the plaintiff's connection here is insufficient to establish venue in the Southern District.

Further, Plaintiff alleges that the Southern District is proper under 28 U.S.C. §1391(b)(2), because a State court judge can enforce Judiciary Law §470. Plaintiff argues that since a State court judge can enforce Judiciary Law §470 when raised by opposing counsel, it could be enforced against her by a State court judge located within the Southern District. See Plaintiff's Opposition p. 14. This point does not assist Plaintiff in establishing venue in this action because she has not named a State court judge in the Southern District as a defendant. The hypothetical action of a person not named as a party is irrelevant for venue purposes. To fulfill 28 U.S.C. §1391(b)2, the substantial actions must be those that give rise to this particular claim. Here, Plaintiff requests the court to enjoin the named defendants from enforcing the statute against her. The hypothetical action of a non-party potential actor in the Southern District is not related to the defendants' enforcement of Judiciary Law §470. Thus, it is not part of the substantial events giving rise to this claim against the named defendants. Additionally, since one

DECLARATION OF SERVICE

KATE BURSON, being duly sworn, deposes and says:

1. I am an attorney admitted to the bar of this State and an Assistant Attorney General in the office of ANDREW M. CUOMO, the Attorney General of the State of New York, Attorney for the Defendants in this action.

2. On the 5th day of November, 2008, I served a copy of the Reply Memorandum of Law in Support of the Motion to Dismiss dated November 5, 2008, upon all parties herein as set forth below:

Ekaterina Schoenefeld
3371 US Highway 1 Ste 105
Lawrenceville, NJ 08648

by enclosing the same in properly addressed, postage paid envelopes and depositing the same in a box maintained by Federal Express for express delivery.

3. On the 6th day of November, 2008, I served a copy of the annexed Reply Memorandum of Law in Support of the Motion to Dismiss, which included the Table of Contents, Table of Authorities, and a minor non-substantive change dated November 6, 2008 upon all parties herein as set forth below:

Ekaterina Schoenefeld
3371 US Highway 1 Ste 105
Lawrenceville, NJ 08648

by enclosing the same in properly addressed, postage paid envelopes and depositing the same in a box maintained by Federal Express for express delivery.

Dated: New York, New York
November 6, 2008

KATE BURSON