UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
Ekaterina Schoenefeld

Plaintiff,

08 CIV. 3269 (NRB)

-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, 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.
----------X

MEMORANDUM OF LAW ON BEHALF OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, TO TRANSFER THE MATTER TO THE NORTHERN DISTRICT AND FOR RELATED RELIEF

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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")[1]. Basically, Plaintiff seeks action against thirty-six defendants.[2] 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.

This memorandum of law is respectfully submitted in support of the Defendants' motion to dismiss the complaint 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.

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. Further, witnesses and records would be located in the Northern District. In addition, the plaintiff does not reside in the Southern District. Thus, there is no connection with the Southern District which would make it a proper venue. This action should be dismissed or, in the alternative, transferred to the Northern District where venue is proper. Such transfer will promote the convenience of the parties and serve the interests of justice.

[1] The Attorney General and the State of New York are the only defendants that have been officially served. Nevertheless, the arguments in this memorandum equally pertain to these individuals and entities.

[2] 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.

Statement of Facts

Background

This action was commenced on or about April 1, 2008 in the Southern District of New York. Plaintiff is an attorney admitted to the New York Bar. She resides in Princeton, New Jersey and has her law office in Lawrenceville, New Jersey. On June 5, 2007 Plaintiff learned that New York's Judiciary Law § 470 might require nonresident attorneys admitted to the New York bar to have an office in New York in order to practice law in New York. The statutory provision has not been enforced against Plaintiff nor has a party threatened to enforce the law against her. See Complaint at ¶¶ 5, 6, 13, 16, 17.

Federal Complaint

Plaintiff alleges that §470 on its face and as applied violates rights granted under the privileges and immunities clause, the due process clause, and the commerce clause of the U.S. Constitution. Judiciary Law §470 states,

> A person, regularly admitted to practice as an attorney and counselor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counselor, although he resides in an adjoining state.

She claims that Judiciary Law §470 violates the privileges and immunities clause by imposing an office requirement on non-residents, which, she alleges, is not imposed on residents. Plaintiff also asserts that the statute violates the equal protection clause by requiring only non-residents to maintain an office in New York. Additionally, plaintiff claims that Judiciary Law §470 places a burden on interstate commerce in violation of the commerce clause. Plaintiff seeks both injunctive and declaratory relief.

Plaintiff makes no specific allegations as to venue in the complaint. The complaint merely states: "venue is proper in the Southern District of New York pursuant to 28 U.S.C. §1391(b)." See Complaint at ¶ 4.

Currently and at all times relevant to the allegations made in the Complaint, all named defendants reside in Albany. In addition, the Supreme Court Appellate Division, Third Department and the Committee on Professional Standards, which is part of the Third Department, are located in the Northern District. See Judiciary Law §§ 70 and 75. Further, enforcement of Judiciary Law §470 would occur in the Northern District.[3] Plaintiff resides in New Jersey, and thus does not reside in the Southern District.

The Defendants now move for the dismissal pursuant to 28 U.S.C. §§12(b)(3) and 1406(a), or, in the alternative, for the transfer of this action to the Northern District pursuant to 28 U.S.C. §1404(a).

STANDARD OF REVIEW FOR 12(b)(3) MOTION TO DISMISS

"On a motion to dismiss for improper venue pursuant to Rule 12(b)(3), the court must accept the facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. See Imagineering, Inc. v. Lukingbeal, 1996 U.S. Dist. LEXIS 3939, 5, (S.D.N.Y. 1996)(Carter, J.)(citation omitted). 'Although plaintiff benefits from such favorable construction, it nonetheless bears the burden of proving that venue is proper, once an objection has been made.' Id." Dolson v. N.Y.State Thruway Auth., 2001 U.S. Dist. LEXIS 4283 (S.D.N.Y. 2001).

[3] All non-resident attorneys admitted to the New York bar are registered in the Appellate Division, Third Department, located in Albany, New York, the same location and jurisdiction of the Northern District of New York. Responsibility for regulating non-resident attorneys admitted to the New York bar lies with the Third Department. See 22 N.Y.C.R.R. 6000.5(c); Judiciary Law §90(2).

ARGUMENT

POINT I

THE COMPLAINT SHOULD BE DISMISSED OR VENUE TRANSFERRED TO THE NORTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. §1406(a)

A. The Northern District of New York is the Proper Venue for this Action Under 28 U.S.C. §1391(b).

Plaintiff has commenced a civil action in federal district court based on federal questions. Proper venue in a federal question case such as this one is set out in 28 U.S.C. §1391(b) which reads:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claims occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. §1391(b).[4]

Where proper venue is not established pursuant to §1391(b), the remedy is set out in 28 U.S.C. §1406(a) which reads as follows:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Under §1406(a), where venue does not lie, the case shall be dismissed or transferred. The decision of whether to dismiss or transfer an action for improper venue is within the discretion of the trial court.

[4] Plaintiff asserts a 42 U.S.C. §1983 claim, which does not contain a specific venue provision, thus the venue provisions of 28 U.S.C. §1391 govern Plaintiff's claim.

Friedman v. Revenue Management of New York, 38 F.3d 668, 672 (2d Cir. 1994); Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993).

1. Plaintiff's Claim Does Not Satisfy 28 U.S.C. §1391(b)(1) Requirements

Venue is improper in this case because none of the requirements of 28 U.S.C. §1391(b) are met. First, Plaintiff's choice of venue does not satisfy §1391(b)(1) because none of the defendants reside in the Southern District. All of the defendants "reside" in Albany, which is within the Northern District of New York. Both the New York Supreme Court Appellate Division, Third Department and the Third Department Committee on Professional Standards are located in Albany. See Judiciary Law § 75. In addition, the individual defendants, who are all state officials sued in their official capacities, reside in Albany.[5] It is settled law that when state officials are sued in their official capacity, their official residences are where they perform their official duties. Birnbaum v. Blum, 546 F. Supp. 1363, 1366 (S.D.N.Y. 1982). See Neville v. Dearie, 745 F. Supp. 99 (N.D.N.Y. 1990); Procario v. Ambach, 466 F. Supp. 452, 453 (S.D.N.Y. 1979). Here, all of the defendants perform their duties in Albany. The judges and the Third Department clerk work at the Appellate Division, Third Department courthouse located in Albany and the members of the Committee on Professional Standards members perform their respective duties and functions at their office in Albany.[6] See Judiciary Law §75.

Additionally, the Attorney General performs his official duties in Albany and thus officially resides there as well. Neville v. Dearie, 745 F.Supp. at 102. The Attorney General differs from the other thirty-five defendants in that he has an office in New York City. This

[5]When members of the Committee on Professional Standards are sued in their official capacity for their roles on the committee, they are state officials. 22 NYCRR § 806.3(c).

[6]The Committee on Professional Standards is located at 40 Steuben Street Albany, New York, 12207. See http://www.courts.state.ny.us/ad3/cops/index.html.

office, however, does not constitute a second official residence for the matter at issue and thus is not sufficient to establish venue under §1391(b)(1). "Whether a state defendant has a second official residence turns on three factors: (1) the defendant's presence in the district in which the plaintiff has sued; (2) the extent of defendant's official activities in the district; and (3) the relationship of the defendant's activities within the district to the cause of action asserted." Cheeseman v. Carey, 485 F. Supp. 203, 207 (S.D.N.Y. 1980) (When the act at issue in a case does not have a nexus to a district, maintenance of an office in that district does not, on its own, establish a second official residence); See Berry v. New York State Dep't of Correctional Serv., 808 F. Supp. at 1109 (For § 1391(b) purposes, state officials can have more than one official residence, but venue is only appropriate in the districts where there is a nexus between the additional official residence and the activities on which the suit was based). Cf. Kirk v. N.Y. State Dep't of Educ., 2008 U.S. Dist. LEXIS 24322 (W.D.N.Y. 2008) (In a constitutional challenge to the state statute governing veterinarian licensure, the court held venue was proper in the Western District when plaintiff resided and worked in the Western District and there was no district with a stronger connection to plaintiff's claim.).[7]

Here, no nexus exists between the Attorney General and the enforcement of Judiciary Law § 470. The Attorney General does not have the authority to individually enforce this law. The responsibility for enforcement of Judiciary Law § 470 lies only with the 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. See Judiciary Law §90; Lichtenstein

[7]In the instant matter, the Plaintiff does not live in the Southern District, has provided no evidence of harm in the Southern District, and there is a district, the Northern District, with a stronger connection to Plaintiff's claim.

v. Emerson, 251 A.D.2d 64 (1st Dep't 1998).[8] Thus, for purposes of venue, there is an insufficient nexus between the Attorney General in New York City and the challenged statute to establish a second official residence in New York City.

Moreover, the Attorney General is not a proper party to this action. 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 the enforcement of Judiciary Law § 470. As noted above, Judiciary Law § 470 is enforced by the court system, and the Attorney General is not involved in the individual enforcement of Judiciary Law § 470. See Judiciary Law § 90. N.Y. County Lawyers' Ass'n v. Pataki, 188 Misc. 2d 776 (N.Y. Sup. Ct. 2001), aff'd sub. Nom. N.Y. County Lawyers' Ass'n v. State, 415 F. Supp. 294 A.D. 2d 69 (1st Dep't 2002); Gras v. Stevens, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976). Thus, even if the Attorney General's second residence could be considered an "official" residence for venue purposes, it cannot serve to establish venue in the Southern District under 1391(b)(1) because he is not a proper party to this action.

2. Plaintiff's Claim Does Not Meet §1391(b)(2) Requirements

The Southern District is also the improper venue under §1391(b)(2) because the events giving rise to the claim would occur in the Northern District. Judiciary Law §470 has not been enforced against Plaintiff. However, as noted above, if enforcement were to occur by one of the named defendants, it would occur in the Northern District. Enforcement of Judiciary Law § 470

[8]Plaintiff asserts that Judiciary Law § 476-a authorizes the Attorney General to enforce Judiciary Law § 470 against her. This is incorrect. Judiciary Law § 476-a authorizes the Attorney General to maintain an action against those individuals who engage in the unlawful practice of law. For purposes of Judiciary Law § 476-a, "unlawful practice of law" includes (a) acts enumerated under the provision (b) the practice of law by a party not licensed or admitted to practice law in New York, and (c) any act punishable by the supreme court as criminal contempt under §750-b. See also Judiciary Law §§ 478, 479, 483, 484, 489, 490, 491, & 495. Judiciary Law § 476-a does not authorize the Attorney General to enforce Judiciary Law § 470, which applies only to attorneys licensed and admitted to practice law in New York, as the Plaintiff is here.

lies only with the 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. See Judiciary Law §90; Lichtenstein v. Emerson, 251 A.D.2d at 64. Here, Plaintiff was admitted and remains registered in the Third Department. See 22 N.Y.C.R.R. 6000.5(c) Thus, enforcement of the statute would occur in the Third Department. Additionally, the pertinent records and enforcing body are located in the Third Department. Clearly, the Northern, and not the Southern District, is the "judicial district in which a substantial part of the events or omissions giving rise to the claim[ ] [would] occur[ ]." The remaining basis for venue, §1391(b)(3), is inapplicable as venue clearly is proper in the Northern District.[9] As such, venue does not lie in the Southern District under 28 U.S.C. §1391 and the remedy is the transfer or dismissal of the case pursuant to 28 U.S.C. §1406(a).

POINT II

ALTERNATIVELY, VENUE SHOULD BE TRANSFERRED TO THE NORTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. §1404(a)

Even where venue is proper, a Court may still transfer an action to another district where it might have originally been brought for "the convenience of the parties and witnesses" or in the "interests of justice." 28 U.S.C. §1404. Here, in the event that the complaint is not dismissed for improper venue, the case should be transferred to the

[9]Section 1391(b)(3) provides that venue may lie "in a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." However, since this action clearly could have been brought within the Northern District, this subsection is inapplicable.

Northern District in the interests of justice pursuant to 28 U.S.C. §1404(a).

Section 1404(a)reads:

> For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. §1404(a).

The decision of whether to transfer venue is in the sound discretion of the trial court and may only be reviewed for an abuse of discretion. McFarlane v. Esquire Magazine, 74 F.3d 1296, 1301 (2d Cir. 1996); Friedman v. Revenue Management of New York, 38 F.3d at 672.

It is well established that, for venue purposes, where no material connections exists between the venue and the underlying events and parties, the action should either be dismissed or transferred to the district court where venue is more appropriate. See Berry v. New York State Dep't of Correctional Services, 808 F.Supp. 1106, 1109 (S.D.N.Y. 1992); Karriem v. American Kennel Club, 949 F.Supp. 220, 222 (S.D.N.Y. 1996); Hamilton v. Accu-Tek, 47 F.Supp.2d 330, 339 (E.D.N.Y. 1999).

In making the determination of whether to transfer, "appropriate areas of inquiry include: where the operative facts occurred, the location of relevant witnesses and documents, the convenience of the parties, the plaintiff's choice of forum, and the docket conditions of the transferor and transferee districts." Eichenholtz v. Brennan, 677 F.Supp. 198, 199-200 (S.D.N.Y. 1988) (citations and footnotes omitted). See also Schnedier v. Sears, 265 F.Supp. 257, 263 (S.D.N.Y. 1967). Consideration of these factors supports a transfer of this action to the Northern District of New York.

Here, the convenience of the parties clearly mandates that the action be transferred to the Northern District. First, all thirty-six defendants reside in the Northern District. And second, since enforcement would occur in the Third Department and the Commission members who would enforce this law against Plaintiff are located in Albany, it is most likely that relevant documents and any witnesses would be located in Albany as well.

Additionally, Plaintiff's choice of forum is not controlling in this case. Though plaintiff's forum selection is ordinarily entitled to some deference, plaintiff's choice should be "given less weight where, as here, plaintiff is not a resident of the forum and the cause of action is minimally connected with the forum." Eichenholtz, 677 F.Supp. at 201. Since, Plaintiff does not reside in the selected forum and has failed to provide evidence that the claim has a connection to the forum, less weight should be given to Plaintiff's forum selection and the matter should be transferred to the Northern District.

Considering that all of the defendants reside in Albany, enforcement of the statute would occur in Albany, all witnesses and relevant documents would be in Albany, the Plaintiff does not reside in the Southern District, and the Plaintiff has failed to establish evidence of a minimal connection between the claim and the Southern District, litigation in the Northern District would be more convenient and would better serve the interests of justice concerning this action.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE COMPLAINT SHOULD BE DISMISSED FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, TRANSFERRED TO THE NORTHERN DISTRICT AND, IN THE EVENT THAT THE ACTION IS TRANSFERRED, DEFENDANTS SHOULD BE GRANTED SIXTY DAYS TO ANSWER OR OTHERWISE MOVE IN RESPONSE TO THE COMPLAINT AFTER SERVICE OF THE PLEADING IS EFFECTUATED ON THE REMAINING THIRTY-FOUR DEFENDANTS.

Dated: New York, New York
September 29, 2008

Respectfully Submitted,
ANDREW M. CUOMO
Attorney General of the
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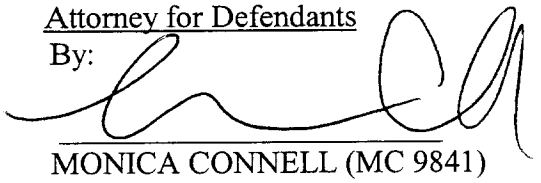
Attorney for Defendants
By:



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