UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EKATERINA SCHOENEFELD,

Plaintiff,

-against-

09-CV-0504

LEK/RFT

STATE OF NEW YORK; ANDREW M CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL; NEW YORK SUPREME COURT, APPELLATE DIV, THIRD JUDICIAL DEPT; ALL JUSTICES OF NY SUPREME COURT; MICHAEL J NOVACK, IN HIS OFFICIAL CAPACITY AS CLERK OF NY SUPREME,

Defendants.

MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants State of New York, Andrew M. Cuomo, NYS Office of Court Administration, Michael J. Novack and Thomas C. Emerson
The Capitol
Albany, New York 12224-0341

Christina L. Roberts-Ryba
Assistant Attorney General, of Counsel
Bar Roll No. 105818
Telephone: (518) 486-9717
Fax: (518) 473-1572 (Not for service of papers)

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Preliminary Statement

Plaintiff claims in her motion for summary judgment that section 470 of Judiciary Law violates the privileges and immunities clause; that it is is an "artificial trade barrier" and that since the residency requirement was found to be unconstitutional, anything related to the residency requirement is unconstitutional. In addition, plaintiff claims that the state fails to proffer a purpose or objective for section 470.

For the reasons set forth below, plaintiff's motion for summary judgment should be denied.

STATEMENT OF THE CASE

The plaintiff alleges that she was admitted to practice law in New York State on January 26, 2006. See Am. Compl. ¶ 13. Plaintiff asserts that on June 5, 2007 she attended a continuing legal education course, entitled Starting Your Own Practice, offered by the New York State Bar Association. Id. ¶ 16. Plaintiff asserts that during the course she learned that, according to § 470, as a non-resident of New York State she may not practice law in the State of New York unless she maintains an office located within the State Id. ¶ 17. Urging that this provision is unconstitutional on its face, plaintiff seeks declaratory and injunctive relief under 42 U.S.C. 1983.

A. PLAINTIFF'S CLAIM THAT DEFENDANTS CANNOT SHOW ANY SUBSTANTIAL REASON FOR § 470 FAILS:

To ascertain the State's reason for the difference in treatment between residents and non-resident attorneys, defendants rely on the legislative history of § 470 and case law. See Roberts-Ryba Affirmation and Exhibit A (Dkt # 62). In reviewing the law from the year 1862 along with

the Full Explanatory Notes, the applicable statute stated the following (emphasis added):

> "A person, regularly admitted to practice as attorney and counselor, in the courts of record of the 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. **But service of a paper, which might be made upon him at his residence, if he was a resident of the State, may be made upon him, by depositing the paper in the city or town where his office is located, properly inclosed [sic] in a postpaid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.**" See Roberts-Ryba Affirmation p. 6.

In 1908, the Board of Statutory Consolidation explained the following (emphasis added):

> "The part bracketed has been removed to the Judiciary Law (§ 470), because it relates to the right of an attorney and counselor to practice in the courts of record of the state although a resident of an adjoining state. **The balance of the section which has been retained relates to the service of a paper** upon him which is a practice provision and therefore has been retained in the Code of Civil Procedure." Id. p 10.

In addition to the legislative history which outlines the law's rational as "service of paper", historically case law also describes the rational of § 470 not only as the service of papers but also the use of the remedy of attachment.[1] See Matter of Tang, 39 AD2d 357 (1st Dept. 1972); Matter of Fordan, 5 Misc. 2d 372 (Surrogates Ct. NY Co. 1956). In the past, the rational was also to allow bar admission authorities an opportunity to observe and evaluate an applicant's character. Matter of Gordon, 48 NY2d 267 (1979). However, recently the rational has been facilitation of service. See In re Estate of Garrasi 907 N.Y.S.2d 821, 826 (N.Y.Sur.,2010). In Garrasi the surrogate's court stated the following with regard to § 470 (citing Austria v. Shaw 143 Misc.2d 970, 972, 542 N.Y.S.2d 505, 506 (N.Y.Sup.,1989)), "Implicit in the requirements of the statute, is the expectation that adversaries and others dealing with the attorney, will be able to serve legal notices at the New York address." Id.

1 The analysis of § 470's rational is mostly limited to State law cases as there is little reference to § 470's rational in federal case law.

In West Virginia, where a nonresident lawyer brought an action for declaratory and injunctive relief against both the Supreme Court of Appeals of West Virginia and the West Virginia State Bar, asserting that the State rule requiring pro hac vice sponsors to practice law on a daily basis from an actual physical office located in the State violated privileges and immunities clause, the United States District Court for the Northern District of West Virginia dismissed the complaint. See Parnell v. Supreme Court of Appeals of West Virginia 926 F.Supp. 570 (N.D.W.Va.,1996). The lawyer seeking the injunctive relief in Parnell appealed and the Court of Appeals, held that: (1) the rule did not contain residency classification triggering review under privileges and immunities clause, and (2) sponsorship of pro hac vice applicant was not a fundamental component of the right to practice law and thus, privileges and immunities protections did not apply to such activity. Id.

"A state has an interest in ensuring that a lawyer practicing within its boundaries is amendable to legal service and to contact his or her client, as well as opposing and other interested parties, and a State may, therefore, reasonably require an attorney, as a condition of practicing within its jurisdiction, to maintain some genuine physical presence therein." Lichtenstein v. Emerson 251 A.D.2d 64; 674 N.Y.S.2d 298 (1998 1st Dept.) citing Tolchin v. Supreme Court of the State of N.J. 111 F.3d 1099, 1111 -1113 (C.A.3 (N.J.),1997)

In Tolchin a non-resident attorney licensed to practice in New Jersey challenged the constitutionality of the requirement of all attorneys to have a bona fide office and take Continuing Legal Education courses. See Tolchin supra. The court conduced a two step analysis: "First, do the bona fide office and mandatory attendance requirements discriminate against nonresident attorneys? Second, if they do, is the imposition too heavy a burden on the privileges of nonresidents, and does it fail to bear a substantial relationship to New Jersey's

objective?" Tolchin supra citing Barnard, at 559, 109 S.Ct. at 1303. Moreover, in other contexts, the Court has concluded that the Constitution does not require a state bar to admit lawyers simply because they have been admitted to another state bar. See Paciulan v. George 38 F.Supp.2d 1128, 1142 (N.D.Cal.,1999) citing Leis v. Flynt, 439 U.S. 438, 99 S.Ct. 698, 701, 58 L.Ed.2d 717 (1979). In addition, New York courts have concluded the following:

> "It can be argued that to require an office in New York (which will necessitate concomitant expenses and tax ramifications) in order to appear as attorney of record would have the consequence of effectively economically barring many nonresidents from practicing in our courts. As I see it, the answer to this is that the requirement of a New York location places the nonresident in no different position than a resident. The fact that the nonresident must also maintain a residence and/or office elsewhere does not mean he is being discriminated against in the State of New York. On the contrary, if we were to permit him to avoid the expenses of a New York location including the payment of local taxes, we might be creating a discriminatory benefit in his favor." See White River Paper supra.

In plaintiff's memorandum of law, there are citations to a law review article by Daniel C. Brennan, which is not legal precedent. Nevertheless as discussed above, the state has proffered a substantial reason for § 470 and therefore, plaintiff's claim that § 470 violates the Privileges and Immunities Clause fails.

B. PLAINTIFF'S CLAIM THAT THE STATE COURT DECISIONS REVEAL NO VALID PURPOSE AND THEREFORE RESULTS IN INCONSISTENT INTERPRETATIONS OF THE STATUTE FAILS

As discussed *supra*, the purpose for § 470 is service of process. As indicated by the legislative history *supra*, service of process was always a factor in the statute. Furthermore, due to the fact that § 470 does not target any suspect class or fundamental right, its constitutionality is judged under the "rational basis" test. Under that test, § 470 "will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state

objective." Greene v. Town of Blooming Grove, 879 F.2d 1061, 1063 (2d Cir.1989). "The proper inquiry is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body." Id. (quoting Haves v. City of Miami, 52 F.3d 918, 922 (11th Cir.1995)); see also Williams v. Morgan, 478 F.3d 1316, 1320 (11th Cir.) ("A statute is constitutional under rational basis scrutiny so long as 'there is ***any*** *reasonably conceivable state of facts* that could provide a rational basis for the [rule]'") (quoting FCC v. Beach Comm'ns, Inc., 508 U.S. 307, 313 (1993)), cert. denied, 552 U.S. 814 (2007); WMX Technologies, Inc. v. Gasconade County, Missouri, 105 F.3d 1195, 1201 (8th Cir.1997) (in adjudicating a constitutional challenge to an ordinance, "we do not inquire into the methods and motives behind its passage. We ask only whether a *conceivable* rational relationship exists between the ordinance and legitimate governmental ends") (emphasis added).

Thus, as the party presenting a facial challenge to the Court's rules, plaintiff has the burden to "negative every conceivable [rational and legitimate] basis which might support" the statute. Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 75 (2001) (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)). That burden is a heavy one. Doe v. Michigan Dep't of State Police, 490 F.3d 491, 504 (6th Cir.2007); Mostowy v. United States, 966 F.2d 668, 672 (Fed.Cir.1992); Genesee Scrap Tin and Baling, Co. v. City of Rochester, 558 F.Supp.2d 432, 434 (W.D.N.Y.2008); Ecogen, 461 F.Supp.2d at 104; see also United States v. Salerno, 481 U.S. 739, 745 (1987) (to show that legislative act is unconstitutional, "challenger must establish that no set of circumstances exists under which the Act would be valid"). In addition, a "classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' " Heller, 509 U.S. at 321 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

The Second Circuit has explained, "[r]ational basis review is deferential. 'Rational basis

review does not pass judgment upon the wisdom, fairness, or logic of legislative decisions; it turns on whether there are plausible reasons for [the legislative body]'s choices.' " Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir.2001) (quoting General Media Comm., Inc. v. Cohen, 131 F.3d 273, 286 (2d Cir.1997), cert. denied, 524 U.S. 951 (1998)). See also Lewis v. Thompson, 252 F.3d 567, 590 n. 33 (2d Cir.2001) (describing rational-basis review as "highly deferential"); United States v. Watson, 483 F.3d 828, 835 (D.C.Cir.2007) (same); Williams v. Pryor, 240 F.3d 944, 948 (11th Cir.2001) ("Almost every statute subject to the very deferential rational basis ... standard is found to be constitutional").

Given the standard discussed above, § 470 passes constitutional muster. The requirements imposed on non-resident attorneys to have an office for the purpose of legal service clearly has some rational connection to the legitimate ends to be served by the rule. § 470 allows non-resident attorneys who are admitted to practice law in New York State the opportunity to practice law if the office requirement is met. Since it cannot be said that § 470 is "wholly irrational," Smart v. Ashcroft, 401 F.3d 119, 123 (2d Cir.2005), Owens v. Parrinello, 365 F.Supp.2d 353, 359 (W.D.N.Y.2005), plaintiff's facial challenge to § 470 must be dismissed. See Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir.2004) (court engaging in rational-basis review may not "speculate as to whether some other scheme could have better regulated the evils in question"), cert. denied, 544 U.S. 920 (2005); Palmieri v. Town of Babylon, 2006 WL 1155162, at *7 (E.D.N.Y. Jan. 6, 2006)

Here, the state has established a rational basis for § 470. Therefore, plaintiff's claims regarding inconsistent interpretation of the statute fail.

C. PLAINTIFF'S CLAIM THAT SECTION 470 SERVES AS AN ARTIFICIAL TRADE BARRIER FOR NEW YORK NON-RESIDENT ATTORNEYS FAILS

Plaintiff claims that § 470 presents an artificial trade barrier. However, there is no

dispute that the statute allows the plaintiff to practice law in New York State as long as she complies with the office requirement. Case law has shown that the office requirement is not onerous. "Neither the telephone nor the desk need to be exclusively that of the attorney." Austria v. Shaw 143 Misc.2d 970, 972, 542 N.Y.S.2d 505, 506 (N.Y.Sup.,1989). Furthermore, an attorney need only establish a relationship "of counsel" to satisfy the office requirement. Id. Therefore, it does not follow that there are less restrictive means for the State's objective. Furthermore, like Parnell, § 470's office requirement is not a "residency requirement" and therefore review under privileges and immunities clause has not been triggered. See Parnell 110 F.3d 1077.

In addition, plaintiff's claims regarding artificial trade barriers resemble her commerce clause argument that was dismissed from the case in a earlier decision where the court determined the following:

> "plaintiff has raised no theory by which New York's office requirement for nonresident attorneys can be said to be "clearly excessive" to the substantial interest New York has in ensuring that nonresident attorneys are familiar with New York law and maintain a stake in their New York license and interest in the integrity of the state bar." (Dkt. # 32)

CONCLUSION

Based on the above analysis, plaintiff's motion for summary judgment must be denied and as outlined in defendants' motion for summary judgment (Dkt. # 62), the complaint should be dismissed in its entirety.

Dated: Albany, New York
January 18, 2011

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

By: s/ Christina L. Roberts-Ryba
Christina L. Roberts-Ryba
Assistant Attorney General, of Counsel
Bar Roll No. 105818
Telephone: (518) 486-9717
Fax: (518) 473-1572 (Not for service of papers)

TO: Ekaterina Schoenefeld
Plaintiff pro se
Schoenefeld Law Firm LLC
32 Chambers Street
Suite 2
Princeton, NJ 08542