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 REPLY

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Preliminary Statement

Plaintiff claims in her opposition to defendants' motion for summary judgment the following: 1) that defendants arguments are not supported by the legislative history of § 470, 2) that the New York state court decisions that defendants cite are not valid and should be rejected, and 3) defendants' use of case law from other jurisdictions provide not support to defendants' arguments.

For the reasons set forth below, plaintiff's claims are without merit and defendants' motion for summary judgment should be granted.

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. Plaintiff also brings an "as applied" challenge which should be dismissed since there has been no application of the statute to her.

A. DEFENDANTS ARGUMENTS ARE SUPPORTED BY THE LEGISLATIVE HISTORY OF § 470:

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). Since neither the plaintiff nor the defendants were involved in the actual legislative process regarding the enactment of § 470 in the 1800's, all parties are left attempting to interpret the meaning by relying upon the specific language of the statute, the explanatory notes, and case law. 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.

Most recently the rational has remained the 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. New York State courts have found that the State "has an interest in ensuring that a lawyer practicing within its boundaries is amenable to legal service and to contact by 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. See Lichtenstein v. Emerson 251 A.D.2d 64; 674 N.Y.S.2d 298 (1998 1st Dept.); see also White River Paper Co., Ltd. v. Ashmont Tissue, Inc., 110 Misc.2d 373 (N.Y.City Civ.Ct. 1981).

Therefore, as discussed above, defendants arguments are supported by the legislative

history and the case law of § 470.

B. PLAINTIFF'S CLAIM THAT THAT NEW YORK STATE COURT DECISIONS ARE NOT VALID, IS INCORRECT

In defendants motion for summary judgment, they included some New York State cases meant to summarize the history of the application of § 470. Defendants' use of these New York cases is aimed at aiding the court in it's review of this case. Plaintiff claims that the "New York state court decisions cited in their brief are not valid, and, as such, should be rejected." See Plaintiff's Memorandum of Law in Opposition to Defendants Motion for Summary Judgment, p. 7. Plaintiff's claim regarding defendants' use of State cases is conclusory. A "non-moving party may not rely on conclusory allegations or unsubstantiated speculation." Scotto v. Almenas, 143 F3d 105, 114 (2d Cir. 1998). Plaintiff states that, the reasons offered by defendants, "make no sense and are by no means substantial, especially in light of the current state of technology and legal developments." See Plaintiff's Memorandum of Law in Opposition to Defendants Motion for Summary Judgment, p. 8. Again, plaintiff concludes that technology has eliminated the need for personal service, which is also an invalid conclusory argument. See Scotto *Supra*. However, as recently as 2010, the rational of § 470 remains facilitation of service. See In re Estate of Garrasi 907 N.Y.S.2d 821, 826 (N.Y.Sur.,2010). This rational is valid and should not be rejected. Plaintiff's dislike of rational is not sufficient reason to conclude that it violates her Privileges and Immunities.

C. PLAINTIFF'S CLAIM THAT DEFENDANTS' CASE LAW FROM OTHER JURISDICTIONS PROVIDES NO SUPPORT IS WITHOUT MERIT

Plaintiff points to the differences between the cases defendants cite and the instant one claiming that the differences do not support § 470. However, the similarities between the cases

are legitimate and support the State's use of § 470. For example, in their motion for summary judgment, defendants rely upon Parnell v. Supreme Court of Appeals of 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 the privileges and immunities clause. In that case, the United States District Court for the Northern District of West Virginia dismissed the complaint. See 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 (emphasis added). Id.

Defendants rely on Parnell to establish that if a state's rule regarding the practice of law does not contain a residency classification, there is no "triggering review under privileges and immunities clause." The ruling in Parnell is relevant to this case in that the office requirement of § 470 is not a residency requirement and therefore should not be no reviewed under privileges and immunities. See Parnell Supra.

In addition, Tolchin v. Supreme Court of the State of N.J is relevant to the instant case. See 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. Clearly the facts of Tolchin have similarities to the underlying case where plaintiff challenges the office requirement of § 470. The court in Tolchin concluded that (emphasis added):

> "the bona fide office and mandatory attendance requirements did not impose a disproportionately heavy burden on nonresidents. These requirements bear a substantial relationship to New Jersey's goal of regulating the practice of law to the benefit of the public and are not overly restrictive of attorneys. Thus, these requirements do not violate the Privileges and Immunities Clause." Id.

Finally, with regard to defendants use of Paciulan v. George, the case discusses a State's right to limit nonresident lawyers activities. See 38 F.Supp.2d 1128, 142 (N.D.Cal.,1999). Limitation of nonresident lawyers is relevant to the instant matter based on the fact that plaintiff challenges the office requirement for non-resident attorneys.

D. PLAINTIFF'S CHALLENGE OF § 470 UNDER PRIVILEGES AND IMMUNITIES FAILS

There is no dispute that the Privileges and Immunities Clause bars the use of residency to deny a lawyer the privilege of practicing. Paciulan *supra*, 1142 (N.D.Cal.,1999) citing Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985), Supreme Court of Virginia v. Friedman, 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988), and Barnard v. Thorstenn, supra. In all three cases, the Court held that states could not require some form of residency as a qualification for admission to the bar. However, the Court did not address whether the Privileges and Immunities Clause permitted states to accord nonresident lawyers limited privileges to practice law that it denied residents. Id. "The better view is that these cases do not imply that the Privileges and Immunities Clause bars states from granting nonresident lawyers limited privileges denied to residents." Paciulan supra. 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.

Based on this analysis, plaintiff's claim that § 470 violates Privileges and Immunities fails.

E. THE STATE HAS A RATIONAL BASIS FOR THE OFFICE REQUIREMENT

Due to the fact that § 470 is not a residency requirement, review under privileges and immunities has not been triggered. 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.

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. In fact, § 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.

CONCLUSION

Based on the above analysis, defendants' motion for summary judgment should be granted and the complaint should be dismissed in its entirety.

Dated: Albany, New York
January 24, 2011

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