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 SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Date: December 15, 2010

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Preliminary Statement

Ekaterina Schoenefeld (hereinafter "Plaintiff") filed an action for equitable relief pursuant to 42 U.S.C.§ 1983 alleging that § 470 of the New York State Judiciary Law (hereinafter "§ 470"), on its face and as applied, violates her rights under Article IV, § 2 ("Privileges and Immunities Clause"), the Equal Protection Clause of the Fourteenth Amendment ("Equal Protection Clause"), and Article I, § 8 ("Commerce Clause") of the Constitution of the United States. See Compl. (Dkt. # 1); Am. Compl. (Dkt. # 4). Plaintiff brought this action naming thirty-seven defendants including: the State of New York; the New York State Supreme Court, Appellate Division, Third Department ("the Appellate Division"); the Appellate Division Committee on Professional Standards ("Committee on Professional Standards"); New York State Attorney General Andrew M. Cuomo; eleven Justices of the Appellate Division; the Appellate Division Clerk; and twenty-one members of the Committee on Professional Standards. See generally Am. Compl. All individual Defendants were sued in their official capacity only. Id.

Defendants filed a motion to dismiss plaintiff's Amended Complaint. Dkt. # 20. Defendants asserted that: (1) the Court lacked subject matter jurisdiction on the grounds that the case was not ripe; (2) pursuant to Rule 12(b)(6) Defendants State of New York, the Appellate Division, and the Committee on Professional Standards did not qualify as "persons" within the meaning of 42 U.S.C. § 1983; and (3) Plaintiff failed to plead sufficient facts linking the named Defendants to the alleged constitutional violations. Id.

Defendants' Motion for dismissal was granted for the State of New York, Appellate Division and the Committee on Professional Standards. As for the Appellate Division Clerk, the

Attorney General, the Justices of the Appellate Division and the Chairman of the Committee on Professional Standards, Defendants' Motion was denied with respect to Plaintiff's claims under Article IV, § 2 of the Constitution of the United States and was granted with respect to Plaintiff's claims under the Fourteenth Amendment and Article I, § 8 of the Constitution of the United States.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants now move for summary judgment dismissing the case based on the fact that plaintiff's claims are without merit.

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. For the reasons stated herein, defendants move for summary judgment dismissing the case.

Summary Judgment Standard

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the evidence submitted must be viewed in the light most favorable to the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Even if parties dispute material facts, summary judgment must be granted "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Golden Pacific Bancorp. v. F.D.I.C, 375 F.3d 196, 200 (2d Cir. 2004) (internal citations and quotation marks omitted). In addition, once the moving party has made a sufficient showing, "[t]he non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." Id. (quoting D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998)). Where a statute in New Jersey required attorneys to have a "bona fide office" to practice in New Jersey, the court granted defendants motion for summary judgment as plaintiff failed to raise an issue of fact sufficient to preclude the entry of summary judgment. See Tolchin v. Supreme Court of the State of N.J. 111 F.3d 1099, 1116 (C.A.3 (N.J.),1997) citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986).

POINT I
§ 470 DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." See U.S. Const. art. IV, § 2. This clause was intended to "fuse into one Nation a collection of independent, sovereign States." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279, 105 S.Ct. 1272, 1275-76, 84 L.Ed.2d 205 (1985) (quoting Toomer v. Witsell, 334 U.S. 385, 395, 68 S.Ct. 1156, 1161-62, 92 L.Ed. 1460 (1948)). The United States Supreme Court has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." Piper, 470 U.S. at 280, 105 S.Ct. at 1276 (quoting Toomer v. Witsell, 334 U.S. 385, 396, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460 (1948)). The Supreme Court has recognized the practice of law as a privilege under the Privileges and Immunities Clause, "and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause." Barnard v. Thorstenn, 489 U.S. 546, 553, 109 S.Ct. 1294, 1299, 103 L.Ed.2d 559 (1989); see also Supreme Court of Virginia v. Friedman, 487 U.S. 59, 65, 108 S.Ct. 2260, 2264-65, 101 L.Ed.2d 56 (1988); Piper, 470 U.S. at 279-83, 105 S.Ct. at 1275-78. The practice of law is protected by the Privileges and Immunities Clause because it plays a vital role in the nation's economy and facilitates the vindication of individual and societal rights. Piper, 470 U.S. at 280-81, 105 S.Ct. at 1276-78.

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.

When a challenged restriction deprives nonresidents of a privilege or immunity protected by this clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." Piper, 470 U.S. at 284, 105 S.Ct. at 1278. In addressing these questions, the court considers, among other things, whether less restrictive means of regulation are available. Barnard, 489 U.S. at 552-53, 109 S.Ct. at 1299-1300. Courts must distinguish between incidental discrimination against nonresidents and discrimination that imposes too heavy a burden on their privileges. See id. at 557, 109 S.Ct. at 1301-02. "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. The court in Tolchin concluded that:

> "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.

In the present case, petitioner, a New Jersey resident, claims that the office requirement of § 470 violates the Privileges and Immunities Clause based on the fact that as a non-resident she is required to have an office while an attorney residing in New York State is not required to have an office. See generally Am. Compl. The language of Judiciary Law § 470 is as follows:

> "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."

As discussed above, the standard for analyzing plaintiff's claim begins by determining (i)"if there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." Piper, 470 U.S. at 284. In addressing these questions, the court considers, among other things, whether less restrictive means of regulation are available. Barnard, 489 U.S. at 552-53, 109 S.Ct. at 1299-1300. Here, 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. 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. Accordingly, as discussed above, with regard to plaintiff's

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.

claim that § 470 violates Privileges and Immunities, the first element in the analysis ("is there is a substantial reason for the difference in treatment?") has been satisfied. 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 supra; see also White River Paper Co., Ltd. v. Ashmont Tissue, Inc., 110 Misc.2d 373 (N.Y.City Civ.Ct. 1981), where the court held that "the local office requirement for nonresidents does not result in disparate treatment and the fact that litigation can be more effectively resolved without a trial if there is a local presence justifies such a mandate."

With regard to the second element: whether "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective", it is clear from the analysis above that the State's office requirement for non-resident attorneys bears a substantial relationship to the State's objective of requiring attorneys to be "amendable to legal service" at a New York State office. "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. Thus, as explained in Garrasi supra, the State's office requirement bears a substantial relationship to the objective that New York State attorneys need not serve legal papers on the attorney's out of state offices, but may avail themselves of the New York office for that purpose. 143 Misc.2d 970, 971 -972.

Next in the analysis is the determination of "the availability of less restrictive means." Due to the fact that the purpose of the rule is to allow for service within New York State, there does not appear to be any less restrictive means than the office requirement especially when the

office requirement can be satisfied in many different ways. "Neither the telephone nor the desk need to be exclusively that of the attorney." Austria supra. Thus, 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.

There is no dispute that the Privileges and Immunities Clause bars the use of residency to deny a lawyer the privilege of practicing. Paciulan v. George 38 F.Supp.2d 1128, 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. Furthermore, in Barnard, the Court expressly affirmed that the Privileges and Immunities Clause prevents discrimination against nonresidents. Id. citing 109 S.Ct. at 1299. However the case did not establish that the Privileges and Immunities Clause prevented discrimination in favor of nonresident lawyers. Id. 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 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.

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

POINT II:
PLAINTIFF CANNOT SATISFY THE STRINGENT STANDARD IMPOSED UPON FACIAL CHALLENGES

To plead an adequate facial challenge to the constitutionality of a law or regulation, a plaintiff must allege facts that, if proven, would "establish that no set of circumstances exists under which the challenged [law] would be valid ." Cranley v. Nat'l Life Ins. Co. of Vermont, 318 F.3d 105, 110 (2d Cir.2003) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

Plaintiff's Amended Complaint, "seeks a declaration that § 470, as interpreted and applied so as to prohibit non-resident attorneys, who are admitted to practice in the State of New York, from actually practicing law in the courts of New York unless they establish a full-time office in the State, is unconstitutional." See Am. Compl. p. 2. Defendants contend that because § 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). In undertaking that analysis, the Court may consider whether the rules are rationally related to its stated purpose, but "that is ultimately not determinative, and in fact it is not necessary for defendants to enunciate any purpose" for the rule. Ecogen, LLC v. Town of Italy, 438 F.Supp.2d at 157 (citing Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1546 (11th Cir.1994)). Instead, "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 rules. 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. As the defendants argued supra, § 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. Whether § 470 could have been "better" drafted or more finely tuned is not the issue, nor is it the role of the Court to decide whether it would have drafted it in the exact same way. 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)

(stating that a town's rental permit law was "rationally related to its purpose of furthering safety. No further analysis of the law is necessary to dismiss Plaintiff's claim that the Rental Permit Law on its face violates the Equal Protection Clause").

Here, unlike "residency requirements" that have been uniformly struck down by the courts, the office requirement of § 470 is not overly burdensome and as such plaintiff fails to meet the stringent standard required for a facial challenge.

CONCLUSION

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

Dated: Albany, New York
December 15, 2010

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