UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
ANGELA STERN,

Plaintiff,

05 CV 8574 (SCR)

-against-

THE TOWN OF MOUNT KISCO & THE MOUNT KISCO POLICE DEPARTMENT, LIEUTENANT PATRICK M. O'REILLY, and DETECTIVE RAUL FERNANDEZ, and other individual employees of the MOUNT KISCO POLICE DEPARTMENT, AND THE STATE OF NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL, and STATE OF NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL INVESTIGATOR FRANK ENGLANDER, and other individual employees of the STATE OF NEW YORK DIVISION of ALCOHOLIC BEVERAGE CONTROL,

Defendants.
---X

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

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Defendants.
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MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

PRELIMINARY STATEMENT

Plaintiff, Angela Stern, brings this action pursuant to 42 U.S.C. § 1983, alleging inter alia, that defendants, the New York State Liquor Authority ("SLA"), and SLA Investigator Frank Englander (collectively the "State defendants"), on or about April 30, 2005, in conjunction with the defendants, the Mount Kisco Police Department, conducted an investigation of her establishment, Café La China, located in Mount Kisco, New York, and improperly charged Ms. Stern with violations of the State of New York Alcohol and Beverage Control Law ("ABC Law").

By this action, plaintiff seeks $ 1,000,000 in compensatory and punitive damages

as well as injunctive relief.

State defendants, submit this memorandum of law in support of the motion to dismiss the complaint pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). State Defendants move to dismiss the complaint on the grounds that plaintiff has failed to state a cause of action under 42 U.S.C. § 1983, and this action is precluded by the Eleventh Amendment of the United States Constitution, the principles of Younger abstention, and Investigator Englander is entitled to Qualified Immunity.

Statement of Facts

For the purposes of this motion to dismiss, all of the facts asserted in plaintiff's complaint are assumed to be true. For the court's convenience, a copy of the following public records: (1) plaintiff's Amended Complaint; and (2) the SLA Notice of Pleading, Case No. 25057, served on plaintiff Angela Stern, have been annexed as exhibits to the accompanying declaration of State defendants' counsel, Assistant Attorney General Lisa Ghartey ("Ghartey Dec.").

Plaintiff, Angela Stern, is a resident of the Town of Mt. Kisco, located in Westchester County New York. See Complaint ¶14. In or around 2001, plaintiff opened a restaurant, Café La China, located at 155 Lexington Avenue in Mt. Kisco, NY. See Complaint ¶ 18. The restaurant has a predominantly Hispanic clientele. See Complaint ¶18. In or around May 2001 plaintiff received a complaint from her landlord claiming that the restaurant was allowing women to prostitute themselves at Café La China. See Complaint ¶ 19. Plaintiff denied this allegation to "town officials". See Complaint ¶ 19. Plaintiff invited "[town officials] down to the restaurant to make their own observations. The invitation was not accepted. She did notice thereafter an increased police presence at Café La China. . . ." See Complaint ¶ 19. According to the complaint,

in 2003, after a new mayor took office law enforcement policing escalated to the point of harassment of plaintiff Angela Stern and Café La China clientele. Id.

According to the complaint, defendants, the Town of Mt. Kisco and the Mt. Kisco Police Department, have singled out Café La China for police investigation after which they would issue referrals to the SLA which resulted in the SLA issuing pleadings claiming license violations to plaintiff. See Complaint ¶ 20. During the first nine months of 2005 the SLA issued eight separate pleadings involving allegations of violations at Café La China on thirteen separate dates. See Complaint ¶ 21. The violations include disorderly premise, selling to intoxicated persons, selling to minors, and the failure to post the store liquor license or post warnings concerning alcohol consumption and pregnancy. Id.

On April 30, 2005, SLA investigator Frank Englander participated with the Mt. Kisco Police Department in an investigation of Café La China, which resulted in plaintiff being charged with, violations which resulted in the issuance of a Notice of Pleading for case number 25057. See Complaint ¶ 22; see also Ghartey Dec., Exh. B, Notice of Pleading Case No. 25057. Plaintiff is contesting all of the pleadings as unfounded. See Complaint ¶ 23. The cases are still pending. Id.

On or about June 25, 26 & 27, 2005 as well as July 15, 2005, the Mt. Kisco police conducted random searches of people leaving Café La China but did not investigate patrons of the deli adjacent to Café La China. See Complaint ¶ 24. On July 2, 2005 plaintiff observed the police chase someone who had been standing in front of Café La China but left alone those people standing in front of the deli nearby. See Complaint ¶ 25. According to the complaint, Café La China is being singled out by defendants for unnecessary police activity and interference because her business has

a predominantly if not exclusively an Hispanic clientele. See Complaint ¶ 27.

Federal Complaint

By her Amended Complaint dated October 22, 2004, plaintiff alleges that the State defendants violated her civil rights, and seeks $1,000,000.00 in damages as well as injunctive relief. See Cplt.Wherefore Clause. The Complaint fails to state a claim against the State defendants upon which relief can be granted, is barred by the Eleventh Amendment, and principles of Younger abstention and further, State defendant Frank Englander is entitled to Qualified Immunity.

ARGUMENT

POINT I

The Eleventh Amendment Bars
This Suit Against The State Defendants

The Eleventh Amendment bars suit in a federal court by a citizen of a state against that state unless the State consents to such a suit or the U.S. Congress enacts legislation overriding the Eleventh Amendment immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54-57, (1996); Papasan v. Allain, 478 U.S. 265, 276 (1986); Pennhurst State School & Hospital v. Helderman, 465 U.S. 89, 100-101 (1984); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (per curiam); Employees v. Department of Public Health, 411 U.S. 279, 280 (1973); See Trotman v. Palisades Intersate Park Commission, 557 F.2d 35, 38-40 (2d Cir. 1977)(the State of New York has not consented to suit in federal court).

Eleventh Amendment immunity "represents a real limitation on a federal court's federal-question jurisdiction," Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997). The absolute bar of the Eleventh Amendment immunity applies to lawsuits under 42 U.S.C. § 1983 in federal courts seeking monetary relief, as well as declaratory and injunctive relief against a state or state agency. Papason v. Allian, 478 U.S. at 276-77; Missouri v. Fiske, 290 U.S. 18, 27 (1933); Cory v. White, 457 U.S. 85, 91 (1982); Kentucky v. Graham, 473 U.S. 159 (1985). The absolute bar of the Eleventh Amendment applies to lawsuits under § 1983 since states and state agencies are not "persons" subject to suit under the provision. See e.g. Will v. Michigan Dept. Of State Police, 491 U.S. at 71. Therefore, the § 1983 claims against the State Liquor Authority, should be dismissed.

This Eleventh Amendment also applies to suits against State officials in their "official capacity", regardless of the nature of the relief sought. Will v. Michigan Dept. Of State Police ,

supra; Pennhurst State School & Hospital v. Halderman, 465 U.S. at 102; Cory v. White, 457 U.S. at 91 ; Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir. 1996). To the extent that, Investigator Frank Englander, a state official, is sued in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state. Yin Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir. 1993). Accordingly, the claims against Investigator Englander in his official capacity must be dismissed. Ippolito v. Meisel, 958 F.Supp. 155 (S.D.N.Y. 1997).

Accordingly, the § 1983 claims against the State Liquor Authority and the claims against Investigator Frank Englander in his official capacity are barred by the Eleventh Amendment and must be dismissed.

POINT II

YOUNGER ABSTENTION BARS PLAINTIFF'S CLAIM FOR RELIEF AS AGAINST THE STATE DEFENDANTS

Abstention principles enunciated in Younger v. Harris, 401 U.S. 37, 45 (1971), also require dismissal of plaintiff's claim for relief against the State defendants. The United States Supreme Court has held Younger abstention is appropriate only if: (1) there are ongoing state judicial proceedings; (2) the state proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions. See Mateo v. Phillips, 361 F.Supp.2d 328, 330 (S.D.N.Y. 2005) quoting, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); see also Temple of the Lost Sheep, Inc. v. Abrams, 930 F.2d 178, 182 (2d Cir.), cert denied, 502 U.S. 866 (1991).

For Younger abstention purposes a state court action is considered "ongoing" through the completion of the state appeals process, even if the federal plaintiff has failed to exercise state appellate rights. Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975)reh'g denied 421 U.S. 971 (1975)("a necessary element of Younger is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court"); see also Neustein v. Orbach, 732 F. Supp. at 341 ("although generally there is no requirement that a plaintiff exhaust state remedies before commencing a § 1983 action, Younger does impose one . . .").

The first prerequisite for abstention -- an ongoing state court proceeding -- has been satisfied in this case. In Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., (Dayton Christian Schools), 477 U.S. 619, 627 (1986), the United States Supreme Court, "applied the [abstention doctrine of Younger v. Harris] to state administrative proceedings in which important

state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." Id.; see also University Club and the Union League Club v. City of New York, 842 F.2d 37,40 (2d Cir. 1988)(quoting Dayton Christian Schools).

For Younger purposes an administrative proceeding is considered ongoing where, "the administrative agency has filed formal charges against an individual and has not yet concluded the adjudication of the charges, when the target of the investigation has brought suit in federal district court to halt the administrative actions because of alleged infringement of constitutional rights." University Club and the Union League, 842 F.2d at 40. Here, plaintiff, Stern, has commenced this federal action against the State defendants prior to the SLA, "completing the hearings on the charges challenged in this matter, or imposing any sanctions or penalties, on those charges, accordingly, an ongoing state proceeding exists." Id.

The second prong of Younger -- the substantial state interest -- necessary to implicate the abstention doctrine is also present. Indeed the proper enforcement of laws concerning the sale and distribution of alcoholic beverages to state citizens is a sufficiently important state interest to justify Younger abstention. Indeed states have a compelling interest to enforce their rules and regulations. Indeed, the Supreme Court recognized the significant state interest "in protecting 'the authority of the [state's] judicial system, so that its orders and judgments are not rendered nugatory.'" See generally, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 12-13(1987).

Third, plaintiff has, or will have, the opportunity to litigate the alleged federal claims that form the basis of her request for relief in state court. Indeed, the obligation and competence of state courts to decide federal questions is well-settled. "When a litigant has not attempted to present

federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy. . . ." Pennzoil Co. v. Texaco, Inc., 481 U.S. at 1. The Second Circuit has held that, "constitutional issues . . . may be decided in an Article 78 proceeding pursuant to the New York Civil Practice Rules and Law. . . . New York case law abundantly supports the conclusion that constitutional claims arising from the application of a statue be raised in an Article 78 petition." University Club and the Union League Club 842 F.2d at 40-41. Moreover, a constitutional challenge does not have to be raised before the administrative tribunal, subsequent state court judicial review of the administrative proceeding is sufficient for Younger purposes. Id, quoting, Dayton Christian Schools, 477 U.S. at 629. Accordingly, in this case, it is sufficient that plaintiff's constitutional claims may be raised in an Article 78 judicial review at the conclusion of the of the administrative -- SLA-- proceedings. See NY ABC Law § 121 .

The abstention doctrine enunciated in "Younger v. Harris contemplates the outright dismissal of [this] federal suit, and the presentation of all claims, both state and federal, to the state courts." Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

POINT III

INVESTIGATOR FRANK ENGLANDER IS ENTITLED TO QUALIFIED IMMUNITY

"The doctrine of qualified immunity attempts to balance the strong policy of encouraging the vindication of federal civil rights by compensating individuals when those rights are violated, with the equally salutary policy of attracting capable public officials and giving them the scope to exercise vigorously the duties with which they are charged by relieving them from the fear of being sued personally and thereby made subject to monetary liability." Rodriguez v. Phillips, 66 F.3d 470, 475 (2d Cir. 1995) (citations omitted).

Under this doctrine, government officials performing discretionary functions are shielded from suit for civil damages if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); Zavaro v. Coughlin, 970 F.2d 1148, 1153 (2d Cir. 1992), or insofar as it was objectively reasonable for them to believe that their acts did not violate those rights. See Anderson v. Creighton, 483 U.S. 635, 638-9, 107 S.Ct. 3034, 3038-39 (1987); Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994), cert. denied, 115 S.Ct. 721 (1995)." Martinez v. City of Schenectady, 115 F.3d 111, 114 (2d Cir. 1997)(quoting Velardi v. Walsh, 40 F.3d 569, 573 (2d Cir. 1994)); see also Brown v. City of Oneonta, 106 F.3d 1125, 1130-31 (2d Cir. 1997).

Three factors are to be considered in determining whether a right was clearly established at the time a defendant official acted: "(1) whether the right in question was defined with reasonable specificity; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under pre-existing law a reasonable defendant official would have understood that his or her acts were unlawful." Jermosen

v. Smith, 945 F.2d 547, 550 (2d Cir. 1991).

Even where a defendant's actions violated clearly established rights, he can still assert qualified immunity if he can show that his actions were objectively reasonable, i.e., "that 'reasonable persons in his position would not have understood that their conduct was within the scope of the established prohibition.'" Williams v. Greifinger, 97 F.3d 699, 703 (2d Cir. 1996) (citing In Re State Police Litigation, 88 F.3d 111, 123 (2d Cir. 1996)).

Investigator Englander did not violate a clearly established right of which a reasonable defendant official would have known. Investigator Englander's contact with the plaintiff and her establishment, Café La China, was not to discourage her from pursuing a protected activity, but to protect the public from the illegal sale and distribution of alcoholic beverages within the State of New York Investigator Englander did not commit any acts which can be construed, either legally or factually, to show that he intended and did deny plaintiff her constitutional rights. Indeed plaintiff cannot point to any evidence which would establish that Investigator Englander who on April 30, 2005, was conducting an investigation of Café La China pursuant to ABC Law § 106, would have known that in conducting this investigation he was violating plaintiff's constitutional rights. Clearly, no constitutional deprivation exists here. Accordingly, Investigator Englander is entitled to qualified immunity.

CONCLUSION

FOR ALL THE FOREGOING REASONS, STATE DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED IN ITS ENTIRETY IN ALL RESPECTS

Dated: New York, New York
February 16, 2006

Respectfully submitted,

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