08-4873CV

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ELIOT I. BERNSTEIN, individually and P. STEPHEN LAMONT on behalf of SHAREHOLDERS OF IVIEWIT HOLDINGS, INC., IVIEWIT TECHNOLOGIES, INC., UVIEW.COM, INC., IVIEWIT.COM, INC., I.C., INC., IVIEWIT.COM LLC, IVIEWIT LLC, IVIEWIT CORPORATION, IVIEWIT, INC., and PATENT INTEREST HOLDERS,

Plaintiffs-Appellants,

- against -

APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, in his official and individual capacity,

(Caption Continued on Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLEES THE FLORIDA BAR, JOHN ANTHONY BOGGS, KENNETH MARVIN, LORRAINE HOFFMANN, ERIC TURNER, JOY BARTMON, JERALD BEER, AND KELLY OVERSTREET JOHNSON

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JOSEPH WIGLEY, in his official and individual capacity, CATHERINE O'HAGEN WOLFE, in her official and individual capacity, PAUL CURRAN, in his official and individual capacity, MARTIN R. GOLD, in his official and individual capacity, ANGELA M. MAZZARELLI, in her official and individual capacity, RICHARD T. ANDRIAS, in his official and individual capacity, DAVID B. SAXE, in his official and individual capacity, DAVID FRIEDMAN, in his official and individual capacity, LUIS A. GONZALES, in his official and individual capacity, APPELLATE DIVISION SECOND DEPARTMENT, LAWRENCE F. DiGIOVANNA, in his official and individual capacity, DIANA MAXFIELD KEARSE, in her official and individual capacity, JAMES E. PELTZER, in his official and individual capacity, A. GAIL PRUDENTI, in her official and individual capacity, STEVEN C. KRANE, in his official and individual capacity, HON. JUDITH S. KAYE, in her official and individual capacity, KENNETH RUBENSTEIN, ESTATE OF STEPHEN KAYE, PROSKAUER ROSE LLP, MELTZER LIPPE GOLDSTEIN & BREITSTONE LLP, LEWIS S. MELTZER, RAYMOND A. JOAO, FOLEY LARDNER LLP, MICHAEL C. GREBE, WILLIAM J. DICK, DOUGLAS A. BOEHM, STEVEN C. BECKER, STATE OF NEW YORK COMMISSION OF INVESTIGATION, LAWYERS FUND FOR CLIENT PROTECTION OF THE STATE, THE FLORIDA BAR, LORRAINE CHRISTINE HOFFMAN, in their official and individual capacity, ERIC TURNER, in his official and individual capacity, JOHN ANTHONY BOGGS, in his official and individual capacity, KENNETH MARVIN, in his official and individual capacity, THOMAS HALL, in his official and individual capacity, DEBORAH YARBOROUGH, in her official and individual capacity, VIRGINIA STATE BAR, ANDREW H. GOODMAN, in his official and individual capacity, NOEL SENGEL, in her official and individual capacity, MARY W. MARTELINO, in her official and individual capacity, and JOHN DOES,

Defendants-Appellees.

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STATEMENT OF THE ISSUES

I. WHETHER THE CLAIMS OF BERNSTEIN AND LAMONT AGAINST THE FLORIDA BAR APPELLEES ARE BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE FLORIDA BAR APPELLEES HAVE IMMUNITY FROM THE CLAIMS AGAINST THEM.

III. WHETHER THE CLAIMS AGAINST THE FLORIDA BAR APPELLEES ARE BARRED BY THE STATUTE OF LIMITATIONS.

IV. WHETHER THE DISTRICT COURT HAS PERSONAL JURISDICTION OVER THE FLORIDA BAR APPELLEES.

STATEMENT OF THE CASE

The Course of Proceedings and Disposition in the Court Below

Appellants Eliot I. Bernstein and Stephen P. Lamont, filed their 318-page, 1,131 paragraph, Amended Complaint against hundreds of defendants alleging a vast conspiracy to violate Bernstein and Lamont's Fifth and Fourteenth Amendment rights. Amended Complaint, Docket Entry # 87 (hereinafter "Am. Compl."). The defendants include lawyers, law firms, former employees, judges, court personnel, police officers, lawyer disciplinary entities, lawyer disciplinary personnel, corporations, businessmen, governmental entities and government officials. Am. Compl. ¶¶ 25-206. Bernstein and Lamont seek damages of at least one trillion dollars and other relief, including injunctive relief. Am. Compl. at pp. 301-306.

Among the defendants are Appellees The Florida Bar, former president of The Florida Bar Kelly Overstreet Johnson, and Florida Bar staff attorneys John Anthony Boggs, Lorraine Hoffmann, Eric Turner, Kenneth Marvin, Joy Bartmon and Jerald Beer (collectively referred to herein as "The Florida Bar Appellees").[1] Am. Compl. ¶¶ 81-88. Essentially, the Amended Complaint alleges that The Florida Bar Appellees acted in conspiracy to deny due process rights to Bernstein and Lamont relating to certain Bar grievance complaints filed by them in 2003 against Christopher Wheeler, a Florida attorney, Michael Triggs, a Florida attorney, Eric Turner, a Florida attorney and employee of The Florida Bar, and Proskauer Rose LLP, a law firm having an office in Boca Raton, Florida and in which Mr. Wheeler is a partner. Am. Comp. ¶¶ 544-607. The crux of the claims as to The Florida Bar Appellees stems from The Florida Bar's decision not to discipline Wheeler, Proskauer Rose, Triggs or Turner. Bernstein and Lamont claim that The Florida Bar Appellees "conspired" with Wheeler, Triggs and Proskauer, to "white wash" and otherwise "rubber stamp" the attorney discipline

[1] The record does not indicate that a summons was ever issued for Joy Bartmon, Jerald Beer or Kelly Overstreet Johnson or that these Appellees were ever served with a summons or with a copy of the Complaint or Amended Complaint. *See* Docket Entries dated January 12, 2008 and January 23, 2008 pertaining to the issuance of summons. The style of the case does not include these individuals, but they are listed as defendants within the Amended Complaint (Am. Compl. ¶¶ 83, 87, 88) and the district court's order dismisses these individuals from the lawsuit. *Bernstein v. New York*, 591 F. Supp.2d 448, 471 (S.D.N.Y. 2008) (dismissing Appellees Bartmon, and Beer in Appendix B of the opinion and Appellee Johnson in Appendices A, B and C).

complaints. Amended Complaint ¶ 607. The events in this matter pertaining to The Florida Bar Appellees occurred from the spring of 2003 until the spring of 2004. *Id.; Bernstein v. New York*, 591 F. Supp.2d 448, 467 (S.D.N.Y. 2008).

More specifically, Bernstein and Lamont allege in the Amended Complaint that:

- They filed a complaint in 2003 with The Florida Bar regarding attorney Christopher Wheeler, which was dismissed by Appellee Hoffmann, in her capacity as an attorney for The Florida Bar. Am. Compl. ¶¶ 544, 547.

- Appellee Hoffmann's letter of July 1, 2003, dismissing the complaint against Mr. Wheeler, recognized that the allegations of misconduct in the Wheeler complaint were the subject of a then pending counterclaim in a Florida state court (*Proskauer Rose LLP v. Iviewit*, Case No. CA01-04671 AB, Palm Beach County) and explained that The Florida Bar does not intervene into, or attempt to resolve, civil disputes. The letter stated: "This is not to say that The Florida Bar has considered and

determined the veracity of Mr. Wheeler's position as to the validity of your specific charges."[2]

- By letter dated January 20, 2004, Appellee Eric Turner, as Chief Branch Discipline Counsel for The Florida Bar, denied Bernstein and Lamont's request to reopen the investigation of Mr. Wheeler on the basis that the "complaint was essentially an action for malpractice" and "The Florida Bar does not determine civil claims."[3]

- When asked how to elevate the Wheeler and Proskauer Rose complaints to the "next highest review level," Appellee Turner allegedly "stated that he was the final review for [the Bar] and therefore the case was permanently closed." Am. Compl. ¶ 565.

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[2] The letter is expressly incorporated at ¶ 548 of the Amended Complaint and as stated therein can be viewed at: http://iviewit.tv/CompanyDocs/2003%2007%2001%20Florida%20Bar%20hoffman%20Response%20Wheeler%20Complaint.pdf

[3] The letter is expressly incorporated at ¶ 559 of the Amended Complaint and as stated therein can be viewed at: http://iviewit.tv/CompanyDocs/2004%2001%2020%20Florida%20Bar%20Response.pdf

- In response to Appellee Turner's actions, and alleged false representation, a complaint was filed against Appellee Turner with The Florida Bar. Am. Compl. ¶ 561. The Florida Bar converted the complaint into an internal employee matter. *Id*.

- The Bar stood behind its determination with regard to the Wheeler and Proskauer Rose complaints and "refused to retract their statements." Am. Compl. ¶ 572.

- The Wheeler and Proskauer Rose complaints were forwarded to the Chairperson of the 15(c) Grievance Committee and were again dismissed. Am. Compl. ¶¶ 566-569.

- Bernstein and Lamont also filed a complaint against Florida attorney Matthew M. Triggs alleging that his representation of Wheeler and Proskauer Rose was a conflict of interest because he had been a previous member of a Bar grievance committee. Am. Compl. ¶¶ 578-582.

- Bernstein and Lamont sent information regarding the complaints to Appellee Kelly Overstreet Johnson, then the President of The Florida Bar, with requests for Ms. Johnson to take special actions such as "forcing" formal docketing and

disposition of the complaints. Am. Compl. ¶¶ 587-88. Ms. Johnson allegedly did not respond to the requests of Bernstein and Lamont. Am. Compl. ¶ 591.

The Florida Bar Appellees moved to dismiss the action as to them on the grounds of absolute immunity, Eleventh Amendment immunity, lack of in personam jurisdiction, and failure to state a claim. Docket Entries # 12, 13, 68, 69. On August 8, 2008, the district court dismissed the complaint against all defendants. *Bernstein,* 591 F.Supp.2d at 448. Although the claims in the Amended Complaint were set forth as direct constitutional claims, the district court deemed the Amended Complaint to have been filed pursuant to 42 U.S.C. § 1983. *Id.* at 459-460. The district court thereafter dismissed such claims against The Florida Bar Appellees on the basis that they are barred by the statute of limitations for section 1983 actions. *Id.* at 467. The district court also dismissed the claims against The Florida Bar pursuant to Eleventh Amendment immunity. *Id.* at 465-66. The district court further dismissed the claims against the remainder of The Florida Bar Appellees on the basis of absolute quasi-judicial immunity. *Id.* at 466. Additionally, the district court found that Appellee Kelly Overstreet Johnson was protected on the grounds of qualified immunity as well as absolute immunity, and that the Amended Complaint did not allege that she had engaged in any wrongful conduct. *Id.* at 465-66. The district court also noted that although it likely could

not exercise personal jurisdiction over many of the defendants, it did not reach that issue because there were sufficient other grounds for dismissal of the action. *Id.* at 469 n.165. The district court denied leave to replead stating that Bernstein and Lamont "cannot overcome the various immunity defenses or the pertinent statutes of limitations." *Id.* at 470. This appeal ensued.

STATEMENT OF THE FACTS

The only relevant facts to the appeal as it pertains to The Florida Bar Appellees are those stated above.

SUMMARY OF ARGUMENT

The district court properly dismissed Bernstein and Lamont's Amended Complaint as against The Florida Bar because the court is barred from exercising jurisdiction by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment bars suits against a state agency for damages and in equity in federal court, including actions brought pursuant to 42 U.S.C. § 1983. The Florida Bar is an official arm of the Florida Supreme Court and has been expressly held to enjoy Eleventh Amendment immunity. Also, the district court correctly dismissed the Amended Complaint as to the other Florida Bar Appellees on the grounds of absolute immunity. Pursuant to established law, in the performance of disciplinary functions, The Florida Bar, and its agents, act as an official arm of the Florida Supreme Court and are entitled to absolute immunity for such functions.

Moreover, the district court correctly found that the lawsuit as against The Florida Bar Appellees was barred by the statute of limitations. The allegations against The Florida Bar Appellees were deemed to have been brought pursuant to section 1983 and the statute of limitations for section 1983 actions is three years. Because the lawsuit was filed in December 2007 and the allegations in the suit pertain to conduct of The Florida Bar Appellees occurring from the spring of 2003 until the spring of 2004, the statute of limitations has expired.

Furthermore, while the district court properly dismissed Bernstein and Lamont's claims against The Florida Bar Appellees on immunity grounds and on the basis of the statute of limitations, the court also lacks personal jurisdiction over The Florida Bar Appellees. Bernstein and Lamont's allegations do not satisfy New York's requirements for personal jurisdiction.

ARGUMENT

I. THE CLAIMS OF BERNSTEIN AND LAMONT AGAINST THE FLORIDA BAR APPELLEES ARE BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Standard of Review

In considering whether an entity is an arm of the state, this Court reviews the district court's factual findings for clear error and its legal conclusions *de novo. See McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001).

B. Discussion

The district court lacks subject matter jurisdiction over the claims of Bernstein and Lamont pursuant to the Eleventh Amendment to the United States Constitution.[4] The Eleventh Amendment bars suits, whether in law or equity, against a state in federal court in the absence of a waiver by the state of its Eleventh Amendment immunity. *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 100-101 (1984); *Deposit Ins. Agency v. Superintendent of Banks,* 482 F.3d 612, 617 (2d Cir. 2007). Such Eleventh Amendment immunity extends to state agencies and other arms of the state. *Deposit Ins. Agency,* 482 F.2d at 617. Furthermore, this immunity extends to individual defendants who are a state official acting in his or her official capacity. *Id.* (*citing Edelman v. Jordan,* 415 U.S. 651(1974)).

The Florida Bar is an official arm of the Florida Supreme Court charged with the regulation of Florida's lawyers. Art. V, § 15, Fla. Const.; *Carroll v. Gross,* 984 F.2d 392, 393 (11th Cir. 1993), *cert. denied*, 510 U.S. 893 (1993); *Dacey v. The Florida Bar, Inc.*, 414 F.2d 195, 198 (5th Cir. 1969), *cert. denied,* 397

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[4] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

U.S. 909 (1970); *Tindall v. The Florida Bar,* No. 97-387-CIV-T-17C, 1997 WL 689636 at *4 (M.D. Fla. 1997), *aff'd,* 163 F.3d 1358 (11th Cir. 1993); *Dade-Commonwealth Title Ins. v. North Dade Bar Ass'n,* 152 So. 2d 723, 725 (Fla. 1963); *The Florida Bar v. Dancu,* 490 So. 2d 40, 42 (Fla. 1986) (Judge Ehrlich concurring); *Kee v. Bailey,* 634 So. 2d 654 (Fla. 3d DCA 1994). *See also* Chap. 1, Introduction, R. Regulating Fla. Bar; R. Regulating Fla. Bar 3-3.1. To this end, it has been expressly held that The Florida Bar is a state agency for Eleventh Amendment purposes and is entitled to Eleventh Amendment sovereign immunity. *Brown v. The Florida Bar,* 243 Fed. Appx. 552 (11th Cir. 2007); *O'Connor v. The Florida Bar*, 197 Fed. Appx. 741, 743 (10th Cir. 2006) (finding that The Florida Bar is entitled to Eleventh Amendment immunity in a 42 U.S.C. § 1983 action); *Kaimowitz v. The Florida Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993) (same).

This holding is consistent with those in matters pertaining to other state bar or lawyer regulatory organizations that have been held to have Eleventh Amendment immunity. *E.g., Thiel v. State Bar of Wisconsin,* 94 F.3d 399, 403 (7th Cir. 1996); *Bishop v. State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986); *Ginter v. State Bar of Nevada.,* 625 F.2d 829, 830 (9th Cir. 1980); *Johnson v. Board of Bar Overseers of Mass.,* 324 F. Supp.2d 276, 286 (D. Mass. 2004); *Feliciano v. Tribunal Supremo De Puerto Rico*, 78 F. Supp.2d 4, 10 (D. P.R. 1999); *Kish v. Michigan State Bd. of Law Examiners,* 999 F. Supp. 958, 964 (E.D. Mich. 1998);

Wu v. State Bar of California, 953 F. Supp. 315, 318-19 (C.D. Calif. 1997); *Thaler v. Casella,* 960 F. Supp. 691, 700 (S.D. N.Y. 1997); *Ware v. Wyoming Bd. of Law Exam'rs*, 973 F. Supp. 1339, 1352 (D. Wyo. 1997), *aff'd,* 161 F.3d 19 (10th Cir. 1998); *McFarland v. Folsom,* 854 F. Supp. 862, 872-73 (M.D. Ala. 1994); *Jackson v. Manhattan and Bronx Surface Transit Operating Auth.,* No. 92-2281, 1993 WL 118510 (S.D.N.Y. 1993), *aff'd,* 17 F.3d 1426 (2d Cir. 1994), *cert. denied,* 513 U.S. 818 (1994); *Rapoport v. Departmental Disciplinary Comm.,* No. 88-5781, 1989 WL 146264 (S.D.N.Y. 1989); *Mattas v. Supreme Court of Pennsylvania*, 576 F. Supp. 1178, 1182 (W.D. Pa. 1983).

There is nothing in the record to show that The Florida Bar, or that any of The Florida Bar Appellees as its agents, waived their immunity or otherwise consented to suit. There is also nothing in the record to indicate that The Florida Bar Appellees were acting outside the scope of their official duties so as to provide a basis to conclude that Eleventh Amendment immunity does not apply to them. Furthermore, Congress has taken no action to abrogate The Florida Bar's immunity, and the United States Supreme Court has specifically held that 42 U.S.C. § 1983 does not abrogate a state's Eleventh Amendment immunity. *E.g., Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64-71 (1989).

The United States Supreme Court has recognized a narrow exception to Eleventh Amendment immunity in the case of actions against state officials

seeking only prospective injunctive or declaratory relief to end violations of federal law. *Ex parte Young*, 209 U.S. 123 (1908). The exception, commonly referred to as the *Ex parte Young* doctrine, is only applied in cases involving ongoing violations as opposed to cases in which federal law has been violated at one time or over a period of time in the past. *See Florida Ass'n of Rehab. Facilities v. State of Florida*, 225 F.3d 1208, 1219 (11th Cir. 2000). Also, if the prospective relief sought is "measured in terms of a monetary loss resulting from a past breach of a legal duty," *Ex Parte Young* does not apply. *Id.* (*citing Edelman*, 415 U.S. at 669).

Here, the allegations of Bernstein and Lamont regarding The Florida Bar Appellees pertain to events occurring over a period of time during 2003 and 2004. *Bernstein*, 591 F. Supp.2d at 467; Am. Compl. ¶ 607. Moreover, both Bernstein and Lamont cite to *Ex parte Young* to support their request for "retroactive monetary relief" against state officers, including those in Florida. Bernstein Brief at 36; Lamont Brief at 19. As such, the allegations against The Florida Bar Appellees and the relief sought do not fall within the *Ex parte Young* exception for the allowance of suits seeking prospective injunctive relief.

Therefore, the district court did not err in ruling that Eleventh Amendment immunity applies to The Florida Bar, and such immunity may appropriately be applied to all of The Florida Bar Appellees as well. *See Johnson*, 324 F. Supp.2d

at 286; *Feliciano*, 78 F. Supp.2d at *11; *Thaler*, 960 F. Supp. at 700; *Jackson*, 1993 WL 118510 at *2.

II. THE FLORIDA BAR APPELLEES HAVE IMMUNITY FROM THE CLAIMS AGAINST THEM.

A. Standard of Review

This Court reviews *de novo* a district court's dismissal of a complaint based on absolute or qualified immunity. *Carley v. Lawrence*, 24 Fed. Appx. 66, 67 (2d Cir. 2001); *Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003).

B. Discussion

The United States Supreme Court has extended the doctrine of absolute immunity, which has traditionally protected judges and prosecutors, to administrative officials involved in quasi-judicial or quasi-prosecutorial functions. *Butz v. Economou*, 438 U.S. 478, 511-17 (1978) (finding that agency officials have absolute immunity from liability for their judicial and prosecutorial acts including in deciding whether a proceeding should be brought or continued). To this end, both federal and state courts have consistently held that, in the performance of lawyer disciplinary functions, The Florida Bar and its agents act as an official arm of the Florida Supreme Court and enjoy absolute immunity for such functions. *E.g.*, *Carroll*, 984 F.2d at 393 (affirming dismissal of complaint against Florida Bar members acting in their official capacity as agents of The Florida Bar); *Solomon v. The Florida Supreme Court*, No. 03-7002, 2003 WL 1873939 (D.D.C.

2003) (holding that members of The Florida Bar disciplinary committee act as agents of the Florida Supreme Court and thus are entitled to absolute immunity from damages for their judicial acts); *Solomon v. The Supreme Court of Florida,* 816 A.2d 788 (D.C. 2002) (upholding the absolute immunity of The Florida Bar and its agents for conduct related to disciplinary proceedings); *Ippolito v. The Florida Bar*, 824 F. Supp. 1562, 1572-74 (M.D. Fla. 1993) (in action against The Florida Bar and its agents for racketeering and selective prosecution for the unauthorized practice of law, finding that The Florida Bar, the Bar president, and Bar committee members were agents of the Florida Supreme Court and were entitled to absolute immunity); *Tindall v. The Florida Bar,* No. 97-387, 1997 WL 689636 at *4 (M.D. Fla. 1997) (holding that The Florida Bar and its disciplinary staff act as an official arm of the Florida Supreme Court and enjoy absolute immunity); *Kee*, 634 So. 2d at 654 (The Florida Bar and its employees act as a official arm of the Florida Supreme Court and in such capacity enjoy absolute immunity for actions taken within the scope of their duties); *Mueller v. The Florida Bar*, 390 So. 2d 449, 452-53 (Fla. 4th DCA 1980) (absolute immunity insulates The Florida Bar and its agents carrying out their official functions).

Likewise, courts across the nation have applied absolute immunity to professional regulatory boards and their members, including bar related boards, with respect to the conduct of their disciplinary functions and the decision as to

whether or not disciplinary action should be taken. *See, e.g.*, *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1509 (10th Cir. 1987) (affirming summary judgment in favor of member of board of medical examiners held absolutely immune from action brought by disciplined doctor), *cert. denied* 484 U.S. 964 (1987); *Werle v. Rhode Island Bar Assoc.*, 755 F.2d 195, 198-200 (1st Cir. 1985) (affirming dismissal for failure to state a claim against bar association's unauthorized practice of law committee); *Clulow v. Oklahoma*, 700 F.2d 1291, 1298 (10th Cir. 1983) (affirming dismissal of claims against bar association members engaged in disciplinary proceeding), *overruled on other grounds*, 731 F.2d 640 (10th Cir. 1984); *Slavin v. Curry*, 574 F.2d 1256, 1266 (5th Cir. 1978) (holding that "members of the [bar] Grievance Committee are entitled to same immunity that judges would have . . . ."), *overruled on other grounds*, 604 F.2d 976 (5th Cir. 1979).[5] The same application of absolute immunity must obtain here.

[5] District courts applying state law principles of absolute immunity have followed suit. *See, e.g.*, *Esposito v. State of New York*, 2008 WL 352910 at *12 (S.D.N.Y. 2008) (members of New York Department Disciplinary Committee are absolutely immune from charges of failure to investigate attorney misconduct allegations); *Truong v. McGoldrick*, No. 06-1430, 2006 WL 1788960 at *4 (S.D.N.Y. 2006) (members of New York Departmental Disciplinary Committee have absolute judicial immunity for attorney disciplinary functions), *aff'd*, 272 Fed. Appx. (2d Cir. 2008)); *Ivancie v. State Bd. of Dental Exam'rs*, 678 F. Supp. 1496, 1498 (D. Colo. 1988) (board of dental examiners and individual members entitled to absolute immunity); *Rosenfeld v. Clark*, 586 F. Supp. 1332, 1340 (D. Vt. 1984) (noting that board of bar examiners should be afforded absolute immunity when exercising judicial discretion), *aff'd*, 760 F.2d 253 (2d Cir. 1985); *Schneider v. Colegio de Abogados de Puerto Rico*, 546 F. Supp. 1251, 1264 (D. P.R. 1982) (bar

The overwhelming weight of the above-cited authority demonstrates that The Florida Bar and its agents are immune from suits premised upon acts undertaken in an official capacity and in connection with disciplinary functions. Here, Bernstein and Lamont make no specific factual allegations to indicate that any of The Florida Bar Appellees were acting outside the scope of their official duties or with bad faith with regard to any allegation made in the Amended Complaint. In fact, the allegations regarding the conduct of The Florida Bar Appellees all relate to their decision not to pursue disciplinary proceedings pursuant to the complaints filed by Bernstein and Lamont. Such conduct is consistent with the performance of The Florida Bar Appellees' official disciplinary functions. Accordingly, the district court did not err in dismissing the Amended Complaint against The Florida Bar Appellees Boggs, Johnson, Hoffmann, Turner, Marvin, Bartmon and Beer on the grounds of absolute immunity and in finding that any attempt to amend the complaint would be futile. *Bernstein,* 591 F. Supp.2d at 466, 470.

Also, the district court correctly found that Appellee Kelly Overstreet Johnson, the former president of The Florida Bar, is not only immune from this suit by reason of the doctrine of absolute immunity, but she is additionally immune from suit by reason of qualified immunity. *Bernstein,* 591 F. Supp.2d at 466. This

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association officials immune for acts undertaken in connection with disbarment proceedings).

Court has found that the doctrine of qualified immunity protects a government official if either (a) the official's action did not violate clearly established law, or (b) it was objectively reasonable for the official to believe that his or her action did not violate such law. *Anderson*, 317 F.3d at 197. Within the context of the doctrine, "clearly established" means that "(1) the law is defined with reasonable clarity, (2) the Supreme Court of the Second Circuit has recognized the right, and (3) a reasonable defendant would have understood from the existing law that [his or her] conduct was unlawful." *Id.*

Neither the Supreme Court nor this Court have recognized a constitutional right of an individual to have the government investigate an allegation of wrongdoing. *See Esposito*, 2008 WL 3523910 at *13. Likewise, neither the Supreme Court nor this Court have recognized a private right of action for any person for failure by a lawyer grievance entity to take disciplinary action against a lawyer. *See Application of Phillips*, 510 F.2d 126 (2d Cir. 1975).[6] Therefore,

[6] The Florida Supreme Court has also noted that Florida Bar disciplinary proceedings are not designed to vindicate the rights of private parties who retain the ability to seek redress through a civil action:

> Disciplinary proceedings against attorneys are instituted in the public interest and to preserve the purity of the courts. No private rights except those of the accused attorney are involved.

Bernstein and Lamont cannot demonstrate that they have a clearly established right regarding The Florida Bar disciplinary matters of which they complain. Moreover, the district court also dismissed the Amended Complaint as to Appellee Johnson because it does not allege that she engaged in any wrongful conduct. As such, the district court's application of the doctrine of qualified immunity to Appellee Johnson, and otherwise dismissing the Amended Complaint as to her, is not error.

III. THE CLAIMS AGAINST THE FLORIDA BAR APPELLEES ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Standard of Review

The application of a statute of limitations is a legal issue that this Court reviews *de novo*. *E.g.*, *Somoza v. New York Dep't of Educ.*, 538 F.3d 106 (2d Cir. 2008).

B. Discussion

Bernstein and Lamont allege direct violations of their Fifth and Fourteenth Amendment rights. Rather than dismiss the claims because of the availability of an action pursuant to 42 U.S.C. § 1983, the district court deemed the Amended

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Tyson v. The Florida Bar, 826 So. 2d 265, 268 (Fla. 2002). The foregoing principle is codified in Rule 3-7.4(i) of the Rules Regulating The Florida Bar that provides in pertinent part:

> The complaining witness is not a party to the disciplinary proceeding. *** The complaining witness shall have no right to appeal.

R. Regulating Fla. Bar 3-7.4(i).

Complaint to have been pled pursuant to section 1983. *Bernstein*, 591 F. Supp.2d at 459-60. The statute of limitations applicable to claims brought pursuant to section 1983 in New York is three years. *Patterson v. County of Oneida, New York*, 375 F.3d 206, 225 (2nd Cir. 2004).

Bernstein and Lamont filed this action on December 12, 2007. However, as found by the district court, all allegations in the Amended Complaint pertaining to The Florida Bar Appellees occurred from the spring of 2003 until the spring of 2004. *Bernstein*, 591 F. Supp.2d at 467; Am. Compl. ¶ 607. Therefore, because Bernstein and Lamont could only assert causes of action occurring before December 12, 2004, the claims pertaining to The Florida Bar Appellees are barred by the statute of limitations.

This is not a matter in which the doctrine of equitable tolling applies. This Court will apply this doctrine in section 1983 cases where "as a matter of fairness" a plaintiff has been "prevented in some extraordinary way from exercising his rights." *Pearl v. City of Long Beach*, 296 F.3d 76, 85 (2d Cir. 2002), *cert. denied*, 538 U.S. 922 (2003), *quoting Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) (equitable tolling doctrine is available only where a plaintiff "could show that it would have been impossible for a reasonably prudent person to learn" about his or her cause of action). In the case at bar, there is nothing in the Amended Complaint that could indicate that Bernstein or Lamont were not

cognizant of their cause of action or were in any way prevented from filing their claims against The Florida Bar Appellees so as to toll the statute of limitations. Rather, the allegations make it clear that Bernstein and Lamont were fully aware of The Florida Bar Appellees decisions regarding their grievance complaints by the spring of 2004. The district court correctly dismissed all claims against all The Florida Bar Appellees based on the statute of limitations.

IV. THE DISTRICT COURT DOES NOT HAVE PERSONAL JURISDICTION OVER THE FLORIDA BAR APPELLEES.

As stated by the district court, there were sufficient grounds for the dismissal of the Amended Complaint without reaching the issue of personal jurisdiction. *Bernstein,* 591 F. Supp.2d at 469. However, the district court noted it "likely cannot exercise jurisdiction over many of the defendants." *Id.* The Florida Bar Appellees are among those defendants over which the district court cannot exercise personal jurisdiction.

In a federal question case such as the one at bar, where the defendants reside outside the forum state, federal courts apply the forum state's personal jurisdiction rules. *See Sunward Elec., Inc. v. McDonald,* 362 F.3d 17, 24 (2d Cir. 2004). Here, all of The Florida Bar Appellees reside outside of New York, the forum state. Am. Compl. ¶¶ 81-88. Therefore, the issue of personal jurisdiction in this matter is governed by New York's long arm statute. *D.H. Blair & Co., Inc. v. Gottdiener,* 462 F.3d 95, 104 (2d Cir. 2006). This statute provides that a New York court may

exercise personal jurisdiction over any person who, or through an agent:

> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. § 302(a). Additionally, the cause of action in question must arise from one of these enumerated acts. *Id.* The test of whether a defendant "expects or should reasonably expect his act to have consequences within the State" within the purview of the New York long-arm statute is an objective one. *Kernan v. Kurz-Hastings, Inc.* 175 F.3d 236, 241 (2nd Cir. 1999).

The allegations raised by Bernstein and Lamont in the Amended Complaint pertain to grievances filed in Florida with The Florida Bar against three Florida attorneys that, according to Bernstein and Lamont, reside in Florida, and against a law firm having an office in Florida in which one of these attorneys works.

Amended Complaint at ¶¶ 27, 33, 34, 85. Bernstein and Lamont challenge The Florida Bar Appellees' decisions not to bring disciplinary proceedings in Florida pursuant to the grievances. Amended Complaint ¶¶ 544-607. In doing so, Bernstein and Lamont do not allege any acts on the part of The Florida Bar Appellees that would make them subject to New York's long-arm statute. Simply put, the allegations in the Amended Complaint with regard to The Florida Bar Appellees do not provide a basis for the district court in New York to have personal jurisdiction over The Florida Bar Appellees.

Furthermore, the record indicates that a summons was never issued for Joy Bartmon, Jerald Beer or Kelly Overstreet Johnson or that these Appellees were ever served with a summons or with a copy of the Complaint or Amended Complaint. *See* Docket Entries dated January 12, 2008 and January 23, 2008 pertaining to issuance of summons. Therefore, the district court's personal jurisdiction should not be extend to these individuals for this additional reason. *See Retail Software Servs., Inc. v. Lashlee,* 854 F.2d 18, 22-23 (2nd Cir. 1988) (before court can render valid personal judgment against nonresident defendants, due process requires that defendants receive notice through valid service of process); *Browne v. N.Y.S. Court Sys.,* 599 F. Supp. 36 (E.D.N.Y. 1984) (dismissing pro se plaintiff's complaint for lack of in personam jurisdiction where service of process was insufficient).

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to affirm the decision of the lower court with regard to The Florida Bar Appellees.

Dated: Tallahassee, Florida
March 26, 2009

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 5166 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and typestyle requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 SP3 in 14-point Times New Roman.

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ANTI-VIRUS CERTIFICATION

CASE NAME: Bernstein, et al. v. Appellate Division First Disciplinary Committee, et al.

DOCKET NO.: 08-4873-cv

I, M. Hope Keating, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to prosecases@ca2.uscourts.gov and that no viruses were detected. The document was scanned using McAfee VirusScan, version 8.5i, last updated March 25, 2009.

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M. Hope Keating

Date:_____

CERTIFICATE OF SERVICE

CASE NAME: Bernstein, et al. v. Appellate Division First Disciplinary Committee, et al.

DOCKET NO.: 08-4873-cv

M. HOPE KEATING, being duly sworn, deposes and states: I am over the age of 18 and an attorney in the law firm of Greenberg Traurig, P.A. I hereby certify that on the 26th day of March 2009, I served two written copies of the BRIEF OF APPELLEES THE FLORIDA BAR, JOHN ANTHONY BOGGS, KENNETH MARVIN, LORRAINE HOFFMANN, ERIC TURNER, JOY BARTMON, JERALD BEER, AND KELLY OVERSTREET JOHNSON via U.S. mail, and electronically mailed a PDF version of this brief, to the following named persons:

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STATE OF FLORIDA)
COUNTY OF LEON)
Sworn to and subscribed before me this 26th day of March 2009, by M. Hope Keating, who is personally known to me.

NOTARY SEAL

Notary: _____
Print Name: _____
Notary Public, State of Florida

My commission expires:

_____

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