

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, et al,
Plaintiffs

v.

KENNETH L. MILLER, et al,
Defendants

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Docket No. 2:12-cv-184

DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN, AND RESPONSE
UNLIMITED, INC.'S REPLY MEMORANDUM IN SUPPORT OF THEIR RENEWED
MOTION TO DISMISS IN LIGHT OF THE
U.S. SUPREME COURT'S FEBRUARY 25, 2014 DECISION IN WALDEN V. FIORE

Preliminary Statement

The Court should dismiss the claims against defendants Zodhiates, Hyden and Response Unlimited Inc. for lack of personal jurisdiction. It remains a fundamental tenet of the Due Process Clause that defendants should not be forced to litigate in a distant forum unless personal jurisdiction exists over them.

Plaintiffs' argument that the renewed motion to dismiss is too early exalts form over substance, and would only serve to delay the Court's proper administration of this case. Rule 12 does not preclude defendants from seeking dismissal because the plaintiffs are between various drafts of their complaints.

Plaintiffs fail to identify any allegations in the current iteration of the complaint, or in any affidavits that establish a basis for personal jurisdiction. Instead, Plaintiffs defend the motion to

dismiss by amending their Second Amended Complaint in their opposition to the Renewed Motion to Dismiss. Courts have repeatedly held that this is inappropriate.

Discussion

I. THERE ARE NO PROCEDURAL BARRIERS TO HOLDING THAT PERSONAL JURISDICTION DOES NOT EXIST OVER DEFENDANTS.

Rule 12 of the Federal Rules of Civil Procedure authorizes a motion to dismiss based on a lack of personal jurisdiction. Fed. R. Civ. P. 12(b). Rule 12 provides that “a motion asserting any of [the grounds set forth in Rule 12(b)] must be made before pleading if a responsive pleading is allowed.” *Id.* Rule 12 does not set a time before which a party can file a motion to dismiss. Nor do Plaintiffs cite one.

Plaintiffs concede that Defendants may bring a motion to dismiss based on jurisdiction after the Court grants the Motion to Amend. (Opp’n at 2.) But there is no reason to delay the resolution of this motion, as the Court should resolve questions of personal jurisdiction first. *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 221 (2d Cir. 1963). As the Supreme Court recently reaffirmed, “Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties.” *Walden v. Fiore*, 134 S.Ct. 1115, 188 L. Ed. 2d 12, 20 (2014). The infringement of liberty occurs when non-resident defendants are forced to defend in forums with which they have no connection. “The fairness function [of the Due Process Clause] protects defendants from the burdens of litigating in a distant forum. . .” *See Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 23 (2d Cir. 1988). Delaying resolution of this issue just increases the costs and burdens of defending in a distant forum.

II. THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER DEFENDANTS.

Plaintiffs argue that *Walden v. Fiore* is distinguishable. Yet, the “facts” that Plaintiffs claim distinguish this case from *Walden* are not found anywhere in the Amended Complaint or the Second Amended Complaint. In their opposition, Plaintiffs state that “Defendants intentionally interfered with Vermont custody and visitation order.” (Opp’n at 3.) Plaintiffs also state that “Defendants intentionally interfered with the contact Plaintiff Jenkins should have had with her daughter, Isabella Miller-Jenkins, in Vermont.” (Opp’n at 3.) These “facts” are not even alleged in a conclusory fashion in the Second Amended Complaint, let alone with a factual basis sufficient to satisfy the federal pleading standards. “[P]laintiffs cannot amend their complaint through a legal memorandum.” *Goplen v. 51job, Inc.*, 453 F. Supp. 2d 759, 765 n.4 (S.D.N.Y. 2006).

Plaintiffs also invite the Court to commit the same errors that the Ninth Circuit committed in *Walden*. Plaintiffs argue that defendants “intentionally aimed their tortious conduct at Plaintiff Jenkins *in Vermont*.” (Opp’n at 3). Plaintiffs also argue that “Plaintiff Jenkins resided in Vermont during the entire relevant time period, and Defendants were aware of it.” (Opp’n at 3).

As Defendants stated in the Renewed Motion to Dismiss, *Walden* Court was clear that these rationales for asserting personal jurisdiction are insufficient. “[T]he relationship must arise out of contacts that the ‘defendant himself’ creates with the forum State.” *Walden*, 188 L.Ed.2d at 20. The Supreme Court has “consistently rejected attempts to satisfy the defendant-focused ‘minimum contacts’ inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.” *Id.* The Court also drew a distinction between the forum State and a resident of that State. “[O]ur minimum contacts analysis looks to the defendant’s contacts with the forum

State itself, not the defendant's contacts with persons who reside there." *Id.* The Court again noted that the plaintiff is an insufficient connection between the defendant and the forum State to subject the defendant to jurisdiction. "But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 21. The "defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 21. Moreover, Plaintiffs do not deny that the facts that the *Walden* Court found determinative are present here. The activity of defendants all occurred outside of Vermont. Zodhiaties and Hyden "never traveled to, conducted activities within, contacted anyone in, or sent anything to anyone to" Vermont. *Id.* at 23. Because of Defendants' inability to point to any facts showing a connection between the forum state and Defendants, this Court should dismiss the case for lack of personal jurisdiction.

Defendants' citation to *State v. Doyen*, 165 Vt. 43, 46 (1996) and *State v. Wootten*, 170 Vt. 485 (2000) does not aid them. Both cases relied upon an earlier United States Supreme Court case, *Strassheim v. Daily*, 221 U.S. 280 (1911). *Daily* found jurisdiction when the defendant had been physically present in and committed overt acts in the state seeking to assert jurisdiction over him. *Id.* at 283. The Court held that a defendant need not do every act within in the state as long as some act was done in the state: "On the other hand, however, we think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before." *Id.* at 285. Thus, *Daily* required an actual physical presence and action within the state.

The Vermont cases also noted that each defendant had actually been present in the state. In *Doyen*, the defendant “obtained custody of his daughter *in Vermont* on June 30, 1994.” 165 Vt. at 45. “[S]ometime after June 30, 1994, defendant left Vermont with the child. . .” *Id.* In *Wootten*, the “defendant removed the children from Vermont, thereby committing an act within Vermont’s territorial borders.” 170 Vt. at 488. Here, there was no overt act by Defendants in the State of Vermont. Thus, *Doyen*, *Wootten*, and *Daily* cannot support the assertion of jurisdiction over Defendants.¹ The allegations of the Amended and Second Amended Complaints fail to make out even a prima facie case against Defendants. They should be dismissed.

¹ *Haley v. City of Akron* is also of little help to Plaintiffs. In *Haley*, the Court dismissed defendants that had more significant contacts than the Defendants here. *See Haley v. City of Akron*, 2104 U.S. Dist. LEXIS 26187, *22, *26 (N.D. Ohio Feb. 27, 2014). Thus, *Haley* actually supports Defendants’ position here. Moreover, several cases decided after *Walden* have held that defendants with more contacts than Defendants here are not subject to personal jurisdiction. *See, e.g., Cavanaugh v. Norton*, No. 3:13-cv-1162, 2014 U.S. Dist. LEXIS 32701 (March 13, 2014 M.D. Pa.); *Rich v. Housman*, No. 3:13-1979, 2014 U.S. Dist. LEXIS 28770 (March 6, 2014 M.D. Pa.); *High Tech. Pet Prods. v. Shenzhen Jianfeng Elec. Pet Prod. Co.*, No. 1:13-cv-00242, 2014 U.S. Dist. LEXIS 29772 (March 6, 2014 E.D. Ca.).

Conclusion

The decision of the United States Supreme Court in *Walden v. Fiore* makes clear that the allegations set forth in Plaintiff's Second Amended Complaint do not support personal jurisdiction over Defendants Philip Zodhiates, Victoria Hyden, or Response Unlimited, Inc. The case against them should be dismissed.

Dated: Burlington, Vermont
March 26, 2014

/s/ Matthew B. Byrne

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2014, I caused Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.’s Reply Memorandum in Support of Their Renewed Motion to Dismiss in Light of the U.S. Supreme Court’s February 25, 2014 Decision in *Walden v. Fiore* to be served through the CM/ECF system on Robert G. Cain, Esq., rcain@pfcclaw.com; Thomas E. McCormick, Esq., tem@mc-fitz.com; Frank H. Langrock, Esq., flangrock@langrock.com; Brooks G. McArthur, Esq., bmcArthur@jarvismcarthur.com; Joshua M. Autry, Esq., jmautry@dennisboylelaw.com; Ritchie E. Berger, Esq., rberger@dinse.com; Lisa B. Shelkrot, Esq., lshelkrot@langrock.com; Sarah Star, Esq., srs@sarahstarlaw.com; Sophie E. Zdatny, Esq., szdatny@dinse.com; Peggy J. Schmitz, Esq., schmitz@ccj.com; and Steven J. Shrock, Esq., shrock@ccj.com.

Dated: Burlington, Vermont
March 26, 2014

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