

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, ET AL.,
Plaintiffs,

v.

KENNETH L. MILLER, ET AL.,
Defendants.

Docket No. 2:12-cv-00184-wks

PLAINTIFFS' COMBINED RESPONSE TO MOTIONS TO DISMISS FILED BY
RESPONSE UNLIMITED, INC., VICTORIA HYDEN, PHILIP ZODHIATES AND
LINDA M. WALL

NOW COME Plaintiffs Janet Jenkins, et al., by and through undersigned counsel Sarah R. Star, Esq., and Langrock Sperry & Wool, LLP, and respond in opposition to the Motions to Dismiss the Second Amended Complaint filed by Defendant Linda M. Wall and by Defendants Response Unlimited, Inc., Victoria Hyden and Philip Zodhiates. Because the arguments raised in the two Motions largely overlap, Plaintiffs offer a combined response.

The issues raised by Defendants were already adjudicated by the Court in its order dated October 24, 2013, granting in part and denying in part Defendants' first motions to dismiss. Many of the arguments raised here were previously raised by Defendants and rejected by the Court. To the extent the Court previously granted Defendants' motions to dismiss with leave to amend, the Court provided very clear guidance to Plaintiffs on how to amend the complaint, which Plaintiffs have now done. Thus, Defendants' Motions to Dismiss should be denied.

MEMORANDUM

I. STANDARD OF REVIEW

Under Rule 12(b)(6), the Court must accept as true all factual allegations in a complaint, drawing all reasonable inferences in the plaintiff's favor. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990) (the court assumes the truth of the plaintiff's factual allegations for purposes of a Rule 12(b)(6) motion). Ultimately, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (brackets added; citation omitted).

II. THE COURT ALREADY CONCLUDED THAT PLAINTIFFS STATE A CLAIM FOR THE INTENTIONAL TORT OF KIDNAPPING.

In its Order dated October 24, 2013, this Court denied Defendants' motions to dismiss Count One, the claim for intentional kidnapping, also characterized as intentional interference with custodial rights. *See* Order, Dkt. #115, p. 41-42 ("Defendants' motions to dismiss Count One for failure to state a claim are therefore denied. Count One may proceed as a claim of intentional interference with the custody of a minor child."). While Defendants may disagree with this Court's ruling, attempts to re-litigate this issue must be denied.

The law of the case doctrine forecloses Defendants' arguments at this stage of the proceedings. *See Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964) ("where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again."). The major grounds justifying reconsideration are

“an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Virgin Atlantic Airways v. Nat. Mediation Bd.*, 956 F. 2d 1245, 1255 (2d Cir. 1992) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790). None of these grounds have been asserted by the Defendants in this case – and none of these grounds exist – so the motions should be denied in their entirety as to Count One.

When this case finally reaches trial, Defendants will undoubtedly raise arguments against Plaintiffs’ custodial interference claim on the merits. However, at this stage, the Court has already ruled that Plaintiffs’ claim survives a Rule 12(b)(6) challenge. Defendants’ new motions are a bald attempt to seek reconsideration in the absence of any justifying grounds. These efforts are calculated to delay this case and to force Plaintiffs to spend additional time and resources re-litigating the same battles again. Unfortunately, this also imposes a great burden on this Court.

In addition to the fact that Defendants’ motion attempts to re-litigate settled issues and to delay the progress of this case, it also fails on its substance. With regard to the Defendants other than Lisa Miller, Plaintiffs have alleged both conspiracy and substantive counts of custodial interference. As this Court has already ruled, Plaintiffs have stated a substantive claim for custodial interference. This Court has also already ruled that the allegations of conspiracy, while vigorously denied by the Defendants, are far from vague or conclusory. Dkt # 115, p. 55.

The Revised Second Amended Complaint (“RSAC”) clearly states that the object of the conspiracy was (and still is) to abduct Isabella and to prevent her from having contact with her mother, Janet Jenkins, to violate the Plaintiffs’ civil rights, and to remove Isabella from

the jurisdiction of the Vermont courts. The RSAC clearly alleges that at the time she was removed from the United States, Isabella was the subject of a visitation order, and that Lisa Miller's parental rights were not exclusive. RSAC at ¶¶ 16, 53. Defendants RUL, Zodhiates, and Hyden clearly knew this, as they are alleged to have been in contact with Lisa Miller's attorneys on the very day of the kidnapping. *Id.* at ¶ 49.

Where the "thing done" is unlawful – that is, the kidnapping of Isabella – there is no requirement that the specific acts in furtherance of the conspiracy be unlawful in and of themselves. *See Davis v. Vile*, No. 2002-465, 2003 WL 25746021, at *3 (Vt. Sup. Ct. 2003) (entry order) ("In *Boutwell*, this Court stated that the grounds of recovery in a civil suit alleging conspiracy differ from criminal conspiracy in that a 'civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement,' and 'the thing done be something unlawful in itself.'") (quoting *Boutwell v. Marr*, 71 Vt. 1, 42 A. 607 (1899)). The unlawful "thing done" here is the kidnapping, which is indisputably illegal and therefore satisfies this requirement.

Moreover, acts that constitute aiding and abetting a federal felony cannot be construed as "legal." The RSAC clearly alleges that Philip Zodhiates and Kenneth Miller engaged in a scheme to launder money and use the United States mail in furtherance of their scheme – both of which are unlawful acts. *Id.* at ¶ 45. The federal conviction of Kenneth Miller and the pending indictment against Zodhiates are strong evidence as well that the kidnapping actions were unlawful.

III. THE COURT GRANTED LEAVE TO AMEND THE CLAIM FOR CONSPIRACY TO VIOLATE CIVIL RIGHTS, AND PLAINTIFFS PROPERLY AMENDED TO COMPLY WITH THE COURT'S GUIDANCE.

In its Order on the first motions to dismiss, Dkt. # 115, the Court concluded that Plaintiffs could not state a claim under 42 U.S.C. § 1985(3) grounded in gender-based

animus, but they could state a claim for animus against same-sex couples. *See* Dkt. #115, p. 3-4, 53-70. The Court provided an in-depth analysis of the legislative history and case law regarding § 1985(3) and concluded that the *only* reason the claim failed initially was that it was “cast as a conspiracy to violate Plaintiffs’ civil rights on the basis of gender.” *Id.*, p. 60. In fact, the Court devoted more than seventeen pages of its decision to a careful analysis of why Plaintiffs’ claim under § 1985(3) could go forward with the simple amendment it laid out. The Court concluded that “[t]he factual allegations of the Amended Complaint however can be read to suggest that the defendants harbored invidiously discriminatory animus against Jenkins because of her sexual orientation.” *Id.*, p. 61.

Plaintiffs carefully amended their Complaint to follow the Court’s guidance. *Compare id.*, p. 69-70 (“Plaintiffs may move to amend the Amended Complaint to allege a conspiracy to prevent or hinder State authorities from securing equal protection of the laws to same-sex couples, based on invidiously discriminatory animus against gays and lesbians.”) *with* RSAC at ¶ 56 (Defendants conspired “to violate the civil rights of Janet Jenkins and Isabella Miller-Jenkins, based on discriminatory animus against same-sex couples and against Janet Jenkins due to sexual orientation, and to prevent the courts of Vermont and Virginia from securing to them equal protection of the law, and to prevent or hinder State authorities from securing equal protection of the law to same-sex couples”).

Therefore, Defendants are actually seeking reconsideration of the Court’s earlier Order, which must be denied because Defendants cannot establish any of the limited grounds for reconsideration. *See, e.g., Virgin Atlantic*, 956 F. 2d at 1255 (setting forth limited bases for reconsideration). Given the attention the Court paid to this claim previously, upon careful

weighing Plaintiffs' amended allegations against the limited standard of Rule 12(b)(6), the claim must be permitted to go forward.

Although the law of the case doctrine would permit this Court simply to reject Defendants' arguments, Plaintiffs nonetheless address Defendants' new arguments on the merits. To the extent Defendants' "free speech" arguments are raised for the first time in these motions, the Court should deem them waived for failure to raise them in the first round of motions to dismiss. *See, e.g., Annunziato v. Collecto, Inc.*, No. 12-CV-3609 ADS AKT, 2014 WL 1410255, at *2 (E.D.N.Y. Apr. 12, 2014) ("Of importance, a motion for reconsideration is not an opportunity for litigants to reargue their previous positions or present new or alternative theories that they failed to set forth in connection with the underlying motion.").

A. Section 1985(3) is Not Overbroad As Applied In This Case.

Section 1985 is not overbroad when applied to the facts of this case, and Defendants are wrong that Plaintiffs' §1985 claim is directed at protected speech. While it is true that Plaintiffs cite many threatening statements made by the Defendants and others with whom they are associated/employed, Plaintiffs also allege specific actions Defendants took in furtherance of the §1985 conspiracy. These statements are necessary to show the context of this case, and the state of mind with which Defendants acted – that is, with animus toward same-sex families – as required by the statute.

Their conduct as alleged in the RSAC is far from mere fundraising in support of a general cause. Defendants raised and laundered money for Lisa Miller, specifically to enable her ongoing kidnapping of her daughter. *See* RSAC at ¶ 32. Hyden facilitated Isabella's removal from the United States by helping to arrange transportation from Lynchburg, where Lisa Miller abandoned her car. *Id.* at ¶ 41. Zodiates provided transportation to the Canadian

border, and facilitated delivery of supplies and money to Lisa Miller in Nicaragua. *Id.* at ¶ 36. Defendant Wall, having made an agreement with Lisa Miller to kidnap Isabella, did carry out acts in furtherance of the conspiracy by collecting donations for Miller after January 1, 2010, and by interfering with law enforcement efforts to locate her. *Id.* at ¶ 21.

B. Section 1985(3) is Not Vague As Applied To Plaintiffs' Allegations.

Section 1985 is far from vague as applied to Defendants' alleged conduct. The Defendants' focus on the term "hinder" is misplaced. By conspiring to remove Isabella from her home country, and beyond the jurisdiction of the Vermont Courts, Defendants have not only "hindered" the State proceedings, they have brought them entirely to a halt, effectively preventing the courts from fulfilling their function of ensuring the parent-child contact already determined to be in Isabella's best interests. As soon as it became known that Isabella was missing, the Rutland Family Court issued an arrest warrant for Lisa Miller. However, the family court can take no further action until Lisa Miller and Isabella are located.

Notably, the fact that Miller and Isabella were missing did not prevent Miller's lawyers from filing more appeals on her behalf, claiming they had "advanced instructions," but the final outcome of the appeals is still dependent on locating and returning Miller and Isabella to Vermont. The Vermont Supreme Court stated:

Because this Court desires to minimize any further trauma to IMJ, we anticipate her best interests will be met only by way of a specific plan to ensure a successful and safe transition. We therefore direct that, at the time that IMJ is located and the transfer of custody occurs, the family court shall (1) hold a hearing to reevaluate Janet's current relationship with IMJ and establish a plan for the transfer of physical custody to Janet; and (2) set a visitation schedule for Lisa with IMJ, if feasible. In all of these matters, the court will continue to keep IMJ's best interests paramount.

Miller-Jenkins v. Miller-Jenkins, 189 Vt. 518, 527 (2010).

As a result of Defendants' unlawful removal of Isabella from the United States, and her continued detention outside of her home state and country, the Vermont Courts' rulings

cannot be implemented, and Isabella's and Janet Jenkins' rights continue to be violated. Hence, in addition to "hindering," Defendants also have "prevented" the State from securing to Plaintiffs equal protection of the laws. Defendants' characterization of their activities as akin to free speech or peaceful demonstration which merely cause inconvenience, is ludicrous. They have removed a child from her home, from her parent, and from the State charged with ensuring her constitutional rights to equal protection under the laws. That Defendants and those with whom they associate characterize kidnapping and conspiracy to kidnap as "civil disobedience" does not make it so. Plaintiffs have never alleged that Defendants' actions were civil disobedience. Rather, they have only recounted Defendants' own flawed characterization. RSAC at ¶ 40.

C. Plaintiffs Allege Specific Illegal Actions Taken by Each Defendant.

Despite Defendants' contention, application of §1985(3) in this case does not seek to punish mere advocacy of illegality. As stated above, Plaintiffs included in the RSAC numerous allegations of Defendant's actions, and their advocacy of illegality, to show the context and animus with which they acted. Those actions include: entering into an agreement to kidnap a child; driving a minor child, under cover of night and in disguise, to the Canadian border; soliciting funds to be used to prolong her detention outside the United States; and laundering money through a coconspirator's greenhouse business to further these crimes and cover them up. There is simply no way these actions can be described as passive resistance.

Hyden was not only named as a Defendant because she solicited funds, although her solicitation of funds is what led Jenkins ultimately to learn about Hyden's family's scheme through disclosures made by a co-worker. In addition to soliciting funds to further the kidnapping, Hyden played a role in facilitating Isabella's removal from Lynchburg the day before Hyden's parents drove her to the Canadian border. RSAC at ¶ 31. At that time, Hyden

was employed by the very lawyers who were representing Lisa Miller in her custody case, and she was likely fully aware of Jenkins' parental rights and her struggle to maintain her relationship with her daughter. *Id.* at ¶ 36. Plaintiffs have pleaded all these facts sufficiently in the Second Amended Complaint. Defendants' argument should be rejected.

D. Plaintiffs Have Adequately Alleged Animus.

Plaintiffs have alleged that Defendants conspired to kidnap Isabella based on a conviction that Jenkins was unworthy to parent her daughter because of her sexual orientation, which sufficiently establishes the necessary allegation of animus and ill will towards Jenkins. So do the allegations that Defendants deliberately traumatized Jenkins, causing her to be frantic with worry while not knowing whether her child is living or under what conditions, depriving her of her civil rights, and interfering with her relationship with her daughter. Defendants have removed a child from her parent, her home, her friends, her relatives, and her country. RSAC at ¶ 60. They have done so not because of any friendship for Miller – indeed some Defendants apparently did not even seem to know Miller very well – but simply because of who Jenkins is as a gay woman. *Id.* at ¶ 24. These allegations clearly suffice to demonstrate animus at this early stage.

In addition to possessing the requisite discriminatory animus toward Plaintiffs, Defendants are also alleged to have taken sufficient steps to prevent the lawful functioning of not only two state court systems but of international legal processes as well. The RSAC details Jenkins' actions to protect her relationship with Isabella. RSAC at ¶¶ 14, 15, 16, 18. Jenkins waged court battles across two states for the better part of five years, including repeated appeals, and was awarded sanctions, fees, and, most importantly, legal custody of her daughter. Extensive court resources were devoted and expended in these efforts. Defendants' conspiracy defeated Jenkins' efforts, undermined the lawful orders of the

Vermont and Virginia courts, and effectively prevented these Courts from taking any further action to enforce the law. In addition, the federal government has investigated Defendants for several years, bringing criminal charges against four of them. *See* Dkt. # 172, Motion to Stay. Jenkins' efforts to secure her own legal rights and those of Isabella were foiled by Defendants' infiltration of the Beachy Amish Mennonite Brotherhood, through which they accessed a network of brethren in the United States, Canada and Nicaragua. By disguising Lisa Miller and Isabella and by arranging travel through other members of the Brotherhood, Defendants avoided possible detection at the Canadian border and on international flights.

Defendants knew the obstacles they faced in carrying out their scheme. Nevertheless, they managed to defeat the numerous legal systems in place to prevent international child abduction, including international treaties, by intentionally selecting a country that does not have an extradition agreement with the United States. The law cannot require more force than the intentional kidnapping of a child. Plaintiffs' allegations are certainly sufficient at this stage of the litigation.

E. Defendants Were Properly On Notice That Their Conduct Was Unlawful.

Defendants argue that retroactive application of the recent advance in the law concerning sexual orientation and same-sex couples makes enforcing § 1985(3) against them "unfair." *See* RUL's Motion, p. 19. However, it is well-established that Supreme Court constitutional decisions have retroactive effect. "[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505, 507 (1973). The courts, and in particular the Supreme Court, "fulfill [their] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). Retroactivity to pending cases is necessary for orderly and consistent

judicial review. *See Williams v. United States*, 401 U.S. 667, 679 (1971) (“Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.”).

Defendants cite no applicable exception to this well-settled rule of judicial retroactivity. Instead, their citations to unrelated legal principles offer no support. Qualified immunity in a 42 U.S.C. § 1983 claim is an entirely different principle. Importantly, qualified immunity is used to protect government officials from liability even when they committed a wrongful act. There is no such protection for ordinary individuals, nor should there be. Likewise, Defendants’ reference to the impropriety of retroactive *legislation* is inapposite. Here, the Supreme Court’s *judicial* determination should be applied retrospectively, which is, in fact, a tenet of orderly adjudication, as addressed above.

Further, under the circumstances of the instant case, it is clear that Defendants knew their actions were unlawful at the time the acts were undertaken. Indeed, Defendants’ own arguments acknowledge that they were acting in civil disobedience to laws they knew were being enacted to protect the rights of same-sex families. Dkt # 170 at 9. One need only look at the secrecy with which Defendants acted to understand that they were properly on notice that their conduct was illegal. Arranging transportation away from Lynchburg through Lisa Miller’s father; abandoning Miller’s car and her cell phone; going in disguise, under cover of night; arranging for third parties to purchase plane tickets – all such conduct shows that any allegedly retroactive application of legal rights for same-sex families cannot possibly

prejudice the Defendants because it would not have changed their intentionally unlawful conduct.

The notion that, if Defendants had a better understanding of the law, they would have “conformed their conduct accordingly” (Dkt. # 170 at 21, *citing Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)), is patently absurd, especially given that their conduct was unlawful not only under § 1985, but was also a violation of the International Prevention of Parental Kidnapping Act, and other provisions of state and federal law. Therefore, there is no unfairness in the Court’s allowing a claim that “defendants harbored invidiously discriminatory animus against Jenkins because of her sexual orientation.” Order, p. 61.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Defendants’ Motions to Dismiss.

DATED at Middlebury, Vermont this 8th day of December, 2014.

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UNITED STATES DISTRICT COURT
FOR THE
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JANET JENKINS, FOR HERSELF AND
AS NEXT FRIEND OF ISABELLA
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KENNETH L. MILLER, ET AL,
Defendant.

CERTIFICATE OF SERVICE

I, Katherine B. Kramer, Esq., counsel for Plaintiff Janet Jenkins, for herself and as next friend of Isabella Miller-Jenkins, a/k/a Isabella Miller, hereby certify that I caused the foregoing *Plaintiffs' Combined Response to Motions to Dismiss Filed by Response Unlimited, Inc., Victoria Hyden, Philip Zodhiates and Linda M. Wall* to be filed with the Court using the CM/ECF electronic filing system, which will provide electronic notification of such filing(s) to Counsel of Record for the Defendants, and to all other registered users.

Dated at Middlebury, Vermont, this 8th day of December, 2014.

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