

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, for herself and as
next friend of ISABELLA MILLER-
JENKINS, A/K/A ISABELLA
MILLER,

Plaintiffs

v.

Civil No. 2:12-cv-184-wks

KENNETH L. MILLER, LISA ANN
MILLER, F/K/A LISA MILLER-
JENKINS, TIMOTHY D. MILLER,
RESPONSE UNLIMITED, INC., for itself
and as an agent of LIBERTY COUNSEL,
LLC, PHILIP ZODHIATES, individually
and as agent for RESPONSE UNLIMITED,
INC., VICTORIA HYDEN, f/k/a
VICTORIA ZODHIATES, individually
and as agent for both RESPONSE
UNLIMITED, INC., LINDA M. WALL,
MATHEW D. STAVAR, individually and
as agent for LIBERTY COUNSEL, LLC,
RENA M. LINDEVALDSEN, individually
and as agent for LIBERTY COUNSEL,
LLC, and LIBERTY COUNSEL, LLC,

Defendants

**DEFENDANT TIMOTHY D. MILLER’S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION AND
INSUFFICIENT SERVICE OF PROCESS**

Defendant, Timothy D. Miller, by and through his attorneys, Wadleigh, Starr & Peters, P.L.L.C., moves to dismiss the Complaint for lack of personal jurisdiction and insufficient service of process, in accordance with Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5).

1. Timothy D. Miller (“Timo”) was at all relevant times a resident of Nicaragua, Tennessee, and now Pennsylvania.

2. His only contacts with Vermont are his two appearances in a criminal matter that has since been dismissed.

3. Those contacts do not constitute sufficient minimum contacts with Vermont to justify an assertion of personal jurisdiction over him.

4. Furthermore, Plaintiff failed to effectuate service upon Timo in the manner prescribed in this Court’s Order authorizing alternative service.

5. Because the service of process upon Timo was deficient and because this Court’s exercise of personal jurisdiction over Timo would not comport with constitutional principles, the case against him must be dismissed.

6. This Motion is supported by the annexed Memorandum of Law. *See* L.R. 7(a)(2). Because this is a dispositive motion, Plaintiffs’ assent was not sought. *See* L.R. 7(a)(7).

WHEREFORE, Defendant, Timothy D. Miller, respectfully requests that this Honorable Court:

- A. DISMISS the Complaint; and
- B. GRANT such other relief as may be just and necessary.

Respectfully submitted,
Timothy D. Miller
By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: October 1, 2018

By /S/ Michael J. Tierney
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Defendants

**DEFENDANT TIMOTHY D. MILLER’S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION AND
INSUFFICIENT SERVICE OF PROCESS**

Plaintiff’s claims against Defendant, Timothy D. Miller (“Timo”), must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(5) because this Court’s exercise of personal jurisdiction over Timo does not comport with constitutional due process principles and the service of process upon him was deficient.

FACTUAL AND PROCEDURAL BACKGROUND

Timo, a Beachy Amish Mennonite pastor, has been a resident of Managua, Nicaragua; Crossville, Tennessee; and, currently, Denver, Pennsylvania.¹ Rev'd. Second Amended Complaint ("RSAC") ¶9; Ex. 1, Affidavit of Timothy Miller ¶1. Plaintiff argues that Timo and Co-Defendants conspired with Co-Defendant Lisa Miller to kidnap Isabella Miller-Jenkins, aided and abetted Lisa Miller in kidnapping Isabella, and conspired with Lisa Miller to violate Plaintiff's civil rights. RSAC ¶¶65, 67. Specifically, Plaintiff's factual allegations, as they pertain to Timo's conduct, are as follows:

1. Kenneth Miller instructed Timo to purchase planet tickets from Canada to Nicaragua for Lisa Miller and Isabella, who had been living in or around Lynchburg, Virginia.² RSAC ¶24, 38.
2. Kenneth Miller later reimbursed Timo for those tickets. RSAC ¶38.
3. When Lisa Miller arrived in Nicaragua, Timo met her. RSAC ¶38.
4. Lisa Miller worked for a time at Timo's home in Managua. RSAC ¶57.
5. At some point in 2009, Andrew Yoder met Lisa Miller in Nicaragua through Timo. RSAC ¶56.

¹ Given the standard for a motion to dismiss, this memorandum of law and motion to dismiss do not focus upon factual disputes and presume, solely for the purposes of the motion, that the facts as pled in the Second Amended Complaint are true. Defendant expressly reserves the right to challenge at a later date the facts alleged in the Revised Second Amended Complaint.

² Plaintiff's allegation that the purchase "was done anonymously, and in such a way as to avoid detection in a clear effort to avoid the September visit, and the anticipated transfer of custody," RSAC ¶38, is an "argumentative inference[]" that this Court should disregard, *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 673 (2d Cir. 2013).

6. In November 2009, Philip Zodiates arranged for his son's school teacher to deliver two bags of Lisa Miller's personal belongings to Timo in Nicaragua. RSAC ¶45.
7. Kenneth Miller called Timo on November 20, 2009, the day that Plaintiff was awarded custody of Isabella. RSAC ¶48.
8. Approximately six months later, in May 2010, Kenneth Miller gave Andrew Yoder a check to cash so that Yoder could transfer cash to Timo in Nicaragua. RSAC ¶56. Yoder "believed" that the "cash was related to Lisa Miller." *Id.*

In April 2011, Timo was arrested for aiding and abetting the kidnapping of Isabella. RSAC ¶57. He personally appeared twice in Vermont to respond to those charges, which were dismissed in exchange for Timo's agreement to testify against Kenneth Miller. *Id.*; Ex. 1 ¶¶4-5. Timo was unavailable to testify in person due to a family issue, so he was later charged in the Western District of New York for a violation of Title 18, United States Code, Section 371. Ex. 1 ¶6.

This lawsuit was filed on August 14, 2012. ECF 1. On December 16, 2014, Plaintiff moved for alternate service upon Timo "through service on his domestic counsel, Jeffrey Conrad, Esq., Clymer Musser & Conrad, P.C., 408 W. Chestnut St., Lancaster, PA 17603." ECF 178, p. 3. This Court granted the motion "as unopposed" on March 6, 2015. ECF 183. On April 9, 2015, Plaintiff filed an Affidavit of Service indicating that Attorney Conrad's secretary, Kathy Amaro, had been served on March 30, 2015. ECF 193, p. 3.

STANDARD OF REVIEW

"In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 673 (2d Cir. 2013) (quotation omitted). "This prima facie showing must include an

avertment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant.” *Id.* (quotation omitted). “In determining whether a plaintiff has met this burden, [the court] will not draw argumentative inferences in the plaintiff’s favor, nor . . . accept as true a legal conclusion couched as a factual allegation.” *Id.* (quotations and citations omitted). Likewise, “[o]n a Rule 12(b)(5) motion to dismiss [for insufficient service of process], the plaintiff bears the burden of establishing that service was sufficient.” *Khan v. Khan*, 360 F. App’x 202, 203 (2d Cir. 2010)

ARGUMENT

Personal jurisdiction may not be lawfully exercised over Timo in Vermont because the exercise of personal jurisdiction over him does not comport with constitutional due process principles and because Plaintiff’s service of process upon him was not executed properly.

To exercise personal jurisdiction lawfully, three requirements must be met. First, the plaintiff’s service of process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective. Third, the exercise of personal jurisdiction must comport with constitutional due process principles.

Waldman v. Palestine Liberation Org., 835 F.3d 317, 327 (2d Cir. 2016), *cert. denied sub nom. Sokolow v. Palestine Liberation Org.*, 138 S. Ct. 1438 (2018) (citations, quotation, and ellipsis omitted). Because Vermont’s long-arm statute “reflects a clear policy to assert jurisdiction over individual defendants to the full extent permitted by the Due Process Clause,” the analysis for the second and third requirements is the same. *Metro. Life Ins. Co. v. Roberston-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996) (quotation omitted).

Here, Plaintiff cannot make a prima facie showing that personal jurisdiction exists over Timo. First, Timo does not have sufficient minimum contacts with the state of Vermont. Second,

even after this Court authorized alternate service of process upon Timo, Plaintiff did not comply with the manner of service this Court prescribed.

1. Timo does not have sufficient minimum contacts with Vermont to justify this Court's exercise of personal jurisdiction over him

“Constitutional due process assures that an individual will only be subjected to the jurisdiction of a court where the maintenance of a lawsuit does not offend ‘traditional notions of fair play and substantial justice.’” *Waldman*, 835 F.3d at 328 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). “As a general rule, the exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (quotation omitted).

There are two types of personal jurisdiction: specific and general. “A court may assert general personal jurisdiction over a foreign defendant to hear any and all claims against that defendant only when the defendant's affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State.” *Waldman*, 835 F.3d at 331 (quotations and brackets omitted). “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

The Plaintiff alleges that Timo was residing in Nicaragua and Tennessee. RSAC ¶9. He is now residing in Pennsylvania. Ex. 1, ¶1. Plaintiff does not allege that he now resides, or has ever resided, in Vermont. *See* RSAC ¶9. In fact, he has never lived in Vermont, owned or leased property in Vermont, worked in Vermont, conducted any business in Vermont, paid taxes in Vermont, or even voluntarily visited Vermont. Ex. 1 ¶3. And the only contacts Plaintiff has alleged that Timo has with Vermont are his two appearances in Vermont in relationship to a

criminal case against him that was ultimately dismissed. RSAC ¶¶9, 57; Ex. 1, ¶5. Those brief appearances do not render him “essentially at home” in Vermont; thus, this Court lacks general personal jurisdiction over him. *See Waldman*, 835 F.3d at 331 (quotation omitted).

Specific jurisdiction, on the other hand, “exists when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum” *Metro. Life Ins. Co.*, 84 F.3d at 567–68 (quotation omitted). “The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Walden v. Fiore*, 571 U.S. 277, 283–84 (2014) (quotations omitted). “[T]he relationship must arise out of contacts that the defendant *himself* creates with the forum State.” *Id.* at 284 (quotation omitted) (emphasis in original).

Plaintiff’s alleged injury does not, however, arise from Timo’s two fleeting contacts with Vermont. And, while personal jurisdiction “properly exists where the defendant took intentional, and allegedly tortious, actions expressly aimed at the forum[,]” *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013) (quotations and ellipsis omitted), Plaintiff has made no factual allegations that Timo aimed his conduct at Vermont. *See generally*, RSAC ¶¶18-63. Instead, as Plaintiff’s factual allegations make clear, the claimed injury arises from Timo’s alleged conduct that took place in Nicaragua and was aimed at Nicaragua: buying plane tickets from Canada to Nicaragua for Virginia residents; receiving money, bags, and a phone call in Nicaragua; and employing Lisa Miller in Nicaragua. RSAC ¶¶ 24, 38, 45, 48, 56-57.

This Court previously ruled that Plaintiff had “pled specific facts showing that [various Co-Defendants] aimed intentional tortious acts at Janet Jenkins,” knowing that she resided in Vermont. ECF 115, pp. 24-26. Relying on *Calder v. Jones*, 465 U.S. 783, 789 (1984), this Court

therefore concluded that it had personal jurisdiction over those Co-Defendants. ECF 115, p. 24-26.

However, since this Court's 2013 Order, the U.S. Supreme Court has specifically rejected a similar interpretation of *Calder* by the Ninth Circuit Court of Appeals. *See Walden*, 571 U.S. at 289. In *Walden*, the Court examined whether a Nevada court had personal jurisdiction over a police officer who confiscated money from the plaintiffs, Nevada residents, at the Atlanta airport. *Id.* at 279-81. The Ninth Circuit Court of Appeals concluded that the defendant's "knowledge of [the plaintiffs'] strong forum connections," combined with the fact that the plaintiffs "suffered foreseeable harm" in the Nevada, "satisfied the minimum contacts inquiry" such that a Nevada court could exercise personal jurisdiction over the defendant. *Id.* at 289 (quotations omitted).

The Supreme Court disagreed, explaining that "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 285. Thus, even if a defendant knows that a plaintiff resides in a particular state, the defendant's direction of allegedly tortious conduct at that plaintiff is not, alone, sufficient to support the plaintiff's home state's exercise of personal jurisdiction over the defendant. *See id.* at 289 ("Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections."). By concluding otherwise, the Ninth Circuit's "reasoning improperly attribute[d] a plaintiff's forum connections to the defendant and [made] those connections decisive in the jurisdictional analysis." *Id.* (quotation omitted). Thus, even if Timo had known that Plaintiff was a Vermont resident, that knowledge would not be enough to justify this Court's exercise of personal

jurisdiction over him; otherwise, Plaintiff's jurisdictional contacts, rather than Timo's, become decisive.

Similarly, the fact that Plaintiff suffered an injury while residing in Vermont is not sufficient to establish that Timo had minimum contacts with Vermont. "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290; *accord In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013) ("[T]he fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant."). In *Walden*, the Supreme Court explained that, although Nevada was where the plaintiffs experienced the lack of access to their funds, they "would have experienced the same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had." *Id.* at 290. Here, Plaintiff would have been deprived of Isabella's company regardless of the state in which she resided. Thus, Timo's conduct, which allegedly contributed to Plaintiff's injury, does not connect him to Vermont in a meaningful way.

"[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.* at 291. Timo has created no contacts with Vermont. He appeared in Vermont twice – involuntarily. Ex. 1, ¶4. The fact that Plaintiff resides in Vermont and allegedly suffered injury in Vermont does not suffice to justify this Court's assertion of personal jurisdiction over Timo.

2. Plaintiff's service of process upon Timo was procedurally improper

Plaintiff failed to comply with the manner of alternate service authorized by this Court at Plaintiff's own request. Plaintiff requested that she be permitted to serve process upon Timo

through the attorney representing him in the criminal case, Jeffrey Conrad. ECF 178, p. 3. This Court granted Plaintiff's motion. ECF 183. Nevertheless, Attorney Conrad was never served. Plaintiff ultimately filed an affidavit of service reflecting that Kathy Amaro, Attorney Conrad's secretary, was served in Lancaster, Pennsylvania. ECF 193, p. 3. There is no evidence that Attorney Conrad himself was ever served. *See id.*

Attorney Conrad was "an Individual Within a Judicial District of the United States," so Fed. R. Civ. P. 4(e) prescribed the available methods of service upon him. Plaintiff could have served him by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
 - (A) delivering a copy of the summons and of the complaint to the individual personally;
 - (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
 - (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e). Plaintiff failed to serve Attorney Conrad pursuant to any of the options provided by Fed. R. Civ. P. 4.

First, Plaintiff did not comply with Pennsylvania or Vermont state law for serving a summons. *See* Fed. R. Civ. P. 4(e)(1). Pennsylvania, where Plaintiff attempted to serve Attorney Conrad, *see* ECF 193, p. 3, has not authorized service upon the secretary, receptionist, or employee of a defendant's attorney. *See* Pa.R.C.P. No. 402(2)(iii) (authorizing service at "any office or usual place of business of the *defendant*" upon a *defendant's* "agent or . . . the person for the time being in charge" of that office (emphasis added)). Because Kathy Amaro was not Timo's agent or in charge of Timo's place of business, Plaintiff did not comply with Pennsylvania's law for serving process.

Vermont's rule is substantially similar to Fed. R. Civ. P. 4(e)(2). Both provide that service upon an individual may be made by delivering the summons and complaint to: 1) "the individual personally[;]" 2) a "person of suitable age and discretion" residing at the individual's dwelling; or 3) "an agent authorized by appointment or by law to receive service of process[.]" Fed. R. Civ. P. 4(e)(2); Vermont Rules of Civil Procedure, Rule 4(d)(1). Courts have generally held that service upon a secretary or receptionist is not effective in the absence of evidence that the secretary or receptionist has been appointed to receive service by the person who must be served. *See, e.g., McCord v. Bd. of Educ. of Fleming Cty., Ky.*, No. 17-5548, 2018 WL 1724560, at *3 (6th Cir. Jan. 30, 2018) (holding that service upon secretary, who was not authorized to receive service of process, was ineffective); *Allison v. Utah Cty. Corp.*, 335 F.Supp.2d 1310, 1314 (D. Utah 2004) (holding attempted service upon deputy county attorney by leaving summons and complaint with receptionist ineffective under Fed. R. Civ. P. 4(e)); *Amnay v. Del Labs*, 117 F.Supp.2d 283, 286 (E.D.N.Y. 2000) (finding that leaving complaint and summons with defendant's secretary did not comply with Fed. R. Civ. P. 4(e)(2)).

Here, Plaintiff did not serve Attorney Conrad personally and did not deliver the summons and complaint to Attorney Conrad's home. There is no evidence that Ms. Amaro was an agent authorized to receive service of process for Attorney Conrad, and it is Plaintiff's burden to prove that she was. *Khan*, 360 F. App'x at 203.

Because Plaintiff failed to serve process upon Attorney Conrad in accordance with Fed. R. Civ. P. 4, this Court lacks personal jurisdiction over Timo, *see Waldman*, 835 F.3d at 327, and the Complaint against Timo must be dismissed under Fed. R. Civ. P. 12(b)(2), (5).

CONCLUSION

Plaintiff cannot make a *prima facie* showing that this Court has personal jurisdiction over Timo because: 1) Timo's two involuntary contacts with Vermont do not constitute sufficient minimum contacts to justify the exercise of jurisdiction over him consistent with constitutional due process principles; and 2) Plaintiff failed to make procedurally proper service upon him. Therefore, the Revised Second Amended Complaint against Timo must be dismissed under Fed. R. Civ. P. 12(b)(2), (5).

WHEREFORE, Defendant, Timothy D. Miller, respectfully requests that this Honorable Court:

- A. DISMISS the Complaint; and
- B. GRANT such other relief as may be just and necessary.

Respectfully submitted,

Timothy D. Miller

By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: October 1, 2018

By /S/ Michael J. Tierney
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AFFIDAVIT OF DEFENDANT TIMOTHY D. MILLER

1. My name is Timothy (“Timo”) D. Miller. I am over 18 years of age and am competent to testify.

2. I am currently residing in Denver, Pennsylvania.

3. I have never lived in Vermont, owned or leased property in Vermont, worked in Vermont, conducted any business in Vermont, paid taxes in Vermont, or visited Vermont recreationally.

4. I have only been to Vermont twice. Both times, I appeared in connection with a criminal case against me. I was compelled to attend.

5. The criminal charges brought against me in Vermont were dropped in exchange for my testimony against Kenneth Miller.

6. Although I had given a video deposition, I was unavailable to personally attend and testify at Kenneth Miller's trial due to a family issue in Nicaragua. As a result of my failure to testify against him, I was charged in the United States District Court for the Western District of New York for a violation of Title 18, United States Code, Section 371.

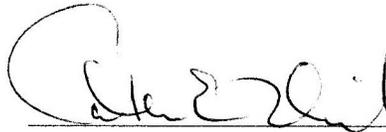
Further, your Affiant sayeth not,



Timothy D. Miller

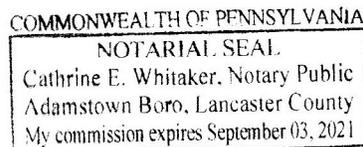
State of Pennsylvania
County of Lancaster

On this 28th day of September, 2018, personally appeared before me the above-named Timothy D. Miller, who affirmed that the foregoing statements are true and accurate to the best of his knowledge and belief.



Notary Public

My commission expires: 9/3/2021



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Defendants

CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date the foregoing documents were filed through the Court’s CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record, including the following:

- 1. DEFENDANT TIMOTHY D. MILLER’S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND INSUFFICIENT SERVICE OF PROCESS**

2. **DEFENDANT TIMOTHY D. MILLER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND INSUFFICIENT SERVICE OF PROCESS**
3. **AFFIDAVIT OF DEFENDANT, TIMOTHY D. MILLER**

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Respectfully submitted,

Timothy D. Miller

By his attorneys,

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Dated: October 1, 2018

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