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. STAVER, 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 RECONSIDER COURT'S ORDER OF OCTOBER 29, 2019 (Doc. 396)

The Defendant, Timothy Miller ("Timo")[1], requests the Court reconsider its October 29, 2019 Order, Doc.396, (the "Order") saying as follows:

[1] Given the number of unrelated individuals with the last name "Miller" this Motion will refer to Defendant Mr. Timothy Miller as "Timo" in order to reduce confusion.

STANDARD OF REVIEW

A motion to reconsider may be granted if "the moving party points to controlling decisions or data that the court overlooked: 'matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" L&B Truck Srvs., Inc. v. Daimler Trucks North America, LLC, No. 1:09-CV-74, 2009 WL 10678877 (D. Vt. Dec. 23, 2009) (quoting Schrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)).

ARGUMENT

A. This Court Lacks Specific Personal Jurisdiction Over Timothy Miller Where He Did Not Purposefully Direct Any Actions Towards Vermont

"[I]t is the plaintiff's burden to establish that the court has personal jurisdiction over the defendants." Waldman v. Palestine Liberation Org., 835 F.3d 317, 334 (2d Cir. 2016). Prior to exercising personal jurisdiction, a defendant must "reasonably anticipate being haled into court" in the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). In its Order, this Court properly recognized that the exercise of specific jurisdiction over a nonresident defendant requires a relationship arising "***out of contacts that the defendant himself creates with the forum***" and that the analysis as to whether the Court has jurisdiction "must be analyzed with regard to the defendant's contacts with the forum itself, not with persons residing there." Order at 7 (emphasis added) (quoting Walden v. Fiore, 571 U.S. 277, 283-84 (2014)). Nevertheless, the Court erred in finding personal jurisdiction existed as the Plaintiff neither alleged nor showed any purposeful direction to Vermont by defendant Timothy Miller.

The plaintiff and this Court's basis for alleged Vermont jurisdiction over Timo is a deposition where Timo testified that "he received a telephone call from Kenneth Miller telling him that Lisa Miller wanted to leave the United States and travel to Nicaragua because a court might transfer custody of her child to another woman. ECF 48-1 at 13-14." Order at 8; see also

Plaintiff's Response in Opposition, Doc 341, p.2. Not once in the cited deposition, however, is there any evidence that the family court that might take custody away from Lisa Miller was located ***in Vermont*** as opposed to one of the other 49 states. The deposition transcription describes rough knowledge of a court somewhere in the United States but not in Vermont. ECF 48-1 at 13-14. The deposition also describes that Timo understood that Lisa Miller was leaving Virginia. ECF 48-1 at 39. But there is no showing that Timo purposefully directed any actions towards Vermont.[2]

Furthermore, the Plaintiff also does not allege in her Complaint that Timo had directed any actions toward the state of Vermont. The Plaintiff asserts that Timo purchased plane tickets from Canada— not Vermont—for Lisa Miller and Isabella, who had been living in or around Virginia—not Vermont—at the time. Rev'd. Second Amend. Compl (Doc. 223) ("RSAC") ¶ 24, 38. The Plaintiff asserts that Lisa and Isabella left the country over the Rainbow Bridge which is located in Niagara Falls, ***New York***[3] – not Vermont. ("RSAC") ¶ 36. This Court's factual conclusion that Timo intended "to prevent Vermont courts from giving effect to their order granting a Vermont resident custody of her child," see Order at 9, is neither factually supported by the deposition cited by the Court nor by the Plaintiff's own allegations.[4]

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[2] Timo testified that Kenneth Miller told him "[t]hat there was someone in the U.S. that wanted to leave and go to Nicaragua." ECF 342-2, at 13:21-22. He testified that "she had a court case – that there was a court case against her and her child." Id. at 14:2-4. As was noted in Timo's reply brief, Vermont was mentioned five times in Timo's deposition: twice as part of the case caption, once in Attorney Crowles' address, once in reference to the criminal charges against Timo that were dropped, and once in the word index. Def. Reply Brief at 6, n. 1. He never once testified to having known that there was a case in Vermont or that he even knew Vermont was a state, much less one whose courts he might be impeding.

[3] A criminal case was brought against Timothy Miller in the Western District of New York for his actions in relation to this case. See *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y.).

[4] In fact, the Plaintiff alleges Timo acted at the instruction of Kenneth Miller, who was a member of the Virginia—not Vermont—Brotherhood. See RSAC ¶ 38. And, the Plaintiff alleges, the Nicaraguan Brethren did not, in 2009, know that the actions they were taking were contrary to any law or would have any negative effect on other parties or forums. See RSAC ¶ 63 (quoting a letter from the Nicaraguan Brethren stating that: "To our knowledge neither

Finally, this Court only considered the alleged initial actions of Timo in assisting Lisa Miller and Isabella out of the United States as establishing personal jurisdiction, but if this Court were to have considered any actions subsequent to those initial actions (i.e., actions in assisting Lisa Miller to stay in Nicaragua following the November 20, 2009 order, which appears to be the order that Timo is alleged to have "impeded"), this Court would find those subsequent actions insufficient to establish personal jurisdiction over Timo. See Jenkins v. Miller, et al., Case No. 2:12-cv-184, at 33 (Oct. 24, 2013) (Doc. # 115) (dismissing claims against Defendant Yoder for lack of personal jurisdiction because "[a]ssuming that Yoder knowingly assisted other Defendants to enable Lisa Miller to remain outside the United States with Isabella, that activity had only an indirect effect within the forum"). Thus, the only actions that would be relevant to establishing personal jurisdiction—those that Timo is alleged to have taken in assisting Lisa Miller and Isabella out of the United States—occurred prior to the order that Timo is alleged to have impeded. As such, even assuming that the Plaintiffs could show that Timo was aware of an action pending in Vermont, Timo could not have impeded an order that had not yet been issued, such that any actions to impede could support the exercise of jurisdiction.

The Supreme Court has held that for personal jurisdiction to exist a defendant must establish a "**substantial** connection" with the forum state, not a mere attenuated connection as the Order suggests. See Walden, 571 U.S. at 284 (emphasis added); Order at 8. The facts, as alleged by Jenkins, suggest that any connection that Timo had with Vermont were fortuitous or attenuated by the contacts he made by interacting with Lisa Miller in Virginia, New York and Nicaragua.

Lisa nor any of the Nicaraguan brethren had heard that an arrest warrant had been issued for her until Timo Miller was arrested a year later. Then we discovered that the law was accusing the brethren of aiding in a kidnapping even though Lisa still had total and legal custody when she left the US . . . At the time we did not know what all was going on").

B. Timothy Miller Was Never Properly Served and Reconsideration is Needed as this Court's Order Interprets Pennsylvania's Rule of Civil Procedure 402 in an Unprecedented Fashion in Contravention of Controlling Law

The Court's order "quickly" dismissed Timo's argument that he was improperly served because Pennsylvania Rule of Civil Procedure 402(a)(2)(iii) only authorizes service on a *defendant's* place of business. The Court reasoned that "[t]his Court authorized Plaintiffs to serve Defendant through Conrad" and Plaintiffs therefore properly read the Pennsylvania rule with respect to Conrad. But this logical leap – that because the Court authorized Plaintiffs to serve Timo, the plain language of the Pennsylvania rule does not control the service of process – is flawed.

When this Court, pursuant to Fed. R. Civ. P. 4(f)(3), authorized Plaintiffs to serve Attorney Conrad, Fed. R. Civ. P. 4(e) gave Plaintiffs the option of serving Attorney Conrad by any of the following methods:

> (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).

Pennsylvania's state law for serving a summons authorizes service only upon defendants. 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)). By contrast, Vermont's state law for service of summons authorizes

service upon "*individual[s.]*" Vermont Rules of Civil Procedure, Rule 4(d)(1). Plaintiffs could have chosen to serve Attorney Conrad in compliance with Vermont's law for service; they chose not to. Plaintiffs could have chosen to serve Attorney Conrad in compliance with Fed. R. Civ. P. 4(e)(2)(A), 4(e)(2)(B), or 4(e)(2)(C) – all of which authorize service upon an *individual* – but chose not to.

Instead, Plaintiffs requested that the Court expand Pennsylvania's rule, which, by its plain language, applies only to defendants, to apply to Attorney Conrad, despite the other avenues available to Plaintiffs to serve Attorney Conrad. In its October 29th Order, the Court agreed.

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). Service of process is a necessary prerequisite to establishing personal jurisdiction. *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). When interpreting a state's service of process provision, federal courts must construe them as the state's supreme court would. *Falco v. Nissan North America Inc.*, 987 F.Supp2d 1071, 1077-78 (C.D.Cal. ("[T]his court is bound to follow a state supreme court's interpretation of that state's statutes."); *see also Hard Candy, LLC v. Hard Candy Fitness, LLC*, 106 F.Supp.3d 1231, 1238 (S.D.Fla. 2015) (citing *Sculptchair, Inc. V. Century Arts, Ltd.*, 94 F.3d 623, 627 (11th Cir. 1996)). "This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

Pennsylvania's Supreme Court has never interpreted Pa.R.C.P. No. 402(2)(iii) the way this Court did in its October 29, 2019 Order. In the absence of controlling case law from

Pennsylvania, this Court is obligated to "predict how the forum state's highest court would decide the issue[], and, to the extent there is any ambiguity in the state statutes under consideration, to carefully predict how the highest court of the state would resolve the uncertainty or ambiguity." *Sprint PCS L.P. v. Conn. Siting Council*, 222 F.3d 113, 116 (2nd Cir. 2000) (quotations, citations, and brackets omitted).

The prediction, in this case, is simple. In Pennsylvania, "[t]he rules relating to service of process must be ***strictly followed***[.]" *Sharp v. Valley Forge Med. Cntr. & Heart Hosp., Inc.*, 221 A.2d 185, 187 (Pa. 1966)(emphasis added) (cited by *City of Philadelphia v. Berman*, 863 A.2d 156, 160 (Pa. Commw. Ct. 2004)). "In analyzing the intent of [Pennsylvania's] Supreme Court, the best indication of said intent is the plain language of a rule." *Horwath v. DiGrazio*, 142 A.3d 877, 880 (Pa. Super. Ct. 2016) (citations, quotations, and brackets omitted). "When the words of a rule are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.* (quotations and brackets omitted). The plain language of Rule 402(a)(2)(iii) authorizes service upon *defendants* only. The Court's interpretation to the contrary is inconsistent with Pennsylvania's jurisprudence and at odds with the principles of federalism that underlie our judicial system.

In addition to acting in contravention of the requirement that the Court construe state statutes as would the state's highest court, this Court overlooked United States Supreme Court precedent counseling that "statutes and rules have always provided the measures for service, [and] courts are inappropriate forums for deciding whether to extend them." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 110 (1987).

In *Omni*, the Court was faced with the previous version of Fed. R. Civ. P. 4, which did not authorize service upon two foreign defendants. The plaintiffs (and the dissenters at the Court of

Appeals) argued, among other things, that the Court should "act to fill the interstices in the law inadvertently left by legislative enactment by creating their own rule authorizing service of process in th[e] litigation." *Id.* at 108 (quotation omitted). The Court declined to do so, explaining that it was unclear whether the Court had the authority to do so, and, even if it did, to do so would be "unwise." *Id.* at 108-09. "Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized. This Court in the past repeated has stated that a legislative grant of authority is necessary." *Id.* at 109. "Legislative rulemaking better ensures proper consideration of a service rule's ramifications within the pre-existing structure and is more likely to lead to consistent application." *Id.* at 110.

The plain language of Rule 402(a)(2)(iii) does not authorize Plaintiffs' service; by validating that service after the fact, this Court has effectively acted to "fill the interstices of the law inadvertently left by legislative enactment." Defendant, therefore, respectfully requests that the Court reconsider its Order.

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

A. RECONSIDER its Order of October 29, 2019 (Doc. 396);

B. DISMISS the Complaint as it pertains to Timothy Miller; and

C. 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: November 8, 2019

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CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date Defendant Timothy D. Miller's Motion to Reconsider Court's Order of October 29, 2019 [Doc. 396] was 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:

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Respectfully submitted,
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Dated: November 8, 2019

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