Vermont Superior Court
Caledonia Unit

KATHERINE BAKER and
MING-LIEN LINSLEY,
Plaintiffs,
And
Vermont Human Rights Commission,
Intervenor-Plaintiff

Civil Division
Docket No. 187-7-11 CACV

v.

WILDFLOWER INN a/k/a DOR
ASSOCIATES LLP,
Defendant

DEFENDANT'S (1) REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT AND (2) OPPOSITION TO THIRD AMENDED COMPLAINT

On March 5, 2012, Plaintiffs launched another misplaced assault on the owners of the Wildflower Inn (Defendant, or Wildflower) with their nonresponsive Opposition to Defendant's Motion to Dismiss the Second Amended Complaint. Plaintiffs also moved this Court for leave to amend their complaint yet again, this time adding a request for punitive damages. Defendant addresses both components of Plaintiffs' March 5, 2012 filing in this combined reply and opposition.

I. Plaintiffs' opposition inadequately addresses the arguments in Wildflower's Motion to Dismiss Plaintiffs' Second Amended Complaint and provides no compelling reason to not dismiss the Second Amended Complaint.

Plaintiffs' opposition appears to be founded on a misconstruction of the basis for Wildflower's motion to dismiss the Second Amended Complaint. Recognizing that they lack standing to challenge a policy that Defendant's employee did not follow—in fact, a policy that the employee admits to having no knowledge of—Plaintiffs now argue that this so-called policy

was actually the proximate cause of the employee's illegal denial of services. Pls' Opp. to Mot. to Dismiss at 3, 6, 9.

It is true that Wildflower's early November, 2011 settlement offer and formal offer of judgment accept liability for the violation of Vermont's Fair Housing and Public Accommodations Act, and that Wildflower's offers eliminate the need for continued litigation. But Wildflower does not just argue that the Second Amended Complaint should be dismissed because it has admitted liability for the claims made in the First Amended Complaint. Rather, Wildflower's Motion to Dismiss points out that the additional claims and relief sought in the Second Amended Complaint reach beyond anything the law allows and are thus outside of this Court's jurisdiction. Yet Plaintiffs fail to respond to these arguments. Instead, Plaintiffs make the new claim that they are entitled to distinguish between direct and vicarious liability in their demands—even though the Fair Housing and Public Accommodations Act contains no such distinction. Wildflower is willing to admit liability for its employee's actions, and that is the extent of the relief that Plaintiffs may seek under the law.[1]

a. There is no actual case or controversy over the additional claims—that is, Plaintiffs did not suffer an injury from and have no standing to raise the additional claims.

As the Vermont Supreme Court explained in *Bischoff v. Bletz*, 183 Vt. 235, ¶ 15 (2008):

> Vermont courts have "subject matter jurisdiction only over actual cases or controversies involving litigants with adverse interests." *Brod v. Agency of Natural Resources*, 182 Vt. 234 ¶ 8 (2007). One element of the "case or controversy requirement is that plaintiffs must have standing, that is, they must have suffered a particular injury that is attributable to the defendant and that can be redressed by a court of law." *Parker v. Town of Milton*, 169 Vt. 74, 77 (1998).

[1] Even if 9 V.S.A. § 4500 *et seq.* included some distinction between direct and vicarious liability, the Plaintiffs' own Appendix A to their Opposition (excerpts from the deposition of Amalia "Molly" Harris, the Wildflower employee) demonstrates that the employee believed that the policy was to flatly deny same-sex reception requests. But there is no need to litigate the employee's motives because Wildflower has accepted responsibility for its employee's action.

> Without standing, the court has no jurisdiction over a petition for declaratory relief.

Parker, 169 Vt. at 77 adds that "[i]n Vermont, a plaintiff must demonstrate standing for a court to have jurisdiction over a petition for declaratory relief. This is because a declaratory judgment can only provide a declaration of rights, status, and other legal relations of parties to an actual or justiciable controversy." (quotation and citation omitted).

Plaintiffs' Second Amended Complaint adds a request for declaratory relief that Defendant violated the law through a policy of "discouraging same-sex couples from holding wedding or civil union receptions at the facilities, telling same-sex couples . . . that the Wildflower Inn will be unable to provide the same quality of services it would be able to provide for different-sex customers, and refusing to return phone calls or other inquiries from . . . same-sex couples." Sec. Amd. Compl. at B. Despite Plaintiffs' convoluted arguments in their Opposition that a policy that they did not encounter and that the employee admits she was unaware of, there are no allegations that they were injured by a failure to return phone calls or emails, nor were they discouraged from holding their event at the Inn. Plaintiffs were injured by the employee's outright denial of services, and there is no "actual or justiciable controversy" over that denial.[2] Plaintiffs lack standing to raise these additional claims in the Second Amended Complaint, and this Court should dismiss the additional Request for Relief B, as well as paragraphs 25, 26, 29, 40, 41, and 47 of the Second Amended Complaint.

b. This Court lacks jurisdiction to order the additional, subjective damages sought in the Second Amended Complaint.

Request for Relief C in Plaintiffs' Second Amended Complaint asks this Court to issue an

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[2] Nor is there a case or controversy over the deferral policy—the only case or controversy raised by the Plaintiffs has always been solely the flat denial of their request. But Wildflower's initial offer of settlement admitted liability on that point, and there has been no case or controversy on the flat denial since then.

injunction that is beyond its authority. Plaintiffs' request for prompt and enthusiastic service lacks the detail required by Vermont Rules of Civil Procedure 65(d), which requires that an injunction "shall be specific in terms; shall describe in reasonable detail [what must be done or not done]." But "[a]n order framed in . . . broad generalities fails to afford notice to [Defendant] of its proscribed or required conduct and is therefore unenforceable." *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 284 (5th Cir. 2008) (discussing the injunction requirements under the nearly identical Fed. R. Civ. P. 65(d)). Plaintiffs have no response to this obvious shortcoming in their Second Amended Complaint. The Court should dismiss the additional Request for Relief C because it cannot issue this type of broad, unenforceable injunction. Even if the injunctive relief requested in Request for Relief C of Plaintiffs' Second Amended Complaint was specific enough to be enforceable, this Court should not issue the requested injunction because the Plaintiffs received prompt communications from the employee and were not discouraged from holding their reception at the Inn. Sec. Amd. Compl. ¶ 20, 23. Instead, Plaintiffs experienced a prompt denial of service. *Id.* at ¶ 23. To the extent that Plaintiffs seek to redress past alleged harms to parties not before this Court, such claims must be flatly rejected.

c. Plaintiffs cannot ask this Court to bind a non-party.

Vermont Rules of Civil Procedure 65(d) also limit this Court's authority to issue injunctions only to parties. "Every . . . injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys."[3] Yet Plaintiffs fail to respond to Wildflower's valid arguments that they cannot request an injunction against a non-party such

[3] Vermont Rules of Civil Procedure 65(d) continues ". . . and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Plaintiffs have never alleged that they contacted or suffered any injuries from the Stepping Stone Spa, and have not alleged the Spa's "active concert or participation" in any discriminatory conduct against the Plaintiffs or other non-parties.

as the Stepping Stone Spa. Indeed, Plaintiffs would be hard-pressed to find a plausible rationale to overcome such a basic legal principle. "When declaratory relief is sought, . . . no declaration shall prejudice the rights of persons [such as the Stepping Stone Spa] not parties to the proceeding." *Bills v. Wardsboro Sch. Dist.*, 150 Vt. 541, 545 (1988). This Court lacks jurisdiction over non-parties and cannot provide the Request for Relief C in Plaintiffs' Second Amended Complaint relating to the Stepping Stone Spa.[4] As a result, this Court should dismiss that component of Request for Relief C, as well as paragraphs 30, 31, and 48 of the Second Amended Complaint.

d. Plaintiffs' remaining requests are moot.

Finally, Plaintiffs offer little in way of a response to Wildflower's argument that because it has admitted liability and has stopped hosting receptions (or other events), their requests to enjoin Wildflower from future denials are moot. Instead, Plaintiffs raise objections to Wildflower's offer—objections that were never raised in the four and a half months that they have had the offer—and insist that they are somehow entitled to a specific type of admission of liability. But Plaintiffs' demands for an admission of direct liability for an employee's action ring hollow. Such an admission would not alter Wildflower's liability, and the Fair Housing and Public Accommodations Act does not make this distinction. The fact that Plaintiffs rely on *no* Vermont cases distinguishing direct and vicarious liability is telling—the distinction is meaningless in this context and, in any event, Plaintiffs are not entitled to it under the Vermont statute.

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[4] The Second Amended Complaint Request for Relief C also asks for an injunction against "any associated business that constitute[s] a public accommodation." That language was included in Plaintiffs' original complaint but is also unenforceable, as no associated businesses are parties to this action.

Once the additional claims that this Court lacks jurisdiction over are cleared away (*i.e.*, the claims relating to the non-party Stepping Stone Spa, the policy that Plaintiffs did not encounter nor were injured by, and the subjective and unenforceable demand for the prompt return of phone calls and e-mails), the remaining claims are moot because Wildflower has made an offer of judgment satisfying all remaining elements of Plaintiffs' Complaint. "The Vermont Constitution . . . limits our authority to the determination of actual, live controversies. . . . Even if the case presented an actual controversy [at an earlier stage of the proceedings], we may not consider the issues unless they remain live throughout the [] process." *State v. Rooney*, 184 Vt. 62, ¶ 9 (2008). This court might properly consider it to be an exception to the mootness doctrine if there was "reasonable expectation that the same complaining party would be submitted to the same action again," *id.* at ¶ 11, but there is no such expectation here. As a result, there is no reason to continue litigation where there is no controversy on the remaining allowable claims.

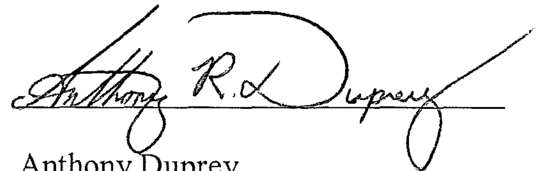
II. Wildflower opposes the Third Amended Complaint because it contains the same non-justiciable components of the Second Amended Complaint and also includes an unsupported request for punitive damages.

Plaintiffs have also moved this Court for leave to amend their Complaint a third time, now adding a request for punitive damages. But Plaintiffs allege no additional facts showing either of the two requirements for punitive damages, namely "wrongful conduct that is outrageously reprehensible" and "malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like." *Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc.*,187 Vt. 541, ¶ 18 (2010). "[T]his Court has set a high bar for plaintiffs seeking [punitive] damages . . . Our cases make clear . . . that intentional, wrongful, and even illegal conduct will not justify punitive damages unless the evidence supports an inference of 'bad motive' evincing a sufficient 'degree of malice.'" *Monahan v. GMAC Mortgage Corp.*, 179 Vt. 167 ¶¶ 55-56

(2005) (citations omitted). Because Plaintiffs have not alleged any of these factors, Wildflower opposes the amendment to request punitive damages.

Wildflower also opposes the Third Amendment Complaint to the extent that it includes the portions of the Second Amended Complaint that suffer from the legal failures described in our Motion to Dismiss Plaintiffs' Second Amended Complaint and our Reply, above. In particular, Wildflower opposes the Third Amended Complaint because Plaintiffs lack standing to raise the additional claims concerning the Inn's actual policy so there is no actual case or controversy; because this Court cannot order the subjective relief Plaintiffs demand by insisting on prompt communications; because this Court has no jurisdiction over a non-party such as the Stepping Stone Spa; and because all remaining claims are moot now that Wildflower has made an offer of judgment that accepts liability for the remaining claims. For these reasons, this Court should deny leave to amend and file the Third Amended Complaint.

Dated at Middlebury, VT this 21st day of March, 2012.



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