

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**

MOTION TO DISMISS

NOW COMES the Defendant, Wildflower Inn a/k/a DOR Associates LLP, and moves to Dismiss the Second Amended Complaint filed by the Plaintiff, and in support thereof states as follows:

Factual and Procedural Background:

1. Plaintiffs themselves never had direct contact with the Defendant. Rather, the mother of one Plaintiff, Channie Peters, had contact with the Defendant's Wedding Coordinator. For ease of reference, however, this distinction is not always mentioned herein and reference is simply made to the Plaintiffs.
2. Defendant offered to settle this matter on November 3, 2011 under all aspects to which the Plaintiff was entitled under its First Amended Complaint. Plaintiffs rejected that offer and demanded further relief to which they are not entitled. Defendant explained that Plaintiffs' additional settlement demands were beyond the scope of their First Amended Complaint and the law. Plaintiffs responded by filing a Motion to file an Amended Complaint. That motion was granted. (See attached Exhibit A).
3. Plaintiffs' Second Amended Complaint, filed on November 22, 2011, poses additional factual allegations and claims that are unrelated to the events leading up to the original complaint. (see Paragraphs 5-7, 24-26, 29-32, 40-41, 47-48).

4. These additional allegations can be summarized into the following three (3) categories:
 - a. A demand that that any court order obtained applies also to **Stepping Stone Spa**, a non-party in the case. (hereinafter the “Stepping Stone Allegations”);
 - b. A **re-characterization of the policy**, which Plaintiffs do not allege to have encountered, in order to accomplish a broader scope of relief (hereinafter the “Policy Allegations”); and,
 - c. A new claim as to **refusing to return phone calls and e-mails** from same-sex couples seeking to hold same-sex wedding or civil union receptions (hereinafter the “Prompt Communication Allegations”), despite receiving prompt communications from Defendant’s employee.
5. Plaintiffs’ Second Amended Complaint poses an expanded scope of requests for injunctive relief. The Second Amended Complaint defines Additional Relief as follows:
 - a. A declaration that Defendant violated the Fair Housing and Public Accommodations Act, Vt. Stat. Ann. Tit. 9, § 4500, *et seq.*, through its policy and practice of discriminating against same-sex couples by, among other things, discouraging same-sex couples from holding wedding or civil union receptions at the facilities, telling same-sex couples seeking to hold wedding or civil union receptions at the facility that the Wildflower Inn will be unable to provide the same quality of services it would be able to provide to different-sex customers, and refusing to return phone calls or other inquiries from prospective customers seeking to hold wedding or civil union receptions for same-sex couples at the resort;
 - b. An injunction prohibiting Defendant from enforcing its policy and practice of discriminating against same-sex couples at the Stepping Stone Spa by, among other things, discouraging same-sex couples from holding wedding or civil union receptions at the facilities, telling same-sex couples seeking to hold wedding or civil union receptions at the facility that the Wildflower Inn will be unable to provide the same quality of services it would be able to provide to different-sex customers, and refusing to return phone calls or other inquiries from prospective customers seeking to hold wedding or civil union receptions for same-sex couples at the resort.

Legal Argument:

Mootness:

6. The Defendant has contemporaneously herewith filed an Answer to Second Amended Complaint, all of which is incorporated by reference herein.

7. The additional relief requested in Plaintiffs' Second Amended Complaint is moot because Defendant has admitted that the Court could find for the Plaintiffs on the First Amended Complaint's claim that Defendant violated the Fair Housing and Public Accommodations Act, Vt. Stat. Ann. Tit. 9, § 4500, *et seq.*, based on its employee's undisputed action and the legal concept of *Respondeat Superior*, *Houston v. Twn. Of Waitsfield*, 183 Vt. 543, ¶ 5 (2007) (citing the limitations of a court's authority under the Vermont Constitution to determine only "actual, live controversies between adverse litigants");
8. The additional relief requested in Plaintiffs' Second Amended Complaint is moot because Defendant is no longer hosting events at their property, thus the injury is not one that is capable of repetition yet evading review. *State v. Rooney*, 184 Vt. 620, ¶¶ 11, 15 (2008) (explaining that the mootness exception applies only when there is "a reasonable expectation that the same complaining party would be subjected to the same action again").

No Actual Case or Controversy:

9. The additional relief requested in Plaintiffs' Second Amended Complaint relating to Defendant's policy cannot be granted because Plaintiffs' injuries are not the result of the alleged policies and practices. Instead, Plaintiffs' injuries are the result of an employee's outright denial, which is not disputed by the parties. Subject matter jurisdiction is lacking when there is no case or controversy, and there can be no case or controversy in a debate over what might have happened if Plaintiffs' request had been handled under Defendant's alleged policy. *See Bischoff v. Bletz*, 183 Vt. 235, ¶¶ 14-16, 21 (2008) (holding that the court had no jurisdiction to decide issues between non-parties, "only over actual cases or controversies involving litigants with adverse interests"—that is, plaintiffs "must have suffered a particular injury that is attributable to the defendant. . . . otherwise, the plaintiff lacks standing to sue, and the courts have no jurisdiction to grant the relief sought. . . . Plaintiffs have no standing to seek the declaratory relief . . . because they cannot show that they suffered any personal injury fairly traceable to [Defendant's] allegedly unlawful conduct [such as Defendant's policy, in this instance].")
10. As a result, this Court lacks subject matter jurisdiction over the Policy Allegations added by the Second Amended Complaint.
11. The Second Amended Complaint does not contain any allegation that the Plaintiffs suffered any harm from having their inquiries ignored or not responded to in a timely fashion. In fact, the Plaintiffs' own key witness, the former Wedding Coordinator, Amalia Harris, has testified that she responded to the Plaintiffs' inquiry in timely manner. (Harris transcript at ____). This is also borne out by the Plaintiffs' own original and First Amended Complaint, which contain an email attachment showing that a prompt response was given.

12. As a result, this Court lacks subject matter jurisdiction over the Prompt Communication Allegations, as the Plaintiffs have no standing to bring an action for events that they do not allege.

Subjective Damages:

13. The additional relief requested in Plaintiffs' Second Amended Complaint cannot be granted by this or any other court because it is not competent to order subjective damages such as prompt and enthusiastic service in hypothetical, future scenarios. *Rooney*, 184 Vt. at 624 ¶ 15 (explaining the Court could not grant relief on possible future controversies dependent on facts that "would presumably be substantially different").
14. An injunction dictating how promptly or in what manner a future phone call or e-mail needs to be responded to is not a relief that the Court is capable of policing, nor should it even desire to do so.
15. As a result, this Court lacks subject matter jurisdiction and renders this Court unable to issue an injunction with regard to the Prompt Communication Allegations.

The Court Cannot Bind a Non-Party:

16. Plaintiffs did not name the Stepping Stone Spa as a defendant and their allegations in the Second Amended Complaint fail to draw a legal connection between the Defendant and the Stepping Stone Spa. Even if an owner of an interest in the Defendant also holds an ownership interest in the Stepping Stone Spa, the Stepping Stone Spa is independently owned and operated through an entirely separate entity that has not been named as a defendant.
17. There is no proof whatsoever offered, other than mere speculation and wishful thinking, to substantiate the whimsical allegations of a conspiracy between the two entities to evade the law.
18. All of that is irrelevant when one considers that the Stepping Stone Spa is not a Defendant to this case, nor could it properly be made so, which is most likely why the Plaintiffs have not attempted to make it so. Instead, they hope to merely make enough unsupported allegations in order to have this Court enter an overreaching order binding a non-party. But a non-party "cannot be bound by the court's judgment." *Bills v. Wardsboro Sch. Dist.*, 150 Vt. 541, 545 (Vermont 1988). "When declaratory relief is sought, . . . no declaration shall prejudice the rights of persons not parties to the proceeding." *Id.*
19. As a result, this Court lacks jurisdiction over a non-party with regard to the Stepping Stone Allegations.


Costs and Fees:

20. In the Defendant's offer on November 3, 2011, Defendant agreed to a judgment in which it would grant the Plaintiffs an award of nominal damages. The amount of attorney fees to be awarded was to be left to the discretion of the judge upon receipt of submitted Invoices, based on the work performed through that date.
21. Plaintiffs are not entitled to any costs and fees incurred after their initial denial of Defendant's offer on November 15, 2011. *Neronsky v. Sutowski*, No. 2002-106, 2002 WL 34422308 (Vermont Sup. Ct. Dec. Term, 2002) (not reported) (explaining that it is "consistent with the spirit of Rule 68" and "within the court's discretion under Rule 53(d)(1)" to award costs up to the date of the settlement offer, if the final award was no greater, and to offset any costs with the incremental costs Defendant incurred to defend post-settlement offer).
22. Defendant's offer of settlement grants Plaintiffs all relief requested in their original and First Amended Complaint for the reasons stated herein.

WHEREFORE, Defendant respectfully requests that this Honorable Court:

- A. Dismiss Plaintiffs' Second Amended Complaint;
- B. Schedule a hearing on this matter;
- C. Enter judgment according to the attached Proposed Order, which is consistent with the Offer of Settlement originally offered by Defendant on November 3, 2011.
- D. Grant such other relief as the Court finds just.

Dated: February 22, 2012.



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