IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

****

ROBERT L. SCHULZ (New York), et al.,

Plaintiffs

v.

STATE OF NEW YORK, et al.,

Defendants

****

MEMORANDUM IN SUPPORT OF CONNECTICUT DEFENDANTS' MOTION TO DISMISS

Case No. 07-CV-0943 LEK/DRH

TABLE OF CONTENTS

I. BRIEF FACTUAL BACKGROUND..2

II. ARGUMENT IN SUPPORT OF DISMISSAL......................................2

A. Plaintiffs lack personal jurisdiction to bring this action against the Connecticut Defendants. 2

(1) Plaintiffs' amended complaint fails to establish jurisdiction Under New York's long-arm statute....................................3

(2) Plaintiffs' amended complaint fails to establish jurisdiction under the Due Process clause of the Fourteenth Amendment...3

B. This Court is not the proper venue to bring this action against the Connecticut Defendants. 4

C. Defendant State of Connecticut is immune from suit under the Eleventh Amendment...6

III. CONCLUSION...7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT SCHULZ, *et al*, Plaintiffs	
v.	CASE NO: 1:07-CV-0943 LEK/DRH
STATE OF NEW YORK, *et al,* Defendants	

MEMORANDUM IN SUPPORT OF
CONNECTICUT DEFENDANTS' MOTION TO DISMISS

NOW COME the State of Connecticut and Susan Bysiewicz, Connecticut Secretary of the State ("Connecticut Defendants"), by and through counsel, the Office of the Attorney General for the State of Connecticut, and hereby move to dismiss the Plaintiffs' amended complaint on the grounds that: (1) pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(2), this Court does not have personal jurisdiction over the Connecticut Defendants; (2) pursuant to FRCP 12(b)(3), this Court constitutes improper venue as to the Connecticut Defendants; and (3) pursuant to the Eleventh Amendment, the State of Connecticut is immune from suit. In support of this motion, the Connecticut Defendants state the following:

I. BRIEF FACTUAL BACKGROUND

Plaintiffs filed this amended complaint alleging three causes of action against State Defendants, including the Connecticut Defendants. The allegations against each of the Defendants relate to Plaintiffs' objection to the Defendants' use of certain voting machines in elections held in the States of each of the named Defendants.

Plaintiffs request that this Court permanently enjoin the Defendants from conducting elections: (1) which are not “open, verifiable, transparent, machine-free, computer-free,” Pls’ Amended Complt. at ¶ 268(a); (2) which do not “rely exclusively on paper ballots, hand marked and hand-counted,” id. at ¶ 268(b); and (3) which do not keep paper ballots in “full public view until the results of the hand counting is publicly announced at that vote station.” Id. at ¶ 268(c).

II. ARGUMENT IN SUPPORT OF DISMISSAL

A. Plaintiffs lack personal jurisdiction to bring this action against the Connecticut Defendants

The party seeking to invoke the court’s jurisdiction bears the burden of establishing by competent proof that jurisdiction exists. See Computer Associates Intern., Inc. v. Altai, 126 F.3d 365, 370-71 (2nd Cir. 1997). “It has long been the rule that the standard to be applied in determining whether a federal district court has jurisdiction over the person in diversity cases is the law of the state where the court sits.” Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir.1989). “The exercise of jurisdiction is proper if the defendant has sufficient contacts to satisfy both the state long arm statute and the Due Process clause of the Fourteenth Amendment.” Computer Associates Intern., Inc., 126 F.3d at 370 (citing Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1025-26 (2d Cir.1997).

(1) Plaintiffs’ amended complaint fails to establish jurisdiction under New York’s long-arm statute.

New York’s long arm statute provides in pertinent part:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or . . .
>
> 4. owns, uses or possesses any real property situated within the state. . . .
>
> (c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. C.P.L.R. § 302(a).

Plaintiffs' amended complaint fails to show that this federal court has jurisdiction over the Connecticut Defendants under New York's long arm statute, N.Y. C.P.L.R. § 302(a). The Connecticut Defendants do not transact business or contract anywhere to supply goods or services in New York. Further, the Connecticut Defendants do not own, use or possess any real property in New York.

(2) Plaintiffs' amended complaint fails to establish jurisdiction under the Due Process clause of the Fourteenth Amendment.

The Due Process clause of the Fourteenth Amendment limits the exercise of personal jurisdiction to persons having certain "minimum contacts" with the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). "A court may exercise personal jurisdiction only over a defendant whose 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" Computer Associates Intern., Inc., 126 F.3d at 370-71 (quoting Burger King Corp., 471 U.S. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). "Essential to the exercise of personal jurisdiction in each case is 'some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State,

thus invoking the benefits and protections of its laws.'" Id. at 371 (quoting Burger King Corp., 471 U.S. at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

In this case, the Connecticut Defendants do not reside in New York. Moreover, none of the allegations contained in the amended complaint relate to the Connecticut Defendants performing any action in New York. The Connecticut Defendants could not reasonably have anticipated litigation in New York as a result of the Plaintiffs' allegations. Therefore, this Court lacks personal jurisdiction over the Connecticut Defendants. Accordingly, the Plaintiffs' amended complaint against the Connecticut Defendants must be dismissed.

B. This Court is not the proper venue to bring this action against the Connecticut Defendants.

This Court should grant the Connecticut Defendants' motion to dismiss because this Court is not the proper venue for this action. "The purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." Leroy v. Great Western United Corporation, 443 U.S. 173, 184 (1979). "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy is to be given a liberal construction." Olberding v. Illinois Central R. Co., 346 US 338, 340 (1953). Therefore, courts are required to strictly construe the venue statue. Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2nd Cir. 2005) (citing to Olberding, 346 U.S. at 340).

Because the Plaintiffs' claim apparently "arises under" federal law, venue must be determined under 28 U.S.C. §1391(b), which provides in pertinent part:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
> (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. §1391(b)

The Plaintiffs have failed to show that they meet the requirements under 28 U.S.C. §1391(b). Subsection (1) does not apply because all of the named Defendants reside in different states. Under subsection (2), with respect to the Plaintiffs' claim against the Connecticut Defendants, no part of the underlying events took place in New York and no part of any Connecticut property subject to the action is situated in New York. See Gulf Ins.Co., 417 F.3d at 357 ("district courts to take seriously the adjective 'substantial.'").

Finally, the Plaintiffs have failed to show that subsection (3) provides them with proper venue. Although one of the Defendants, i.e., the New York State Board of Elections, see Pls' Amended Compl. at ¶160, can "be found" in New York, New York is not the proper venue for the Connecticut Defendants because the Plaintiffs have failed to show that there "is no district in which the action may otherwise be brought." See 28 U.S.C. §1391(b)(3); H.R. Rep. No. 101-734 at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875; see generally, McDonald v. General Accident Insurance Co., 1996 WL 590722 (N.D.N.Y. 1996).

Here, because three named Plaintiffs and the Connecticut Defendants reside in Connecticut, and because the alleged events giving rise to the Plaintiffs' claim against the Connecticut Defendants allegedly occurred, or will allegedly occur in Connecticut, to the

extent that venue is proper in any federal court for adjudicating Plaintiffs' claims against the Connecticut Defendants, it must be the United States District Court in Connecticut.[1] Therefore, pursuant to 28 U.S.C. §1391(b), Plaintiffs claim against the Connecticut Defendants cannot be brought in this Court. Accordingly, this Court should grant the Connecticut Defendants' motion to dismiss.

E. Defendant State of Connecticut is immune from suit under the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution generally bars claims in federal court against the states and their agencies. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Under Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), "a plaintiff may sue a state official acting in his official capacity – notwithstanding the Eleventh Amendment – for prospective, injunctive relief from violations of federal law." In re Deposit Ins. Agency, 482 F.3d 612, 617 (2d Cir. 2007) (internal quotation marks omitted). Importantly, however, the ruling in Ex Parte Young does not allow injunctive action against a state, as opposed to state officers. Ashe v. Board of Elections, 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. 1988); see also NAACP v. California, 511 F.Supp. 1244, 1250 (E.D. Cal. 1981), aff'd. 711 F.2d 121 (9th Cir. 1982).

In this case, Plaintiffs have named the State of Connecticut as a defendant. Because the State of Connecticut is immune from suit under the Eleventh Amendment, the claims against the State of Connecticut should be dismissed.

---

[1] This action has not been, and could not be brought as a class action as the parties are individual pro se plaintiffs acting without counsel and therefore cannot act as counsel for a class. The plaintiffs have also not complied with the requirements for obtaining designation as multidistrict litigation under 28 USC § 1407. See Frank v. Aaronson, 120 F.3d 10 (2nd Cir. 1997); see also Phillips v. Tobin, 548 F.2d 408, 412 (2nd Cir. 1976).

III. CONCLUSION

The Connecticut Defendants respectfully request that this Honorable Court:

(1) Dismiss the Plaintiffs' amended complaint as against the Connecticut Defendants; and

(2) Grant such further relief as it may deem just and equitable.

Dated: Hartford, Connecticut
December 12, 2007

Respectfully submitted,

CONNECTICUT DEFENDANTS

By their attorneys,

Richard Blumenthal
ATTORNEY GENERAL

/s/ Robert E. Clark_____
Robert W. Clark, CT Bar # 18681
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020
Admitted *Pro Hac Vice*
N.Y. Bar Roll # 106488

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid to:

Robert L. Schulz, *pro se* plaintiff
2458 Ridge Road
Queensbury, NY 12804

/s/ Robert W. Clark________
Robert W. Clark
Assistant Attorney General