

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AMANDA JONES, *plaintiff*,

Case No. 2:24-CV-10750-BRM-JSA

vs.

DAN KLEINMAN, *defendant*.

**BRIEF IN SUPPORT OF
MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(A)(2)**

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Plaintiff Amanda Jones, through undersigned counsel, respectfully moves to voluntarily dismiss this action pursuant to Federal Rule of Civil Procedure 41(a)(2).

Introduction

Jones filed this action in November as a protective measure only. Jones sued Defendant Dan Kleinman in Louisiana, but he is a New Jersey resident, and Jones did not know whether the Middle District of Louisiana would exercise personal jurisdiction over him. Jones thus filed this action to protect her rights in the event personal jurisdiction failed there. Far from improper, the filing of a protective action was prudent. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 294 (2005) (“There is nothing necessarily inappropriate, however, about filing a protective action.”) (citing, *e.g.*, *Government of Virgin Islands v. Needle*, 861 F.Supp. 1054, 1055 (M.D. Fla. 1994) (staying an action brought by plaintiffs “to protect themselves” in the event that personal jurisdiction over the defendants failed in the United States District Court for the Virgin Islands)).

Since filing this action, however, Kleinman has effectively consented to personal jurisdiction in Louisiana by failing to assert the defense of lack of personal jurisdiction in his filings there. Because this action is no longer necessary to preserve Jones’s rights, it can be dismissed. Accordingly, Jones respectfully requests an order of voluntary dismissal pursuant to Rule 41(a)(2).

Background

Jones’s complaint

This is a defamation case. Jones is an elementary school librarian in Louisiana. Kleinman is a self-described library watchdog in New Jersey. Jones alleges that Kleinman has defamed her online, sometimes posting about her several times in one day, for at least the past two years.

Jones’s complaint reproduces numerous of Kleinman’s posts. [1 ¶¶ 2, 20-22, 23-72] In them, he falsely states that Jones gives highly age-inappropriate sexual material, including books that depict anal sex and books with titles such as “Spanking for Lovers,” “The Ultimate Guide to Kink,” and “The Ultimate Guide to Threesomes,” to children. He falsely states that she “preys on kids” and “sexualizes” children. He falsely labels her a “child groomer.” Kleinman’s statements about Jones are false and harmful. They cast Jones as a deviant and a danger to children and expose her to misplaced contempt and ridicule. There is perhaps no statement more injurious to an elementary educator than that they “sexualize” children.

Kleinman specifically directs his posts about Jones to a Louisiana audience, including Louisiana’s elected officials. [1 ¶¶ 3, 13] His activities directed at Jones have escalated in recent months. Since last March, he has appeared on Louisiana talk radio to talk about Jones; traveled to Louisiana for the purpose of speaking about Jones at a ticketed event, for which he was the featured guest; purported to have attended the annual Louisiana Library Association meeting for the purpose of encountering Jones; and even contacted Live Oak Middle School, Jones’s employer, at least twice. [1 ¶¶ 14-17] He has implored the Louisiana Department of Education to revoke Jones’s teaching certificate and Livingston Parish parents to challenge it. [1 ¶ 18]

Kleinman’s activities subject him to the jurisdiction of Louisiana courts. [1 ¶¶ 6, 12-19] But because he previously successfully challenged at least one federal court’s personal jurisdiction over him in a defamation case, see *Bittman v. Fox*, No. 14-C-08191, 2015 WL 5612061 (N.D. Ill. Sept. 23, 2015), Jones anticipated that he would challenge the Middle District of Louisiana’s personal jurisdiction over him. Out of an abundance of caution, she filed her complaint in this Court simultaneously with its filing in the Middle District of Louisiana.

Jones’s complaint expressly states that its filing in this Court is “out of an abundance of caution only” and “to preserve all rights.” [1 at ¶¶ 6, 19] It specifically asserts that “Kleinman’s activities subject him to the jurisdiction of *Louisiana* courts” [1 at ¶6 (emphasis added)] and that “[t]he U.S. District Court for the *Middle District of Louisiana* has personal jurisdiction over Kleinman” [1 at ¶12 (emphasis added)].

In addition to the foregoing statements in the complaint, Jones’s counsel separately advised Kleinman’s counsel, before he filed responsive pleadings, that Jones filed the complaint in this Court “as a protective measure” and invited some “agreement on personal jurisdiction.” [Exhibit A] Kleinman filed responsive pleadings in both courts instead.

Proceedings in the Middle District of Louisiana

On January 21, 2025, Kleinman filed a motion to dismiss the complaint in the Middle District of Louisiana. [21-1] The motion does not address the merits of Jones’s claims. Instead, it asks that court to dismiss under Rule 12(b)(3), for improper venue, or, alternatively, to transfer the action to this Court under 28 U.S.C. § 1404(a). The motion relies for its argument solely on the first-filed rule.

Kleinman did not ask the court to dismiss under Rule 12(b)(2), for lack of personal jurisdiction. By failing to assert the defense of lack of personal jurisdiction, he waived it.¹

¹“A party waives any defense listed in Rule 12(b)(2)-(5) by: (A) omitting it from a motion in the circumstances described in Rule 12(g)(2).” Fed. R. Civ. Pro. 12(h)(1). *See also Cruson v. Jackson Nat’l Life Ins. Co.*, 954 F.3d 240, 249 (5th Cir. 2020) (“Federal Rule of Civil Procedure 12(h)(1) relevantly provides that a party waives the defense of lack of personal jurisdiction by ‘omitting it from a motion in the circumstances described in Rule 12(g)(2).’ Fed. R. Civ. P. 12(h)(1)(A). Rule 12(g)(2) prohibits a party from a raising a defense ‘that was available to the party but omitted from its earlier [Rule 12] motion.’ Fed. R. Civ. P. 12(g)(2). Thus, lack of personal jurisdiction is waived if a party omits the defense from a Rule 12 motion and the defense was ‘available.’”); *Am. Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106 (9th Cir. 2000) (“A fundamental tenet of the Federal Rules of Civil Procedure is that certain defenses under Fed. R. Civ. P. 12 must be raised at the first available opportunity or, if they are not, they are forever waived.”); *Casares v. Agri-Placements Int’l, Inc.*, 12 F. Supp. 3d 956, 966 (S.D. Tex. 2014) (“Under Federal Rule of Civil Procedure 12(b), a party may assert seven enumerated defenses by motion, including lack of personal jurisdiction under Rule 12(b)(2). These defenses may be joined together in a single motion, Fed. R. Civ. P. 12(g)(1), and “[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.”

Briefing on Kleinman’s motion in the Middle District of Louisiana is now closed, and he does not dispute that he has waived any objection to the Middle District of Louisiana’s exercise of personal jurisdiction over him. [21-1] In an email to undersigned counsel dated March 27, 2025, Kleinman’s counsel agreed that Kleinman is subject to personal jurisdiction in Louisiana. [Exhibit B]

Proceedings in the District of New Jersey

On January 21, 2025, the same day that he filed his motion in the Middle District of Louisiana, Kleinman filed an answer to the complaint in this Court. [6, 7]

On January 23, 2025, Jones, having observed that Kleinman had failed to object to the Middle District of Louisiana’s personal jurisdiction over him, filed a motion to stay proceedings in this Court. [11]

The same day, Kleinman filed a motion to enjoin the proceedings in the Middle District of Louisiana. [10] That motion, like the motion that he filed in the Middle District of Louisiana, relies for its argument solely on the first-filed rule.

On January 24, 2024, Kleinman filed a letter requesting a pre-motion conference in which he stated his intent to file an Anti-SLAPP motion to dismiss. [13] This Court expressly denied his request and ordered that any such motion “will be held in abeyance until after Judge Allen decides the [11] motion to stay.” [16]

Fed. R. Civ. P. 12(b). Indeed, with certain exceptions not applicable here, once a party files a Rule 12 motion, it “[can]not make another motion under [Rule 12] raising a defense or objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ. P. 12(g)(2). A party waives a defense under Rule 12(b)(2)–(5) by omitting it from a Rule 12 motion or neglecting to include it in a responsive pleading.”; *Orthoflex, Inc. v. ThermoTek, Inc.*, No. 3:10-CV-2618-D, 2013 WL 2284878, at *1 (N.D. Tex. May 23, 2013) (“A party waives its personal jurisdiction defense by omitting it from a previously-filed motion to dismiss if the personal jurisdiction defense was available when the initial motion was made.”).

On March 26, 2023, Judge Allen denied Jones’s motion to stay but, observing that Jones desires to proceed in the Middle District of Louisiana, invited the parties to stipulate to a dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). [33]

Because Kleinman does not stipulate, Jones files this motion pursuant to Rule 41(a)(2).

Argument

Under Rule 41(a)(2), after an answer has been filed, “an action may be dismissed at the plaintiff’s request only by court order.” “Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.”

Jones respectfully requests a court order pursuant to Rule 41(a)(2). Because Kleinman has effectively consented to personal jurisdiction in Louisiana, this action is unnecessary to preserve Jones’s rights therefore can be voluntarily dismissed.

“The Third Circuit has adopted a ‘liberal policy’ in favor of dismissal under Rule 41(a)(2).” *Kachwalla v. Twp. of Edison*, 348 F.R.D. 215, 217 (D.N.J. 2024) (citations omitted). “[W]hether to permit dismissal is left to the discretion of the District Court.” *Est. of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 285 (3d Cir. 2017).

“A broad, defendants-and-also-plaintiffs approach is how the District Courts of the Third Circuit have tended to proceed.” *Kachwalla*, 348 F.R.D. at 218 (citations omitted). “[A] court may consider not only prejudice to the defendant, but also the conduct and motives of the plaintiff.” *Id.*

1. Plaintiff’s motives

“In assessing the conduct and motives of a plaintiff who seeks dismissal, a core inquiry is whether improper ‘gamesmanship’ is potentially at play.” *Kachwalla*, 348 F.R.D. at 218 (citing *Ewideh v. Homesite Ins. Co. of the Midwest*, 2023 WL 5170379, at *3 (M.D. Pa. July 17, 2023)).

There is no gamesmanship here. Jones does not seek to “dodge an unfavorable judicial ruling” (there have been no such rulings) or to obtain a “do-over” because a deadline has passed (there are no such deadlines). *Kachwalla*, 348 F.R.D. at 219. *See also, e.g., McGoveran v. Amazon Web Servs., Inc.*, 2024 WL 4533598, at *5-6 (D. Del. Oct. 18, 2024) (denying a motion for voluntary dismissal that was motivated by certain plaintiffs’ desire to reopen fact discovery).

Jones filed her complaint in this Court as a protective measure only. Her simultaneous filing in the Middle District of Louisiana and this Court was not “a forum-shopping maneuver.” *E.g., Waguespack v. Medtronic, Inc.*, 185 F. Supp. 3d 916, 923 (M.D. La. 2016). Her intention was always clear: She wanted to proceed in Louisiana but filed her complaint in this Court to protect her rights in the event personal jurisdiction over Kleinman failed there.

It has been argued the filing of a protective action is an improper use of the court. That is not true. Case law supports the filing of a protective action in circumstances such as this.² Even the U.S. Supreme Court has acknowledged its prudence. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 294 (2005) (“There is nothing necessarily inappropriate, however,

² *See also Amorin v. Taishan Gypsum Co.*, No. 11-22408, 2019 WL 13061843, at *2 (S.D. Fla. Mar. 19, 2019) (“Plaintiffs filed protective actions in federal courts in seven states: Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Texas ... Given Judge Fallon’s rulings on personal jurisdiction—which the United States Court of Appeals for the Fifth Circuit upheld—the Court does not anticipate the Non-Florida Plaintiffs encountering personal jurisdiction issues. However, out of an abundance of caution, the Court will stay the Non-Florida Claims pending their resolution in other federal courts.”); *Mueller v. Correction Corp. of Am.*, No. 1:12-00147, 2013 WL 431796, at *4 (D. Idaho Feb. 1, 2013) (“In addition, there is no firm procedural prohibition against filing a second protective lawsuit while awaiting a decision on the first. Generally, a litigant in federal court is not permitted to pursue claims against the same defendants for the same alleged wrongs in two different federal court actions. However, district courts have broad discretion to control their dockets and, after weighing the equities of the case, a district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions.”); *Jones v. Cont’l Motors, Inc.*, No. 12-0188, 2012 WL 2733670, at *2 (S.D. Ala. July 6, 2012) (plaintiff filed “identical” lawsuit in Alabama to protect rights in the event personal jurisdiction failed in South Carolina; “no relevant authority” for proposition that protective action was improper); *D’Jamoos v. Pilatus Aircraft Ltd.*, No. 07-1153, 2009 WL 3152188, at *3 (E.D. Pa. Oct. 1, 2009) (“[T]he plaintiffs have done nothing wrong in filing a protective lawsuit . . . There is no showing that the plaintiffs have filed any of their claims in bad faith. The plaintiffs state that they ‘filed their action in Pennsylvania believing, in good faith, that specific jurisdiction existed over Pilatus in Pennsylvania.’ The costs of litigation in Colorado do not amount to an unwarranted hardship to Pilatus. They are the result of a ‘judicial system that often provides multiple forums for plaintiffs to bring their claims.’”).

about filing a protective action.”) (citing, *e.g.*, *Rhines v. Weber*, 544 U.S. 269 (2005) (permitting a federal district court to stay a federal habeas action and hold the petition in abeyance while a petitioner exhausts claims in state court); *Union Pacific R. Co. v. Department of Revenue of Ore.*, 920 F.2d 581, 584, and n. 9 (9th Cir. 1990) (noting that the railroad company had filed protective actions in state court to prevent expiration of the state statute of limitations); *Government of Virgin Islands v. Needle*, 861 F.Supp. 1054, 1055 (M.D. Fla. 1994) (staying an action brought by plaintiffs “to protect themselves” in the event that personal jurisdiction over the defendants failed in the United States District Court for the Virgin Islands)). Indeed, if Jones had not filed a protective action in this Court, and personal jurisdiction over Kleinman later failed in the Middle District of Louisiana, Kleinman could argue Jones was negligent in pursuing her claim.³

Protective actions are frequently stayed, not dismissed.⁴ Accordingly, immediately upon observing that Kleinman appeared to have waived any objection to the Middle District of Louisiana’s exercise of personal jurisdiction over him, Jones moved to stay these proceedings. But because Kleinman now does not dispute that he waived any objection to the Middle District of Louisiana’s exercise of personal jurisdiction over him, there is no need even for a stay.

³ *E.g.*, *Meyer v. Bd. of Regents of Univ. of Oklahoma*, 597 F. App’x 27, 28 (2d Cir. 2015) (“The Defendants argue ... that Meyer was not diligent in pursuing her claim, since she did not file a protective lawsuit in Oklahoma until after the statute of limitations in Oklahoma had run [and] that it was obvious from the outset that personal jurisdiction did not exist in New York”); *D.G. ex rel. LaNisha T. v. New Caney Indep. Sch. Dist.*, 806 F.3d 310, 321 (5th Cir. 2015) (acknowledging that certain circumstances, including risk that a limitations period will expire, may “force parties to “file ‘protective complaints’ ”); *Avery v. United States*, No. 04-1525, 2005 WL 6112629, at *7 (Fed. Cl. May 6, 2005) (“However, Dr. Avery neglected to file a protective complaint with the district court in the event that this court were to determine that it lacked jurisdiction over the subject claims.”).

⁴ *E.g.*, *Amorin*, 2019 WL 13061843, at *2 (“Plaintiffs filed protective actions in federal courts in seven states: Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Texas ... Given Judge Fallon’s rulings on personal jurisdiction—which the United States Court of Appeals for the Fifth Circuit upheld—the Court does not anticipate the Non-Florida Plaintiffs encountering personal jurisdiction issues. However, out of an abundance of caution, the Court will stay the Non-Florida Claims pending their resolution in other federal courts.”); *Mueller*, 2013 WL 431796, at *4 (“[D]istrict courts have broad discretion to control their dockets and, after weighing the equities of the case, a district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions.”).

Immediately after Judge Allen suggested that the parties stipulate to a voluntary dismissal, Jones asked Kleinman to stipulate. Immediately after he refused, she prepared the instant motion for filing. Jones has not sat on her hands. *See generally Shamrock Creek, LLC v. Borough of Paramus*, 2015 WL 3902307, at *2 (D.N.J. June 23, 2015) (a plaintiff's diligence can be relevant to consideration of a Rule 41 motion).

In summary, Jones has not acted in bad faith. She filed this action as a protective measure only, and ample authorities support that it was a proper and prudent thing to do. She has been transparent throughout with Kleinman and the Court. And she has acted promptly. Jones's conduct and motives do not suggest any reason not to grant this motion.

2. Prejudice

“Rule 41 motions should be granted absent extreme prejudice to the defendants.” *Emmanouil v. Mita Mgmt., LLC*, No. 11-5575-MAS-TJB, 2015 WL 5023049, at *4 (D.N.J. Aug. 24, 2015). The mere prospect of a second lawsuit does not count. *CDK Glob., LLC v. Tulley Auto. Grp., Inc.*, 489 F. Supp. 3d 282, 297 (D.N.J. 2020) (“Generally, a Rule 41 motion should be granted unless the ‘defendant will suffer some prejudice other than the mere prospect of a second lawsuit.’”) (quoting *Emmanouil*, 2015 WL 5023049, at *2). “In determining whether a voluntary dismissal will result in prejudice to the defendant, courts look to a variety of factors including, ‘(1) the expense of a potential second litigation; (2) the effort and expense incurred by defendant in preparation for trial in the present case; (3) the extent to which the case has progressed; and (4) plaintiff’s diligence in bringing the motion to voluntarily dismiss.” *Id.* (quoting *Emmanouil*, 2015 WL 5023049, at *2).

Applying the foregoing here, dismissal will not prejudice Kleinman. Currently there are two actions against him; upon the dismissal of this action, there will only be one. Both actions are

in their infancy. The motions filed to-date have not addressed the merits. There has been no discovery, and there are no pending deadlines.

Furthermore, Jones has been transparent and diligent in her communications with Kleinman and the Court. Her complaint expressly states that its filing in this Court is “out of an abundance of caution only” and “to preserve all rights.” [1 at ¶¶ 6, 19] Her counsel separately advised Kleinman’s counsel, before he filed responsive pleadings, that Jones filed the complaint in this Court “as a protective measure” and invited some “agreement on personal jurisdiction.” [Exhibit A] Kleinman’s counsel only agreed that Kleinman is subject to personal jurisdiction in Louisiana this week. [Exhibit B] To the extent Kleinman has duplicated efforts in the Middle District of Louisiana and this Court, it could have been avoided by agreeing to personal jurisdiction earlier.

These circumstances do not suggest any reason not to grant this motion. There is no prejudice, and certainly no extreme prejudice, to Kleinman.

Conclusion

Because Kleinman effectively consented to personal jurisdiction in Louisiana, this action is no longer necessary to protect Jones’s rights and can and should be dismissed. Jones respectfully requests a court order pursuant to Rule 41(a)(2).

Respectfully submitted,

/s/ Kaja S. Elmer

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the ECF system which sent notification of filing to all counsel of record.

March 31, 2025

/s/ Kaja S. Elmer