

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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HAROLD L. ROSENBERGER,

Plaintiff,

-against-

04-CV-0475

NEW YORK STATE OFFICE OF TEMPORARY AND  
DISABILITY ASSISTANCE; ROBERT DOAR,  
Commissioner, in his official capacity; and ULSTER  
COUNTY FAMILY COURT,

(GLS)(DRH)

Defendants.

**MEMORANDUM OF LAW IN REPLY TO PLAINTIFF'S OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT  
AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION  
TO STRIKE DEFENDANTS' MOTION  
("DEFENDANTS' DISMISSAL MEMORANDUM II")**

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## **PRELIMINARY STATEMENT**

The defendants in this action, the New York State Office of Temporary and Disability Assistance (“OTDA”), OTDA’s Commissioner, Robert Doar, and the Ulster County Family Court, have moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. In support of the motion, defendants submitted a Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaint (“Defendants’ Dismissal Memorandum I”). Plaintiff responded with a Memorandum of Law in Support of Plaintiff’s Cross-Motion to Strike, or in the Alternative, to Deny Defendants’ Motion to Dismiss the Complaint (“Plaintiff’s Dismissal Memorandum”). This memorandum of law (“Defendants’ Dismissal Memorandum II”) is submitted in reply to plaintiff’s opposition to defendants’ motion to dismiss the complaint and in opposition to plaintiff’s cross-motion to strike defendants’ motion to dismiss.

It must be noted that prior to service of the instant motion, the Clerk entered default against defendants. On the same date as the motion to dismiss was filed, defendants moved to vacate the Clerk’s entry of default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure. In support of the motion, defendants submitted Declaration of David B. Roberts (“Roberts Decl. I”) and the Memorandum of Law in Support of Defendants’ Motion to Set Aside the Clerk’s Entry of Default (“Defendants’ Default Memorandum I”). In response, plaintiff submitted a Memorandum of Law in Support of Plaintiff’s Motion for Default Judgment and to Sustain Entry of Default (“Plaintiff’s Default Memorandum”). On this date, defendants are submitting a memorandum of law (“Defendants’ Default Memorandum II”) on behalf of defendants in reply to plaintiff’s opposition to defendants’ motion to set aside the Clerk’s entry of default and in opposition to plaintiff’s motion for a default judgment, accompanied by the Reply Declaration of David B. Roberts (“Roberts Decl. II”) and the Affidavit of Linly L. Rarick (“Rarick Aff.”).

The instant memorandum demonstrates that plaintiff is not entitled to an order striking defendants’ motion to dismiss the complaint. Further, as explained herein, plaintiff has failed to sufficiently rebut the bases for dismissal raised by defendants. Also submitted herewith is the Declaration of Lisa Ullman (“Ullman Decl.”).

## ARGUMENT

### POINT I

#### **PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS SHOULD BE DISMISSED.**

Plaintiff's motion to strike defendants' motion to dismiss should be denied. Rule 12(f) of the Federal Rules of Civil Procedure states that upon motion, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.Pro. 12(f). Plaintiff has failed to explain what makes defendants' motion to dismiss "redundant, immaterial, impertinent or scandalous" and appears to proceed under the theory that defendants failed to serve and file a timely response to the complaint. Plaintiffs' Dismissal Motion, p. 4. This is not a sufficient basis on which a motion should be stricken.

The Federal Rules of Civil Procedure specifically permit entry of default against a defendant to be set aside for good cause. Fed. R. Civ. Pro. 55(c). The precedent in this Circuit offers a number of factors showing how good cause may be established. See e.g. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). Defendants have asserted a number of reasons demonstrating that they fall within the criteria articulated in Enron, establishing that the default entered by the Clerk in this case should be set aside. See Defendants' Default Memorandum I and Defendants' Default Memorandum II. Once an entry of default against a defendant is set aside, what logically follows is the defendant's interposition of defenses, whether by answer or motion to dismiss, as permitted by Rule 12(b) of the Federal Rules of Civil Procedure. If the Court directs that the entry of default should be set aside, then defendants' motion to dismiss should be considered. Plaintiff's motion to strike the motion to dismiss should therefore be denied.

## POINT II

### **THIS COURT LACKS SUBJECT MATTER TO REVIEW PLAINTIFF'S CLAIM, WHICH COLLATERALLY ATTACKS FAMILY COURT ORDERS AND JUDGMENTS.**

Defendants' initial memorandum of law argued that the Rooker-Feldman doctrine applied to bar plaintiff's claims; that is, that the Court lacks subject matter to review claims which collaterally attacks orders and judgments issued by a State court. In particular, defendants noted that despite plaintiff's contention to the contrary, plaintiff's complaint represents an attempt to collaterally attack the child support order allegedly issued by Family Court, which is prohibited under the Rooker-Feldman doctrine. Defendants' Dismissal Memorandum I, Point I.

Plaintiff alleges that an exception to the Rooker-Feldman doctrine applies here because his claim is "a general challenge to the constitutionality of a state statute" (Plaintiff's Dismissal Memorandum, p. 6-7) and that he is "not requesting that a State court judgment be overturned, altered, or modified in any way by this Court." Plaintiff's Dismissal Memorandum, p. 7, citing Complaint ¶ 12. However, as noted in defendants' previous memorandum, the Rooker-Feldman doctrine precludes a federal court from exercising subject matter jurisdiction over a federal claim that is "inextricably intertwined" with a state court judgment. Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir. 1996). This means that "where a federal plaintiff had an opportunity to litigate in a state proceeding . . . subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under principles of preclusion." Rivers v. McLeod, 252 F.3d 99, 101 (2d Cir. 2001). Since plaintiff's purported due process and parental privacy claims arise from the Ulster Family Court's determinations regarding child support, they are inextricably intertwined with the state court's determinations and could have been raised in state court, either in the Family Court or on appeal. Cogswell v. Rodriguez, 304 F.Supp.2d 350, 355-56 (E.D.N.Y. 2004).

In a similar action commenced by plaintiff, Rosenberger v. Ulster Family Court, et al., 03-CV-0534, N.D.N.Y. ("Rosenberger I"), plaintiff challenged the constitutionality of New York

Domestic Relations Law §§ 70(1) and 240(1)(a), which concern child custody, following a state court proceeding that apparently determined plaintiff would not have custody over his children. See Rosenberger I, Decision, McAvoy, J., May 17, 2003 (“Rosenberger I Decision I”) (Ullman Decl. Exhibit A); Rosenberger I, Decision, McAvoy, J., August 21, 2003 (“Rosenberger I Decision II”) (Ullman Decl. Exhibit B); Rosenberger I, Decision, McAvoy, J., December 18, 2003 (“Rosenberger I Decision III”) (Ullman Decl. Exhibit C).

In that case the Honorable Thomas J. McAvoy, United States District Judge, held that plaintiff’s challenge to the constitutionality of the Domestic Relations Law’s child support provisions was inextricably intertwined “with the state court’s custody determination inasmuch as Plaintiff had the opportunity to raise the constitutional challenge in state court.” Rosenberger I Decision III, p. 6. The Court, relied on Rivers for the principle that inextricably intertwined claims “are those that would be precluded by res judicata.” Rosenberger I Decision III, p. 6-7, Rivers, 252 F.3d 99 at 101.<sup>1</sup> The same analysis applies here.

As previously explained by defendants, res judicata bars re-litigation of claims actually raised in a prior proceeding as well as those that could have been litigated. Quartararo v. Catterson, 917 F.Supp. 919, 944 (E.D.N.Y.1996). Thus, the same circumstances present in Rosenberger I are at bar. Plaintiff could have raised the instant constitutional challenges to Family Court § 413 and Domestic Relations Law § 240 in the child support proceeding held in Ulster County Family Court. See Complaint ¶ 38. New York’s Appellate Divisions have consistently recognized that such constitutional challenges are properly raised in Family Court. Coleman ex rel. Thomas v. Thomas, 295 A.D.2d 508, 509 (2d Dept. 2002); In re Guardianship of Michael Anthony F., 177 A.D.2d 1031 (4th Dept. 1991); In re Dedrick M., 89 A.D.2d 781 (4th Dept. 1982); see also Richards v. City of N.Y., No. 97-Civ.-7990, 2003 U.S. Dist. Lexis 8037, at \* 26 (S.D.N.Y. May 7, 2003) (copy annexed hereto as Appendix A). Plaintiff therefore should have made the arguments asserted by the

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<sup>1</sup> Rosenberger I was dismissed in its entirety and plaintiff has appealed. Ullman Decl. ¶ 7.

complaint in the context of his child support proceeding. Plaintiff's argument suggesting that res judicata is inapplicable (Plaintiff's Dismissal Memorandum I, p. 9) is therefore unavailing.

Plaintiff also attempts to rebut defendants' argument that jurisdiction over this matter is barred by the domestic relations exception to the jurisdiction of the federal courts, which "divests the federal courts of power to issue divorce, alimony and child custody decrees." Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); see Mitchell-Angel v. Cronin, 101 F.3d 108 (2d Cir.1996); American Airlines v. Block, 905 F.2d 12, 14 (2d Cir.1990). Defendants' Dismissal Memorandum, Point I. In opposition, plaintiff states that he "is not asking for a divorce, alimony or custody decree." Plaintiffs' Dismissal Memorandum, p. 7. Nevertheless, it is obvious that plaintiff desires to change the result of the Family Court order that directed him to pay child support, and the exception bars civil rights actions aimed at changing the results of domestic proceedings, including orders of child custody. See, e.g., Abidekun v. New York City Bd. of Education, 1995 U.S. Dist. LEXIS 22210, \*1 (E.D.N.Y. April 6, 1995) (annexed hereto as Appendix B); Fariello v. Rodriguez, 148 F.R.D. 670, 675; McArthur v. Bell, 788 F.Supp. 706, 708 (E.D.N.Y.1992); Neustein v. Orbach, 732 F.Supp. 333, 339 (E.D.N.Y.1990). As such, plaintiff's claims must be dismissed.

Finally, it is of no moment that, as pointed out by plaintiff, the Order signed by the Honorable David R. Homer, United States Magistrate Judge, on May 7, 2004 (annexed to Plaintiff's Dismissal Memorandum as Appendix A-2), stated that plaintiff "does not seek to overturn the decision of the state court giving rise to this controversy." May 7, 2004 Order, p. 1; Plaintiff's Dismissal Memorandum, p. 7. Defendants do not believe that Magistrate Homer made any finding that substantively affects defendants' motion on jurisdictional grounds, as it appears that the referenced portion of the May 7 Order constituted no more than a recitation of the plaintiff's allegations.

### **POINT III**

#### **THE CASE DOES NOT PRESENT A JUDICIABLE "CASE OR CONTROVERSY".**

Defendants' initial submissions noted that the complaint should be dismissed for lack of jurisdiction, because it does not present a case or controversy as required by Article III of the U.S.

Constitution. U.S. Const. Art. III, § 2. In order to meet the standing requirements of Article III, a plaintiff must show: “(1) he has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-181 (2000).

Plaintiff’s responsive papers do not demonstrate that he has satisfied his burden of establishing standing. Miller v. Silbermann, 951 F.Supp. 485, 489 (S.D.N.Y.1997). Again, plaintiff points to Magistrate Homer’s May 7, 2004 Order (Plaintiff’s Dismissal Memorandum, Appendix A-2), which stated that plaintiff “does not seek to overturn the decision of the state court giving rise to this controversy.” May 7, 2004 Order, p. 1; Plaintiff’s Dismissal Memorandum, p. 10. The Order appeared to repeat plaintiff’s allegations solely in order to provide context for the reader; it does not appear to serve as a substantive determination on defenses that had not yet been raised. Oddly, plaintiff’s only remaining argument in the matter is an assertion that he was injured by the child support order and wage execution issued by the Family Court. Plaintiff cannot at once articulate that he is not challenging the State court order while at the same time asserting that order as the source of the injury upon which he claims standing. The complaint is therefore subject to dismissal.

#### **POINT IV**

#### **THE COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION OVER THIS ACTION.**

Defendants’ earlier memorandum argued that dismissal was appropriate under the doctrine of abstention. Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). The doctrine urges “federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings . . .” Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 237 (1984). Whether Younger abstention should be applied depends on the three-part test articulated by the Second Circuit: “(1) whether there is an ongoing state proceeding; (2) whether an important state interest is involved; and (3) whether the federal plaintiff has an

adequate opportunity for judicial review of his constitutional claims during or after the proceeding.” Christ the King Regional High School v. Culvert, 815 F.2d 219, 224 (2d Cir.), cert den 484 U.S. 830 (1987).

Plaintiff argues in opposition to defendants’ motion that there are no ongoing proceedings. Plaintiffs’ Dismissal Memorandum I. However, as previously noted by defendants, state courts have continuing jurisdiction over issues of support and custody, satisfying the first component of the test. Notably, plaintiff does not take issue with defendants’ arguments as to the second and third portions of the test set forth in Christ the King. There is clearly an important state interest at stake, as the statutes in question concern the State’s methodology for determining child support payments. See Defendants’ Dismissal Memorandum, p. 1-3; Defendants’ Default Memorandum II, p. 5. Moreover, plaintiff could have raised his constitutional challenges before the Family Court. See Point II above. Therefore, abstention is appropriate.

#### **POINT V**

#### **THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

Defendants’ earlier motion papers asserted that the complaint fails to state a claim to the extent it alleges that plaintiff is entitled to a notice and hearing before he may be required to pay support for his children. Further, defendants argued that the complaint does not invoke the Due Process Clause to the extent that it “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Troxel v. Granville, 120 S. Ct. 2054, 2059-60 (2000), quoting Washington v. Glucksberg, 521 U.S. 702, 719-20, 117 S.Ct. 2258 (1997). Defendants’ Dismissal Memorandum I, Point IV. Specifically, plaintiff’s allegations do not sufficiently establish that he has a fundamental right or liberty interest at stake.

In opposition, plaintiff contends that defendants wrongly interpreted Stanley v. Illinois, 405 U.S. 645, 651 (1972). Plaintiff’s Dismissal Memorandum, p. 11-13. However, it is plaintiff who is mistaken. As explained previously, “mere[ ] . . . shifting economic arrangements”, Stanley, 405 U.S. at 651, stand on a different constitutional footing from the parental liberty interest in bringing

up children by molding the moral, religious, educational, and cultural values of their offspring. In this case, the challenged statutes concern the establishment of a minimum support obligation for children. In the event of non-payment of support, or payment of less than sufficient support to meet actual costs, the State may end up meeting these needs. Rynecki v. State of Conn. Dept. of Social Services, 742 F.2d 65, 66-67 (2d Cir. 1984) (“Whether the Connecticut practice that appellant alleges to exist is sound or fair as a matter of policy, we agree with the district court that it is simply not violative of appellant's constitutional rights. The cases supporting rights of privacy and personhood cannot be read so broadly. The state, after all, has a financial interest in seeing to it that children who could be supported by their parents do not become public charges.”) Thus, the statutes concern “shifting economic arrangements” and do not invoke the interests at stake when a parent’s custodial rights are being terminated or curtailed. Since plaintiff has failed to articulate a fundamental right or interest, his due process claims must be dismissed.

#### CONCLUSION

**DEFENDANTS’ MOTION FOR AN ORDER  
DISMISSING THE COMPLAINT SHOULD BE GRANTED  
AND PLAINTIFF’S CROSS-MOTION TO STRIKE  
DEFENDANTS’ MOTION TO DISMISS SHOULD BE DENIED.**

Dated: Albany, New York  
July 26, 2004

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