Yoder, et al v. Town of Morristown, et al Doc. 85

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Levy Yoder, et al.,

Plaintiffs,

-v.- 7:09-CV-0007 (NPM/GHL)

Town of Morristown, et al.

Defendants.

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NEAL P. MCCURN, Senior District Judge

Memorandum, Decision, and Order

I. Introduction

Presently before the court is a motion by the defendants to dismiss the Complaint pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure for failure to join the State of New York ("New York" or the "State") and St. Lawrence County (the "County") under Rule 19.[1] Alternatively, the defendants move to join the State and County as defendants under Rule 19 or Rule 20. Plaintiffs oppose the motion in its entirety. Decision on the pending motion is based entirely on the submitted papers, without oral argument. For the following reasons, the motion is denied in its entirety.

Plaintiffs, Amish residents of Morristown, New York, are Levi Yoder, Jonas Zook, Sam Zook, John L. Hershberger, Menno S. Hershberger, Urie Hershberger, Menno L. Glick, Andy A. Miller, Dannie L. Swartzentruber, Mosie Swartzentruber , Peter D. Swartzenruber, Bishop Harvey Miller, and Bishop Mose Miller (collectively "Plaintiffs"). Defendants are the Town of Morristown ("Morristown" or "the Town"), Morristown Code Enforcement Officer Lanetta Kay Davis ("Davis"), Town Supervisor Frank L. Putnam ("Putnam"), Town Deputy Supervisor Howard Warren ("Warren"), and Town Council Members David Stout III ("Stout"), Mark Blanchard ("Blanchard"), Christopher Coffin ("Coffin"), and Gary Turner ("Turner") (collectively "Defendants").

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[1] Plaintiffs argue that Defendants' Rule 12(b)(7) motion is untimely. But a Rule12(b)(7) to dismiss for failure to join a party under Rule 19 cannot be waived, and a party may make the motion at any time up to and including trial. See FED. R. CIV. P. 12(h)(2). After pleadings are closed, a defendant may also make such a motion in a motion for judgment on the pleadings so long as it is early enough that it will not delay trial. See FED. R. CIV. P. 12(c). As such, the court will consider the merits of the motion.

II. Factual Background

Plaintiffs live in Morristown, New York, and practice the Swartzentruber Amish faith. Compl. ¶ 42, Dkt. No. 1. Their religious tenets include: "1) living a simple life, free of waste or extravagance[;] 2) maintaining separation from the world and worldly customs[;] and 3) maintaining faith in God, rather than man, to protect and provide for the Amish community." Id. ¶ 43. Their religious laws are collected in the "Ordnung" (or Order) that is passed down through the generations. Id. ¶ 46. The Ordnung's rules on housing and construction "ensure that [their] religious beliefs are followed" and that their homes "are built safely." Id. ¶ 46. In accordance with their beliefs and religious laws, the Swartzentruber Amish, among other things, do not use electricity in their homes, and they build their "houses to be simple, basic, and free of modern conveniences or any ornamentation." Id. ¶ 44.

In or about late 2005 or early 2006, the Town Board of Morristown ("Town Board") approved Putnam's appointment of Davis as the Town's Code Enforcement Officer. Compl. ¶ 15. Shortly after the appointment, Defendants enacted Local Law #4 of 2006 ("Local Law #4"), which incorporated portions of New York's Uniform Fire Prevention and Building Code ("the Building Code"). Compl. ¶¶ 3, 60. The Building Code sets forth the minimum level of protection from fire or other elements for all buildings throughout New York. Defs.' Mem. of Law at 4; see N.Y. EXEC. Law §§ 370-83. The Executive Law also provides a scheme by which each level of government (state, county, and local) enforces the Building Code. N.Y. EXEC. LAW § 381(2).[2] Morristown, rather than opting out of

[2] The New York Executive Law states in pertinent part:

> [E]very local government shall administer and enforce the [Building Code] . . . on and after [January 1, 1984], provided, however, that a

enforcing the Building Code on its own, enacted Local Law #4, which "provides for the administration and enforcement" of the Building Code by the Town and the "mechanisms and procedures by which the Town is going to enforce" it. Defs.' Mem. of Law at 5; see also Local Law #4, Ex. A to Aff. of Jacinda H. Conboy ("Conboy Aff."), Feb. 5, 2010, at 4, Dkt. Nos. 42-1 and 42-2.

Under Local Law #4, with limited non-religious exceptions, every "construction, enlargement, alteration, improvement, removal, relocation or demolition of any building or structure or any portion thereof" requires a building permit. Local Law #4 § 4(a)-(b). All building permit applications must be accompanied by "at least [two] sets of construction documents (drawings and/or specifications) [that must be] prepared by a New York State registered architect . . . [and] substantiate that the proposed work [and homes] will comply with the [Building] Code and the Energy Code[.]" Local Law #4 § 4(d)(5).

Plaintiffs contend that obtaining construction documents and building homes in accordance with such documents violates the Ordnung, and their "belief that

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> local government may enact a local law prior to [July 1] in any year providing that it will not enforce such code[] on and after the first day of [the following] January . . . . In such event the county in which said local government is situated shall administer and enforce such code[] within such local government from and after the first day of January [following] the effective date of such local law, in accordance with the provisions of [N.Y. Executive Law section 381(b)] unless the county shall have enacted a local law providing that it will not enforce such code[] within that county. In such event the [New York Secretary of State ("Secretary")] in the place and stead of the local government shall, directly or by contract, administer and enforce the [Building Code.] A local government or a county may repeal a local law which provides that it will not enforce such code[] and shall thereafter administer and enforce such code[] as provided [in the Executive Law.]

N.Y. EXEC. LAW § 381(2).

they must maintain the simple ways approved by their forebears, avoiding any modern extravagances." Compl. ¶ 75. Plaintiffs claim that Defendants are imposing this requirement on Plaintiffs even though Defendants know that the requirement violates Plaintiffs' religious beliefs. Id. ¶ 76.

Davis has allegedly told Morristown's Swartzenruber Amish community "that Amish homes will not be Building Code-compliant unless: (1) battery-powered smoke detectors are installed[;] (2) the homes are equipped with 'hurricane tie downs'[;] and (3) the foundations of their homes are 'frost protected.'" Compl. ¶ 78. The Ordnung, however, prohibits the use of electricity, including battery-powered devices like smoke detectors, in Amish homes. Id. ¶ 79. Requiring hurricane tie downs would also violate "Plaintiffs' belief that they must trust only in God, and not in man, to provide for their safety and welfare." Id. ¶ 80. Likewise, frost-protected foundations "symbolize an impermissible reliance upon man, rather than God, to ensure . . . health and safety," and they are a "wasteful, unnecessary extravagance that . . . induce[s] pride." Id. ¶ 81.

Plaintiffs claim that complying with Local Law #4 would be detrimental to their ability to practice their faith. The Swartzentruber Amish are divided into districts based on geographic location and size of membership. Compl. ¶ 48 n.1. A district's bishop ensures that the district's members are following the Ordnung. Id. ¶ 48. A district that changes its Ordnung in a manner that is "materially different from the traditional" Ordnung will be unable to join in fellowship with other districts, preventing the young people from that district from marrying those in other districts. Id. ¶¶ 49-50. Also, a home that is built in accordance with architect-certified plans or with electronic smoke detectors will be unable to host the members of other communities. Id. ¶ 51. Rather than building churches, the Swartzentruber Amish gather in personal homes for communal worship. Id. ¶ 52.

Thus, a ban on building homes in accordance with the Ordnung will effectively ban Swartzentruber Amish houses of worship. Id. ¶ 53.

Plaintiffs claim that prior to 2006, Morristown's Swartzentruber Amish residents "were granted building permits and permitted to build their homes according to their traditional standards and customs without interference from any Morristown official." Compl. ¶ 10. But since 2006, thirteen of Morristown's Swartzentruber Amish residents were given citations for building or moving a structure without a permit. Compl. ¶¶ 66-72.

Plaintiffs allege that "Defendants are selectively and discriminatorily enforcing Local Law #4 and the Building Code against Plaintiffs because of Plaintiffs' religious beliefs." Compl. ¶ 12. Plaintiffs claim that these actions violate the First and Fourteenth Amendments to the United States Constitution; article I, sections 3 and 4, of the Constitution of the State of New York; 42 U.S.C. § 3601 *et seq.* (the "Fair Housing Act"), and 42 U.S.C. § 2000cc *et seq.* (the "Religious Land Use and Institutionalized Persons Act" or "RLUIPA"). Compl. ¶ 2.

III. Procedural Background

Defendants first move to dismiss the Complaint under Rule 12(b)(7) of the Federal Rules of Civil Procedure for the failure to join the State of New York and St. Lawrence County as parties under Rule 19. Defendants submit that the provisions of Local Law #4 to which the Plaintiffs object are all required by the Building Code. Defendants argue that complete relief cannot be accorded among the existing parties without the presence of either the State or the County because those entities would enforce the Building Code if Morristown stopped doing so. Moreover, they argue that any decision by the court will "necessarily implicate the State and the [Building] Code itself" because Plaintiffs seek "a determination that

the [Building] Code violates Plaintiffs' constitutional First Amendment rights," and that "New York is an [necessary][3] party" because a ruling that the Building Code violated the Constitution would require New York to change its laws. Defs.' Mem. of Law at 5, Dkt. No. 42-4.

Plaintiffs assert that they are making an "as applied" challenge to Defendants' enforcement of Local Law #4 and the Building Code, and that they are not asserting a facial challenge to the laws. See Pls.' Mem. of Law at 8 ("This action has nothing to do with the facial constitutionality of Local Law #4 or the Building Code, but rather Defendants' application of those laws."); Pls.' Sur-Reply at 1, Dkt. No. 51-2 ("Plaintiffs are *not* making a facial challenge to the Building Code . . . . Rather, Plaintiffs *are* contending that the Building Code 'as applied' to them by Defendants is unlawful, and that Defendants *are* discriminatorily enforcing the Building Code against [Plaintiffs].") (emphasis in original).

"A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." Field Day, LLC v. County of Suffolk, 463 F.3d 167, 174 (2d Cir. 2006) (citations omitted). "An 'as-applied challenge,' on the other hand, requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." Id. (citations omitted).

[3] In their memorandum of law , Defendants use the term "indispensable," but the court will assume they mean to use the term "necessary." Throughout their motion papers, Defendants use the terms "necessary" and "indispensable" interchangeably. These two terms, however, are not synonymous. "A party cannot be indispensable [under Rule 19(b)] unless it is a 'necessary party' under Rule 19(a)." Jonesfilm v. Lion Gate Int'l, 299 F.3d 134, 139 (2d Cir. 2002). An argument that the State would be required to change its laws implicates Rule 19(a), and not Rule 19(b). See Point IV infra (defining "necessary party" and "indispensable party" in greater detail).

A facial challenge to the constitutionality of Local Law #4 may implicate the State because the Local Law #4 merely codifies—at the local level—the requirements of the Building Code. But after reviewing the Complaint, and in light of Plaintiffs' repeated representations, the court finds that the Complaint challenges Defendants' application and enforcement of Local Law #4 and the Building Code and not the constitutionality of either law. In addition to seeking monetary damages from Defendants, Plaintiffs seek a permanent injunction (1) directing Defendants to issue building permits to Plaintiffs; (2) from enforcing Local Law #4, the Building Code, or other laws, in a manner that unlawfully discriminates against Plaintiffs based on their religious beliefs; and (3) from imposing other penalties on Plaintiffs for exercising their protected rights. Compl. at 36-37. Plaintiffs also request a declaratory judgment "that: Defendants violated Plaintiffs' civil rights through the manner in which they have enforced their laws against Plaintiffs." Id. at 37. The requested injunctive and declaratory relief all relate to Defendants' enforcement of Local Law #4 and the Building Code, and not to the facial validity of the laws themselves.

Accordingly, the court construes the Complaint as asserting only an "as applied" challenge to Defendants' enforcement of Local Law #4 and the Building Code. The court's analysis of the pending motion will reflect that understanding. Absent a compelling reason to do so, Plaintiffs may not later claim in this action that they are asserting a "facial" challenge to the laws.[4]

Defendants also make an alternative motion to join the State of New York

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[4] See In re PCH Assocs., 949 F.2d 585, 592 (2d Cir. 1991) ("Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation."); Doe v. New York City Dep't of Social Servs., 709 F.2d 782, 789 (2d Cir. 1983) ("[the court] will not depart from [the law of the case doctrine] absent 'cogent' or 'compelling' reasons").

and St. Lawrence County "pursuant to [Federal Rule of Civil Procedure] 20" because the State and County "are necessary *and* proper parties since there are questions of law . . . that are common to the rights and duties of [the State and County] arising out of the series of transactions or occurrences at issue in this action." Defs.' Mem. of Law at 7 (emphasis added). Defendants then conclude that New York is a "necessary party" because "the State's ability to require Counties and/or local municipalities to enforce the [Building] Code consistently across the State will be impaired and/or implicated." Id.

The alternative argument conflates the compulsory joinder of "necessary parties" under Rule 19 and the permissive joinder of "proper parties" under Rule 20. Compare FED. R. CIV. P. 19 ("Required Joinder of Parties")[5] with FED. R. CIV. P. 20 ("Permissive Joinder of Parties").

Under Rule 19, an absentee is "necessary" if:

> (A) in [his] absence, the court cannot accord complete relief among existing parties; or (B) [the absentee] claims an interest relating to the subject of the action and is so situated that disposing of the action in [his] absence may: (i) as a practical matter impair or impede [his] ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED R. CIV. P. 19(a)(1).

On the other hand, under Rule 20, an absentee is a "proper" defendant if:

> (A) any right to relief is asserted against [him] jointly,

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[5] The 2007 Amendments to Rule 19 replaced the term "necessary" with "required" and eliminated the term "indispensable." These changes were intended to be stylistic only. FED. R. CIV. P. 19 advisory committee's note. See also Phillippines v. Pimentel, 553 U.S. 851, 855-856, 128 S. Ct. 2180 (2008). The traditional terms continue to be used as terms of art by courts, attorneys, and commentators. Accordingly, the court will continue to use the traditional terms to avoid confusion.

> severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences [in the pending action]; and (B) any question of law or fact common to all defendants will arise in the action.

FED. R. CIV. P. 20(a)(2).

By arguing that "there are questions of law . . . common to the rights and duties of both [the State and County] arising out of the series of transactions or occurrences at issue in this action," Defs.' Mem. of Law at 7, Defendants invoke the language of Rule 20. But by then concluding that New York is a "necessary party" because "the State's ability to require Counties and/or local municipalities to enforce the [Building] Code consistently across the State will be *impaired* and/or implicated," id. (emphasis added), Defendants invoke Rule 19 despite citing to Rule 20 in their memorandum of law. Defendants' Notice of Motion, however, states that they seek "an Order directing that St. Lawrence County and the State of New York be joined as parties pursuant to [Rules] 19 *and/or* 20." Defs.' Notice of Mot. at 1, Dkt. No. 42 (emphasis added).

In the interest of thoroughness, the court will analyze Defendants' motion for joinder under both Rule 19 and Rule 20.

IV. Discussion

A. Dismissal under Rule 12(b)(7) and Joinder under Rule 19

An action may be dismissed for failing to join an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 12(b)(7). The moving party must show that the absent person or persons should be joined under Rule 19. See Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1123-25 (2d Cir. 1990). Rule 19 "sets forth a two-step test for determining whether a court must dismiss an action for failure to join an indispensable party."

Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 724 (2d Cir. 2000). The court must first "determine whether [the absentee] belongs in the suit, i.e., whether [he] qualifies as a 'necessary' party under Rule 19(a)." Id. See also Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 234 88 S. Ct. 733 (1968) ("Persons having an interest in the controversy, and who ought to be made parties . . . are commonly termed necessary parties[.]") (internal quotation marks and citations omitted).

As already noted above, an absentee is "necessary" where:

> (A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED R. CIV. P. 19(a)(1). If a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b). Viacom Int'l, 212 F.3d at 724 (citing Associated Dry Goods Corp., 920 F.2d at 1123). But where a party is "necessary under Rule 19(a), and joinder . . . is not feasible for jurisdictional or other reasons, . . . the court . . . must determine whether the party is 'indispensable'" under Rule 19(b). Id. (citations omitted). Factors to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be

> adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b). If the party is "indispensable, then the court must dismiss the action pursuant to Rule 19(b). Viacom Int'l, 212 F.3d at 725 (citations omitted).

The court will now proceed with the first step in evaluating Defendants' Rule 12(b)(7) motion, which is to determine whether the State or County are "necessary" under either subparagraph (A) or (B) of Rule 19(a)(1). An absentee is necessary if the court cannot accord complete relief among the existing parties without the absentee's presence. See FED. R. CIV. P. 19(a)(1)(A). "[T]he term complete relief refers only to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought." Arkwright-Boston Mfrs. Mut. Ins. Co. v. New York, 762 F.2d 205, 209 (2d Cir. 1985) (internal quotation marks and citations omitted). The "complete relief" clause is "concerned only with those who are already parties," and it is irrelevant that there might be future litigation involving the absentee. Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 385 (2d Cir. 2006). Mere speculation as to what the absentee may (or may not) do in the future, including filing a claim against one or more of the existing parties, is irrelevant. See Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990) ("The speculative possibility of future litigation . . . furnishes no basis for compulsory joinder" under Rule 19.).

In this case, Plaintiffs seek monetary, injunctive, and declaratory relief against—and only against—Morristown, Morristown Code Enforcement Officer Davis, Morristown Supervisor Putnam, Morristown Deputy Supervisor Warren, and Morristown Town Council Members Stout, Blanchard, Coffin, and Turner.

They have all been named as defendants in the instant action. Plaintiffs will secure the relief requested if the court were to declare that those parties were enforcing Local Law #4 and the Building Code in a discriminatory manner. Likewise, Plaintiffs will also secure the relief requested if this Court were to order those parties to cease their enforcement of Local Law #4 and the Building Code in a discriminatory manner.

Defendants, however, submit that if the court were to grant injunctive relief and order the Town to cease its enforcement of the Building Code, then the State and County would be required to enforce it, making a grant of injunctive relief a "nullity." Defs.' Mem. of Law at 4-5. See N.Y. EXEC. LAW § 381(4)(c)-(d).[6]

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[6] Section 381 of the Executive Law provides:

> If the [Secretary] determines that a local government has failed to administer and enforce the [Building Code] in accordance with the minimum standards promulgated [by the Secretary], the [Secretary] shall take any of the following actions, either individually or in combination in any sequence:
>
> a. The [Secretary] may issue an order compelling compliance by such local government with the standards for administration and enforcement of the [Building Code].
>
> b. The [Secretary] may ask the [State Attorney General] to institute in the name of the [Secretary] an action or proceeding seeking appropriate legal or equitable relief to require such local government to administer and enforce the [Building Code].
>
> c. The [Secretary] may designate the county in which such local government is located to administer and enforce the [Building Code] in such local government.
>
> d. The [Secretary] may, in the place and stead of the local government, administer and enforce the [Building Code] in accordance with the minimum standards promulgated [by the Secretary].

Defendants also contend that the State could "impose penalties, subject [Morristown] to litigation[, and/or] revoke Morristown's election to enforce" the Building Code if the Town were to stop enforcing the Building Code. Id. at 5. See N.Y. EXEC. LAW § 381(4)(a)-(b). Therefore, Defendants submit that the State is a "[necessary][7] party and ultimately it is the State who has a process for review and can make a determination with respect to Morristown's right to enforce the Code." Defs.' Mem. of Law at 6.

Under the New York Executive Law, any action by the State is discretionary. See N.Y. EXEC. LAW § 381(4)(c)-(d) (discussing the steps that the Secretary "may" take). Thus, at this juncture, any action that the State may take against either Plaintiffs or Defendants is speculative. Likewise, the possibility of future litigation between the State and the Town is also speculative. Such speculation is not a proper basis for joinder under Rule 19(a)(1)(A), which is concerned only with "accord[ing] complete relief among the existing parties."

An absentee may also be necessary if he "claims an interest relating to the subject of the action," and his presence is needed to assure that the court's judgment does not "impair or impede [his] ability to protect the interest" later in the litigation or to assure that an "existing party" will not be at a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FED. R. CIV. P. 19(a)(1)(B)(i)-(ii).

Defendants argue that the State of New York is "necessary" because its "ability to require Counties and/or local municipalities to enforce the [Building] Code consistently across the State will be impaired and/or implicated." Defs.'

N.Y. EXEC. LAW § 381(4).

[7] See note 3 supra.

Mem. of Law at 7. But Defendants' attempt to assert an alleged interest on behalf of the State falls outside the language of Rule 19(a)(1)(B). "It is the [absentee who] must 'claim an interest," and a present party cannot do so on the [absentee's] behalf. Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 49 (2d Cir. 1996). See also ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., 102 F.3d 677, 682 (2d Cir. 1996) ("Subparts (i) and (ii) [of Rule 19(a)(1)(B)][8] are contingent . . . upon an initial requirement that the [absentee] claim a legally protected interest relating to the subject matter of the action.") (quoting Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983)). See also Aguinaga v. UBS AG, No. 09 Civ. 03261, 2010 WL 5093433, at *9-10 (S.D.N.Y. Dec. 14, 2010) (citing cases). Here, Rule 19(a)(1)(B) is inapplicable because the State has not moved to join the litigation or otherwise indicated to the court that it claims an interest the subject matter of this litigation.[9]

The cases that Defendants use to support their propositions are not persuasive. The plaintiff in Wymbs v. Republican State Executive Committee of Florida, 719 F.2d 1072 (11th Cir. 1983) sought to overturn the Republican Party of Florida's local rule on how delegates to the 1980 Republican National Convention would be seated. Id. at 1074. The district court found that the rule was unconstitutional on its face and ordered the local party to cease its enforcement of the rule. Id. at 1073. The local rule, however, merely codified the national committee's rule. Id. at 1080. The national committee was "free to continue" to

[8] The text of the that opinion referred to the rule as Rule 19(a)(2), which was a label used prior to the stylistic changes that were made to the Federal Rules in 2007. This court will use the new label even where it discusses cases that might have used prior labels.

[9] Although Defendants do not assert that St. Lawrence County is "necessary" under Rule 19(a)(1)(B), any attempt to do so would also be improper for the reasons discussed herein.

enforce its rule regardless of the district court's finding and order. Id. The Eleventh Circuit concluded that the national committee was a necessary party because it was the national committee—and not the local party—that would have to carry out the district court's order. Id. at 1080. Thus, without the national committee's presence, the district court's order would not provide complete relief.

Here, if Defendants ceased enforcing Local Law #4 or the Building Code in a discriminatory manner, then Plaintiffs would receive the relief they requested regardless of any actions that the State may take in the future. Moreover, Plaintiffs do not challenge the facial constitutionality of either Local Law #4 or the Building Code, and any determination that Defendants are enforcing the laws in a discriminatory manner will not affect the facial validity of either law.

Reliance on Chicago Teachers Union v. Johnson, 639 F.2d 353 (7th Cir. 1980) is also misplaced. There, the Seventh Circuit concluded that the United States Department of Labor was a necessary party because federal law was used to determine whether unemployed teachers were entitled to unemployment benefits that were funded by the federal government but administered jointly by the state and federal governments, and federal regulations required the federal agency to review the state agency's determinations on whether the teachers met the program's eligibility requirements. Id. at 354, 358-59. Thus, the Department of Labor (the absentee) would "ultimately be called upon to process" the teachers' claims. Id. at 358-59. Likewise, in Lopez v. Arraras, 606 F.2d 347 (1st Cir. 1979), the United States Department of Housing and Urban Development ("HUD") was a necessary party because the plaintiffs could not obtain the relief they requested because HUD had the "final say as to the availability" of the funds at issue and the plaintiffs had sued only state-level officials. Id. at 352.

In this case, any review by the State over Defendants' enforcement of the

Building Code is discretionary and—at this juncture—speculative. Unlike Chicago Teachers Union and Lopez, the law at issue here gives Defendants (composed of a local government and local government officials) the authority to enforce the Building Code at their sole option. See N.Y. EXEC. LAW § 381(2). Alternatively, Defendants may elect that the State enforce the Building Code instead. See id. Finally, Defendants here could pay damages without the State's intervention, and the declaratory and injunctive relief requested only impacts the Defendants' enforcement of the laws.

The First Circuit in Lopez also discussed what is now subparagraph Rule 19(a)(1)(B) even though the absentee did not move to join the action. Lopez, 606 F.2d at 353. There, however, a representative of HUD (the absentee) arguably asserted HUD's interest by notifying the director of the local housing agency (a named defendant) that HUD could not provide the funds that would be used to satisfy any judgment of the action. Id. at 352. More importantly, under Second Circuit precedent, the absentee itself must claim the interest, and a present party may not do so on the absentee's behalf.

Defendants also rely on in Kalinsky v. Long Island Lighting Co., 484 F. Supp. 176 (E.D.N.Y. 1980), to support their proposition that the State's presence is necessary under Rule 19. See Defs.' Mem. of Law at 6. In Kalinsky, the court found Rule 19(a)(1)(B) to be a basis for dismissing an action even though the absentee did not move to join in the action. See Kalinsky, 484 F. Supp. at 180. New York's Public Service Commission ("PSC") ordered a local power company "to submit a rate proposal" for a new pricing scheme. Id. at 177. A utility customer who was affected by the new scheme sought an exemption from the power company. Id. State law, however, prohibited the power company from exempting the customer without first receiving the PSC's permission. Id. at 180.

The court found that Rule 19(a)(1)(B) was a basis for dismissing the action because disposition of the case "would most certainly impair or impede the PSC's interest and would make [the power company] subject to inconsistent obligations." Id.

In light of the Second Circuit's more recent holdings that it is the absentee itself who must claim the interest implicated in Rule 19(a)(1)(B), it is unclear whether the court in Kalkinsky would still reach the same conclusion. In addition, the PSC arguably asserted its interest when it ordered the local power company to submit a rate proposal for the new scheme. Moreover, the state law at issue there required the PSC's approval before the local power company could take action, and thus, there was a substantial risk that the power company would be subject to inconsistent obligations because of PSC's absence from the litigation. Here, the risk that Defendants could be subject to inconsistent obligations is low because any action that the State may take is discretionary.[10] Finally, Rule 19 was used as an alternative basis for dismissal in Kalinsky only after the court had already found that dismissal was warranted because the complaint failed to state a claim upon which relief could be granted. Kalinsky, 484 F. Supp. at 178-81.

To further support their motion, Defendants have asked the court to consider

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[10] The court recognizes that New York's Executive Law permits New York's Secretary of State to "issue an order [to Defendants] compelling compliance" with the Building Code or to "ask the [State Attorney General] to institute . . . an action or proceeding" to compel compliance. N.Y. EXEC. LAW § 381(4)(a)-(b). Still, the risk of inconsistent obligations is insubstantial because there are at least two other options that the Secretary may take that would not impact Defendants at all. See id. § 381(4)(c)-(d). Moreover, even if the Secretary were to seek a court order compelling Defendants to comply with the Building Code, as the Second Circuit has recognized: "It is very difficult to believe that a subsequent tribunal faced with a party under a prior court-ordered injunction will nevertheless order that party to perform the very obligations a prior court has prohibited it from performing." Mastercard Int'l Inc., 471 F.3d at 388 (affirming the denial of an absentee's motion to join under Rule 19).

an e-mail that they received from a Regional Codes Division Representative of the New York Department of State. See Conboy Letter, Apr. 20, 2010, Dkt. No. 57. Defendants contend that this e-mail clarifies the State's position, and they have interpreted this letter as a "directive from the State[.]" Id. A portion of the e-mail states: "[The New York Codes, Rules, and Regulations], and . . . [the municipalities'] local laws do not waive permit or inspection responsibilities for any regulated party, regardless of religious, ethnic or any other basis. To do less would suggest that is selective enforcement involved, which is not appropriate." Thomson Email at 2, Apr. 15, 2010, Dkt. No. 57-1.

After reviewing the e-mail in full, it is unclear how this e-mail supports Defendants' motion. There is nothing in the e-mail to indicate that the court will be unable to grant "complete relief among the existing parties" within the meaning of Rule 19(a)(1)(A). The e-mail states that the Codes Division "expect[s] that all municipalities with [Amish] population[s] continue to apply proper administration and enforcement requirements on all regulated parties *until such time, if ever, there is a court order to the contrary* or the Department of State's regulations change to reflect any exemption." Thomson E-mail at 2 (emphasis added). The italicized portion of that statement implies that Defendants (or any other municipality under a similar injunction) should comply with the court's order even if the order were inconsistent with the State's laws and regulations. Moreover, a statement raising the possibility that the regulations may change to exempt religious communities is insufficient to constitute a claim of interest by the State within the meaning of Rule 19(a)(1)(B). An order by the court in this case will not "impair or impede" the State's ability to change the regulations to exempt religious communities. Nor will such a change subject Defendants to inconsistent obligations as the e-mail implies that the change will exempt religious communities from the portions of the

Building Code to which Plaintiffs find objectionable (i.e. any change by the State will provide Plaintiffs with the same relief that they seek in this action).

In summary, the court finds that neither the State of New York nor St. Lawrence County are "necessary" under Rule 19(a)(1)(A) as "complete relief" may be accorded "among the existing parties." Additionally, Defendants may not rely on Rule 19(a)(1)(B) to show the State is "necessary" because Defendants cannot "claim[] an interest" on an absentee's behalf. Because Defendants have failed to satisfy their threshold burden of showing that the State and County are "necessary" under Rule 19(a), any discussion on whether they are "indispensable" under Rule 19(b) is unnecessary.

Accordingly, Defendants' Rule 12(b)(7) motion to dismiss the Complaint for failure to join the State or County under Rule 19 is **denied**, and Defendants' motion to join the State and County under Rule 19 is also **denied**.

B. Joinder under Rule 20

Defendants also move to join the State of New York and St. Lawrence County as "proper parties" under Rule 20. Rule 20 governs "permissive joinder," and it allows "proper parties" to be joined as additional plaintiffs or defendants at the court's discretion for purposes of judicial convenience. See FED. R. CIV. P. 20(a)(1)-(2).

However, the "joinder of defendants under Rule 20 is a right belonging to plaintiffs . . . [and] a defendant cannot use Rule 20 to join a person as an additional defendant." Hefley v. Textron, Inc., 713 F.2d 1487, 1499 (10th Cir. 1983). See also Gen. Inv. Co. v. Ackerman, 37 F.R.D. 38, 41-42 (S.D.N.Y. 1964) (denying a defendant's Rule 20 motion where the absentees that he sought to join were proper parties under Rule 20 but not indispensable or necessary parties under Rule 19). A defendant may only use Rule 20 if he has filed a counter claim or crossclaim. See

4-20 Moore's Federal Practice § 20.02 ¶ 2(b)(i) (footnotes omitted) (A "defendant who files a counter claim or a crossclaim in the pending case is treated as a plaintiff for purposes of permissive party joinder."). See also FED. R. CIV. P. 13(h).

Here, Defendants may not invoke Rule 20 because they have not filed either a counter claim or a crossclaim. In making this conclusion, this court adopts the practice of courts outside this circuit, as courts in the Second Circuit have not addressed the matter.[11] In this case, adopting the practice of preventing a defendant who has not filed a counter claim or cross claim from using Rule 20 is consistent with the Federal Rules. First, it respects Plaintiffs' right to structure the litigation. Moreover, permitting a defendant who has not filed a counter claim or cross claim to use Rule 20 would render the rules governing third-party practice unnecessary. Accordingly, Defendants' motion for joinder under Rule 20 is **denied**.

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[11] Other circuits and district courts that have addressed the issue have reached the same conclusion. See e.g., Hefley, 713 F.2d at 1499; Field v. Volkswagenwerk AG, 626 F.2d 293, 299 (3d Cir. 1980) ("Under Rule 20 . . . joinder of plaintiffs is at the option of the plaintiffs; it cannot be demanded as a matter of right by the defendant.") (internal quotations, citations, and footnotes omitted); Chao v. St. Louis Internal Med., No. 4:06-CV-847, 2007 WL 29674, at *2 (E.D. Mo. Jan. 3, 2007) ("permissive joinder under Rule 20(a) is not available to the defendants as a means to join additional defendants in this action"); Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 216 F.R.D. 511, 515 (D. Kan. 2003) ("Rule 20 is not available to [the defendant] as a means to join [an additional] party to the current action."); Moore v. Cooper, 127 F.R.D. 422, 422 (D.D.C. 1989) ("Rule 20(a) is a rule by which plaintiffs decide who to join as parties and is not a means for defendants to structure the lawsuit."); McCormick v. Mays, 124 F.R.D. 164, 167 (S.D. Ohio 1988) ("*plaintiff* has the right to join one or more of several joint tort feasors as defendants without joining all of them, and a defendant has no right to compel a plaintiff to join those who plaintiff elects not to sue") (emphasis in original; citations omitted); Sternaman v. Macloskie, 37 F.R.D. 316 (E.D.S.C. 1965) ("Plaintiff . . . has the right to join one or more of several joint tort feasors as party-defendants without joining all of them, and defendants have no right to compel plaintiff to join those tort feasors who plaintiff elects not to sue; neither can defendants insist that such parties be brought in as party-defendants."); Trahan v. S. Pac. Co., 209 F. Supp. 334, 338 (W.D. La. 1962) ("permissive joinder is subject to the discretion of the Court . . . and cannot be demanded as a matter of right by the defendant").

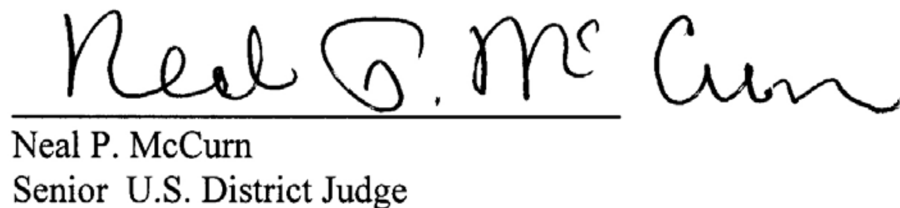
V. Conclusion

In accordance with the foregoing discussion, it is hereby

ORDERED that Defendants' Rule 12(b)(7) motion to dismiss the Complaint for the failure to join the State of New York or St. Lawrence County under Rule 19, see Dkt. No. 42, and their alternative motion to join the State and County under either Rules 19 or 20, id., are DENIED in their entirety.

IT IS SO ORDERED.

DATED: November 7, 2011
Syracuse, New York



Neal P. McCurn
Senior U.S. District Judge