UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PHILIP SULLIVAN, CHARLOTTE SULLIVAN, Plaintiffs, v. JEFFREY STEIN, et al, Defendants.	: : : : : : : : :	Civil No. 3:03cv1203 (MRK)

RULING ON PENDING MOTIONS

Having considered the motions, requests and submissions of the various parties in the above-captioned matter, the Court enters the following orders. However, at the outset, the Court must address its jurisdiction to consider the following motions since Plaintiffs filed a Notice of Appeal on June 23, 2004 [doc. #150], appealing in its entirety this Court's May 24 Ruling [doc. #141]. As a general rule, when an appeal has been filed, the district court is divested of "control over those aspects of the case involved in the appeal." *Marrese v. Am. Academy or Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (quotation marks and citations omitted). "Where, however, a notice of appeal has been filed from an order that is non-appealable, jurisdiction does not rest with the Court of Appeals, but remains with the district court." *Hoffenburg v. United States*, No. 00 Civ.1686 (RWS), 2004 WL 2338144, at * 2 (S.D.N.Y. Oct. 18, 2004) (collecting cases). The reasoning behind this rule is, as the Second Circuit has explained, that "no efficiency [is] gained by allowing a party arbitrarily to halt the district court proceedings by filing a plainly unauthorized notice which confers on this the power to do nothing but dismiss the appeal." *Leonhard v. United States*, 633 F.2d 599, 610 (2d Cir. 1980) (internal citations and quotation

marks omitted). Because the Court's May 24 Ruling "adjudicate[d] fewer than all of the claims remaining in the action" and "adjudicate[d] the rights and liabilities of fewer than all of the remaining parties," that ruling was not a final judgment and was not properly appealable. *Citizens Accord, Inc. v. Town of Rochester, New York*, 235 F.3d 126, 128 (2d Cir. 2000). Because Plaintiffs' appeal is premature, this Court retains jurisdiction over the case and may adjudicate the pending motions.

1. **Plaintiffs' Motion for Joinder [doc. # 203]** is DENIED on grounds of futility. Joinder of additional parties under Rule 21 of the *Federal Rules of Civil Procedure* is governed by "the same standard of liberality afforded to motions to amend pleadings under Rule 15." *Smith v. P.O. Canine Dog Chas,* No. 02 6240 KMW DF, 2004 WL 2202564, at *12 (S.D.N.Y. Sept. 28, 2004) (quotation marks and citations omitted). Although Courts "freely grant leave to amend 'when justice so requires,' courts deny such leave where amendment would be futile." *Marvin Inc. v. Albstein*, No. 04 Civ. 1567 (DAB), 2005 WL 106908, at *8 (S.D.N.Y. Jan. 19, 2005) (citing *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 168 (2d Cir. 2003)).

The Court previously denied Plaintiffs' nearly identical request to join Assistant State's Attorney John Malone as a defendant in connection with their motion for a preliminary injunction [doc. #200]. All of Plaintiff's allegations against Mr. Malone in Claim 20 of their proposed amended complaint arise from his decision to proceed with a criminal prosecution against Mr. Sullivan. Therefore, Plaintiffs' claims against Mr. Malone are barred by the doctrine of absolute prosecutorial immunity. Under this doctrine, prosecutors are absolutely immune from suit for claims arising from conduct "intimately associated with the judicial phase of the criminal process," even though this may "leave the genuinely wronged defendant without civil

redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler v. Pachtman*, 424 U.S. 409, 427-30 (1976); *Halpern v. City of New Haven*, 489 F. Supp. 841, 844 (D. Conn. 1980) (recognizing the "same absolute immunity in § 1985 cases as that which exists in §1983 cases").

Joinder of Mr. Malone as a party would be futile since Plaintiffs' have failed to state an actionable claim against him. *See Oneida*, 337 F.3d at 168 ("A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6).") (quotation marks and citations omitted). Accordingly, the Court denies Plaintiffs' Motion to Join Mr. Malone [**doc. # 203**].

2. **Defendant William Palmieri's Motion to Dismiss** [**doc. # 202**] is GRANTED. Plaintiffs' claims against Mr. Palmieri, are identical in substance to the claims they asserted against various other private defendants, and that the Court dismissed in its May 21, 2004 ruling. For the reasons explained at length in the Court's prior opinion, see Mem. of Decision [doc. #141] at 5-9; 18-21, the Court dismisses all claims against Mr. Palmieri. In addition, as explained in detail below, Plaintiffs' proposed amendments to their complaint do not alter this result.

3. **Plaintiffs' Motion to Amend Complaint** [**doc. #204**] is GRANTED in part and DENIED in part. In arriving at this decision, the Court also considered Plaintiffs' prior Motion to Amend Complaint [doc. #175], Plaintiffs' Corrections and Addition to Amendment Complaint [doc. #185], Plaintiffs' Second Addition and Correction [doc. #182], as well as numerous objections filed by defendants in this case [doc. ## 179, 180, 186, 188, 191, 208, 210].

In their proposed amended complaint, Plaintiffs sue all defendants under 42 U.S.C. §§

1983, 1985(2) and (3) and 1986. In a May 24, 2004 ruling, the Court previously dismissed virtually identical § 1985(3) claims against all defendants. *See* Mem. of Decision [doc. 141] at 7-9. The Court also dismissed § 1983 claims against all defendants except for Chief of Police Michael Whalen, Officers Devine, Williams, and Herbert, William Palmieri, the employees and/or officers of J.W. Greene Co., Inc., and the Town of Farmington. *Id*. at 39-40. Plaintiffs' now seek to revive thee dismissed claims by amending their complaint in an effort to cure the defects noted in the Court's decision. Plaintiffs also seek to "invok[e] new laws for remedy; i.e. 42 US Code 1985(2) and 1986." Pls.' Mot. to Am. Compl. [doc. #204] at 4. The Court denies the majority of Plaintiffs' motion for two reasons: (1) Plaintiffs failed to cure the defects identified in the Court's prior ruling; and (2) Plaintiffs have failed to state a claim under 42 U.S.C. §§ 1985(2) or 1986.

First, with respect to Plaintiffs' claims under 42 U.S.C. §§ 1983 and 1985(3), the defects the Court noted in its prior ruling largely persist in Plaintiffs' proposed amended complaint. The Court will very briefly summarize these defects: (1) Plaintiffs' § 1985(3) claims against all defendants fail because Plaintiffs still have not alleged any actionable race or other class-based animus, *see* Mem. of Decision [doc. #141] at 5-9; (2) Plaintiffs' § 1983 claims against the judicial defendants continue to be barred by the doctrine of absolute judicial immunity, *see id.* at 9-11; (3) Plaintiffs' § 1983 claims against the state defendants (except for Inspectors Zigmont and Coffey which are discussed below) continue to be barred by the doctrine of prosecutorial immunity and/or sovereign immunity, *see id.* at, 11-18; and (4) Plaintiffs' § 1983 claims against the private defendants continue to be barred by the state action doctrine, *see id.* at 18-36. Therefore, with an exception discussed below, Plaintiffs' proposed amendments do not cure the

defects in any of the aforementioned claims, and permitting the proposed amendment would be futile.

The lone exception relates to Plaintiffs' claims under § 1983 against Inspectors Zigmont and Coffey for violations of Plaintiffs' Fourth Amendment rights.[1] In its earlier ruling, the Court held that the Eleventh Amendment barred Plaintiffs' official capacity claims against Inspectors Zigmont and Coffey, but that it did not bar any individual capacity claims Plaintiffs might choose to assert. *See* Mem. of Decision [doc. #141] at 18 (explaining that the Eleventh Amendment does not bar individual capacity claims against these defendants). Plaintiffs now propose to add individual capacity claims under § 1983 against Inspectors Zigmont and Coffey and since those claims do not appear to be futile on their face, the Court grants Plaintiffs' Motion to Amend on these claims only, and denies it with respect to all other proposed amendments of Plaintiffs' previously dismissed §§ 1983 and 1985(3) claims.

Plaintiffs also seek to assert new claims against all defendants under §§ 1985(2) and 1986 for allegedly conspiring to interfere with state court proceedings. The Court notes that this is the

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[1] Inspectors Zigmont and Coffey have objected to Plaintiffs' Motion to Amend Complaint on grounds of timeliness. *See* Obj. to Pls.' Mot. to Am. Compl. [doc. #188] at 3. Timeliness is only one factor the Court takes into account when considering a proposed amendment. *See Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) (amendment may be denied when "there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility."). While there has undoubtedly been a substantial lag in Plaintiffs' filing of their motion to amend the complaint, the Court is cognizant of Plaintiffs' *pro se* status and allowing this amendment does not appear to unduly prejudice Inspectors Zigmont and Coffey. Plaintiffs' individual capacity claims against Inspectors Zigmont and Coffey are based on virtually identical facts as the official capacity claims that appeared in Plaintiffs' prior complaint. Furthermore, Inspectors Zigmont and Coffey were clearly on notice of potential individual capacity claims against them based on those facts as they preemptively responded to such claims in their original Motion to Dismiss [doc. # 78]. The Court will allow Inspectors Zigmont and Coffey to renew their Motion to Dismiss arguments by filing a Motion to Renew **on or before March 1, 2005** that simply incorporates the arguments from their prior motion to dismiss by reference.

second time Plaintiffs have attempted such an amendment – their previous attempt was in their Second Amended Motion for Reconsideration [doc. # 166], which was rejected by the Court in its November 18, 2004 ruling [doc. #167]. In their reconsideration motion, Plaintiffs' asserted that unlike § 1985(3), a claim under clause two of § 1985(2) need not "specify any class identification." Pls.' Second Am. Mot. for Reconsid. [doc. #166] at 2. Presumably, Plaintiffs' request to amend their complaint relies on the same rationale. However, Plaintiffs are mistaken regarding the law governing §1985(2) claims.

The Second Circuit and District Courts in this Circuit have consistently held that claims under §§ 1985(2) and 1986 require a showing of "class-based animus." *Zemsky v. City of New York*, 821 F.2d 148, 151 (2d Cir. 1987) ("A plaintiff states a viable cause of action under Section 1985 or 1986 only by alleging a deprivation of his rights on account of his membership in a particular class of individuals."); *Herrmann v. Moore,* 576 F.2d 453, 458 (2d Cir. 1978) ("no matter to which state court proceedings the complaint refers, plaintiff in the case of a 42 U.S.C. § 1985(2) claim, as in the case of a s 1985(3) claim, bears the burden of proving that defendants had a 'class-based' or other 'invidiously discriminating animus.' ") (citations and quotation marks omitted); *Brown v. Western Conn. State Univ.*, 204 F. Supp. 2d 355, 366 (D. Conn. 2002) (dismissing claim under clause two of Section 1985(2) where plaintiffs failed to alleged class-based animus). As noted above, Plaintiffs have failed to allege any actionable class-based animus in their proposed amended complaint, and thus they do not have a viable § 1985(2) claim. Having failed to state a claim under either § 1985(2) or § 1985(3), Plaintiffs' § 1986 claims necessarily fail as well. *See Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272(RPP), 2005 WL 22833, at *22 (S.D.N.Y. Jan. 5, 2005) ("Section 1986 provides a private

cause of action for neglect to prevent [§ 1985] conspiracy."). Because Plaintiffs' proposed amendments of their claims under §§1985(2) and 1986 would be futile, the Court denies Plaintiffs' motion with respect to those claims.

In conclusion, the Court denies Plaintiffs' Motion to Amend the Complaint [**doc. #204**], except with respect to their Section 1983 individual capacity claims against Inspectors Zigmont and Coffey. As a result, the only defendants and claims remaining in this case are the same ones the Court listed in its May 24, 2004 ruling, see Mem. of Decision [doc. #141] at 40-41, with two modifications. The first modification is that Plaintiffs Section 1983 individual capacity claims described in Claims 10 and 11 of Plaintiffs' proposed amended complaint against Inspectors Zigmont and Coffey will remain in the case at this time and the second modification is that all claims against Mr. Palmieri have been dismissed. Plaintiffs shall file an amended complaint listing only the remaining claims and serve it on the remaining defendants, **on or before March 1, 2005. The Court advises Plaintiffs that the amended complaint they file may not include any claims or defendants that have been dismissed by the Court.** Inspectors Zigmont and Coffey may file a motion to renew the arguments set forth in their Motion to Dismiss [doc. #78] **on or before March 1, 2005**.

4. In light of the Court's ruling denying Plaintiff's Motion to Amend Complaint [doc. #204], **Plaintiffs' Motion for Extension of Time** [**doc. #149**] seeking additional time to amend their complaint is DENIED as moot.

5. Although no formal suggestion of death has been filed with the Court, Plaintiffs have informed the Court that Defendant Mary Crowell who was previously been dismissed from this action, passed away on April 23, 2004. As a result, Plaintiffs now seek to substitute Kathy

Hyland, the executor of Ms. Crowell's estate, as a party. The Court notes that Attorney Owen P. Eagan has appeared for both Ms. Crowell and Ms. Hyland in this action, and directs Mr. Eagan to respond to Plaintiffs' Motions to Substitute Party [doc. ## 176-177] on behalf of his clients on or before **March 7, 2005**.

6. **Plaintiffs' Motion to Add Defendant** [**doc. #178**] is DENIED. Plaintiffs move the Court to join Martin Crowell, co-trustee of a trust settled by Mary Crowell as an indispensable party in this action. At this juncture, all of Plaintiffs' claims against Mary Crowell have been dismissed and Plaintiffs' set forth no independent bases of liability against Mr. Crowell. Therefore, joinder of Mr. Crowell does not appear necessary. To the extent that Plaintiffs' request for amendment is motivated by their desire to preserve their claims against Ms. Crowell on appeal, preservation of their claim is properly accomplished by substitution of an appropriate representative of her estate. Accordingly, the Court DENIES Plaintiffs' request to add Martin Crowell as a defendant [**doc. #178**].

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: **February 7, 2005**.