

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at <http://www.ca2.uscourts.gov/>). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the sixth day of April, two thousand and nine.

PRESENT:

JOSÉ A. CABRANES,
PETER W. HALL,
Circuit Judges,
ROBERT W. SWEET,
*District Judge.**

-----x
STACY BUTLER and CAROL SOJDA,

Plaintiffs-Appellants,

-v.-

No. 08-1361-cv

CITY OF BATAVIA, OFFICER PECK, OFFICER ZOLA, RICHARD
MAGER, VICTORIA MAGER, and CHIEF OF POLICE SEHMS,

*Defendants-Appellees.***
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* The Honorable Robert W. Sweet, of the United States District Court for the Southern District of New York, sitting by designation.

** The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

FOR PLAINTIFFS-APPELLANTS:

CHRISTINA ANN AGOLA,
Rochester, NY.

FOR DEFENDANTS-APPELLEES:

R. SCOTT DELUCA, Schrader,
Israely, DeLuca & Waters LLP,
Williamsville, NY (Robert M.
Shaddock, Joseph A. Wilson,
Hiscock & Barclay, LLP,
Rochester, NY, *of counsel*), *for City of
Batavia, Officer Peck, Officer Zola, and
Chief of Police Sehms.*

STUART B. SHAPIRO, Cohen &
Lombardo, P.C., *for Richard Mager
and Victoria Mager.*

Appeal from a judgment of the United States District Court for the Western District of New York (William M. Skretny, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be **AFFIRMED**.

Plaintiffs-appellants Stacy Butler and Carol Sojda appeal from a judgment dismissing their complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. *See Butler v. City of Batavia*, 545 F. Supp. 2d 289 (W.D.N.Y. 2008). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

Plaintiffs challenge the decision of the District Court on two grounds, arguing that they pleaded adequately (1) a claim under the Equal Protection Clause of the Fourteenth Amendment and (2) a retaliation claim under the First Amendment as incorporated by the Fourteenth Amendment. We disagree.

In order to state a claim under the Equal Protection Clause for selective enforcement of the law, plaintiffs must plead that (1) they were "treated differently from other similarly situated" individuals and (2) this "differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790 (2d Cir. 2007). Plaintiffs argue that their complaint met this standard because (1) the municipal defendants—the City of Batavia, Officers Peck and Zola, and Chief of Police Sehms—did not respond to their complaints in the same manner as they responded to those of similarly situated heterosexuals and (2) this difference in treatment was based on sexual orientation. While plaintiffs allege that sexual orientation motivated the conduct of the municipal defendants, plaintiffs have not pleaded facts sufficient to make this allegation plausible. *See Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) ("[A] pleader [must] amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."). We agree with the District Court that plaintiffs' allegations "demonstrate that the [municipal] [d]efendants were aware of [p]laintiffs' sexual orientation and discriminatory conduct by the Magers, [but] they do not demonstrate a discriminatory intent [on the part of the municipal defendants]." *Butler*, 545 F. Supp. 2d at 292. Plaintiffs' equal protection claim was therefore properly dismissed as inadequately pleaded.

With respect to their retaliation claim, plaintiffs fare no better. To state a claim of retaliation, plaintiffs must plead that “(1) [they have] an interest protected by the First Amendment; (2) defendants’ actions were motivated or substantially caused by [their] exercise of that right; and (3) defendants’ actions effectively chilled the exercise of [their] First Amendment right.” *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001). Plaintiffs allege that, on October 26, 2004, they reported to the municipal police that a registered sex offender lived near a public school in violation of state law. They also allege that, on numerous occasions before and after their October 26 report, they reported to the municipal police that their neighbors and others were harassing them on account of their sexual orientation. The municipal defendants, plaintiffs allege, did not investigate or otherwise respond to these reports.¹ Plaintiffs’ complaint is devoid, however, of any factual allegations tending to show that defendants’ decision not to act on plaintiffs’ reports “was motivated or substantially caused by” plaintiffs’ filing of those reports. Having failed to allege facts suggesting that defendants’ alleged unresponsiveness was motivated by the exercise of their First Amendment rights, plaintiffs have failed to plead a retaliation claim. In light of the inadequacy of plaintiffs’ complaint, we agree with the decision of the District Court to dismiss this claim.

Defendants-appellees Richard Mager and Victoria Mager (the “Magers”) contend that the District Court abused its discretion by declining to exercise supplemental jurisdiction over plaintiffs’ state law claims. They argue that the District Court should have exercised jurisdiction over those claims and then dismissed them. This challenge to the District Court’s judgment is not properly before us. As we have explained previously, “[a]n appellee need not cross-appeal in order to advance any theory *in support of the judgment* that has a foundation in the record, regardless of the theory employed by the district court. But without cross-appealing, it may not advance a theory *that challenges some aspect of the lower court’s judgment.*” *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 349 (2d Cir. 2008) (internal citation omitted) (emphasis added). Even if the Magers had filed a timely cross-appeal, we would nevertheless reject their challenge because it is devoid of merit. “It is well settled that where, as here, the federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining state law claims.” *Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 262 (2d Cir. 2006).

Accordingly, we AFFIRM the judgment of the District Court.

FOR THE COURT,
Catherine O’Hagan Wolfe, Clerk of Court

By _____

¹ Contrary to this allegation, plaintiffs concede that at least one individual was prosecuted by the municipal defendants for harassing plaintiffs. Compl. ¶ 113, J.A. 113.