15 Civ. 5273

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., *et al*.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al*.,

Defendants.

CITY DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs, nineteen children who are or have been in foster care in New York City, allege that the City of New York ("City Defendant") violated the rights of the Plaintiff Children through purported systemic failures in the New York City foster care system, which they seek to remedy through injunctive relief. City Defendant submits this reply memorandum in further support of its motion for partial summary judgment to dismiss as moot the claims of the six Plaintiff Children who are no longer in care.

In opposing City Defendant's motion, Plaintiffs concede that the six Plaintiff Children are no longer in the foster care system or ACS custody. *See generally* Plaintiff Memorandum Opposing Motion for Summary Judgment ("Pl. Mem."). Nevertheless, relying heavily on misdirection and a recital of facts that has little bearing on the issue at hand, Plaintiffs attempt to argue that the claims of these six Plaintiff Children are not moot or, even if they are, may still be heard by the Court under the relation back doctrine, which in a narrow class of cases permits a plaintiff to continue to serve as a class representative even if his claims become moot. As set forth below, neither argument by Plaintiffs is persuasive, particularly in light of the fact that the Court has rejected Plaintiffs' motion for class certification. Accordingly, because Plaintiffs Elisa W., Alexandria R., Olivia R., Ana-Maria R., Xavion M., and Dameon C. are no longer in ACS custody or the foster care system, their claims for injunctive relief are moot, and they should be dismissed from the action.

POINT I

THE CLAIMS OF PLAINTIFF CHILDREN NO LONGER IN CARE ARE MOOT, AS THEY DO NOT QUALIFY AS CAPABLE OF REPETITION BUT EVADING REVIEW.

Plaintiffs first argue that the claims of the six Plaintiff Children no longer in care

are not moot because they are capable of repetition but evade review. *See e.g., Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (moot claims may be litigated "only in exceptional situations" where the harm at issue is 1) "too short to be fully litigated prior to cessation or expiration" and 2) there exists a "reasonable expectation that the same complaining party [will] be subject to the same action again"). In attempting to shoehorn the six Plaintiff Children's facts into that narrow exception, Plaintiffs recite details about Plaintiff Children's assignment to different foster care placements during their time in care, or their trial discharge to their biological parents and subsequent return to foster parents—in other words, facts pertaining to their experience in foster care—to suggest they are somehow a reliable predictor of future failure following their permanent discharge from care pursuant to Family Court authorization.[1] Yet, that the six Plaintiff Children resided in different foster homes or were briefly discharged on a trial basis before returning to foster parents has no bearing on whether they are likely to return to care now that they have been *permanently* discharged. The Plaintiff Children have not left and reentered the foster care system during the last few years, as they were at all times in the custody of the New York City Administration for Children's Services ("ACS") and therefore in foster care until the Family Court made a final determination that they should be adopted or final discharged to a parent,[2] or in the case of Elisa W., until she reached the age of eighteen and elected to leave care.

[1] City Defendant does not admit that the facts set forth in Plaintiffs' Opposition Memorandum are undisputed or that they present an accurate depiction of the Plaintiffs' time in foster care. Indeed, no response is required and Plaintiffs' proposed facts should be disregarded by the Court, as Plaintiffs have failed to submit a 56.1 Statement of additional material facts they contend are not disputed, as required by Rule 56.1(b) of the Local Rules of the Southern and Eastern Districts of New York.

[2] In claiming that ACS "decided" to permanently discharge one of the Plaintiff Children, Pl. Mem. p. 17, Plaintiffs continue to ignore the reality that ACS does not have such authority and that the Family Court issues a permanency decision following an adversarial process in which all of the relevant parties are represented by counsel.

Any previous instability in placement is particularly irrelevant in the cases of Alexandria R., Olivia R., Ana-Maria R., and Dameon C., who have been adopted. Plaintiffs cite no case law holding that children who have found permanent adoptive homes may bring claims for injunctive relief stemming from their time in the foster care system. *Cf. Patton v. Dumpson*, 425 F. Supp. 621, 623 n.4 (S.D.N.Y. 1977) ("Since [plaintiff's] adoption, his prayers for declaratory and injunctive relief are moot."). Moreover, the statistic cited by Plaintiffs that ten percent of children in New York State (not New York City specifically) reenter care within one year of a permanent discharge applies *only* to discharges to a relative or parent, not to adoptions,[3] and therefore, this statistic is irrelevant to the claims of these four Plaintiff Children.[4]

Further, while Xavion M. was final discharged to his mother, it cannot be argued that a rate of reentry of ten percent across New York State, establishes a *reasonable* expectation that Xavion will return to care, when by this metric there is a ninety percent chance he will not. Plaintiffs' account of Xavion's stay in foster care and the stability of the parent to whom he was returned is extremely misleading, with the relevant facts set forth in City Defendant's opposition to Plaintiffs' motion for class certification. *See* Dkt No. 205, p. 25. Xavion has already been home with his mother for nearly a year and a half without a return to the foster care system; indeed, his permanent discharge followed a successful trial discharge to his mother, which, by the metrics cited by Plaintiffs, has a much higher rate of failure than permanent reunifications. *See* Sup. 56.1 ¶ 2. Accordingly, Plaintiffs have not demonstrated that the claims of any of the

[3] *See* http://ocfs.ny.gov/main/reports/2016%20NYS%20APSR.pdf, pp. 29-30, last accessed December 16, 2016.

[4] In fact, data compiled by ACS demonstrates that of the 997 children in ACS custody adopted in 2015, only nine children had returned to care as of December 2016, a reentry rate of less than one percent. *See* City Defendant's Local Civil Rule 56.1 Supplemental Statement of Material Facts, dated December 19, 2016 ("Sup. 56.1") ¶ 1.

Plaintiff Children permanently placed with a birth or adoptive parent are capable of repetition such that the Court should adjudicate their claims for injunctive relief.

As for Elisa W., Plaintiffs assert that while she has voluntarily left the foster care system, she may return until she turns twenty-one, and they cite cases in which claims were found capable of repetition when a plaintiff could apply for benefits in the future. Yet, in these cases, there was not just the mere option of reentry but some likelihood that the plaintiffs would elect to do so. For example, in *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148 (2d Cir. 1992), the plaintiff had gone to great lengths to find a suitable placement for his child in the public education system before ultimately removing him, and therefore it was reasonable to conclude that the child might return were appropriate accommodations made. Similarly, in *Robidoux v, Celani*, 987 F.2d 931, 939 (2d Cir. 1993), the Court noted that two of the plaintiffs "alleged that they expect[ed] to apply or to be recertified for public assistance again in the future."

Conversely, Elisa W. elected to leave foster care upon her eighteenth birthday, the earliest possible date. Moreover, in notifying the foster care agency of her decision, she stated that she planned to leave the state and move to Florida. *See* Sup. 56.1 ¶ 3. Plaintiff Elisa W. thus has demonstrated that she does not intend to reenter the New York City foster care system, and so, at this time, cannot be regarded as having a viable claim for prospective injunctive relief affecting that system in the future. Notably, Plaintiffs' counsel, while purporting to act on behalf of Elisa W., conclusorily argue that she later may choose to avail herself of foster care, but do so without adducing any evidence that they sought to contact her to ascertain her future plans, despite the fact that she is no longer a minor and any possible impediment to speaking with her has been removed. Plaintiffs' uninformed speculation as to Elisa W.'s possible future intention to return to foster care is insufficient to outweigh the contrary evidence of her own actions and

representations, which suggest that she is unlikely to reenter the foster care system and to revive any claim for prospective injunctive relief she may have once had while in care.

Because the claims of the six Plaintiff Children are not capable of repetition, it is unnecessary to reach the question of whether they evade review. However, to the extent it needs to be addressed, Plaintiffs' argument on this ground is unavailing. Plaintiffs' contention depends upon the fact that a stay in foster care is intended to be temporary; yet the action is based on their own allegations that some children, including the Plaintiff Children, are in foster care "for years," Amended Complaint, ¶ 248. Plaintiffs cannot plausibly claim— and, not surprisingly, cite no authority suggesting—that conduct lasting years can be characterized as "evading review." *See* Pl. Mem. p. 19-21; *cf. Spencer*, 523 U.S. at 29 (conduct did not evade review where plaintiff could not demonstrate that "the time between parole revocations and expiration of sentence is always so short as to evade review").

In an attempt to distract this Court from the logical inconsistency of their argument that Plaintiff Children both "languish" in foster care, yet suffer injuries so transient as to evade review, Plaintiffs appear to suggest that City Defendant is somehow barred from noting the illogic of Plaintiffs' position. Plaintiffs' argument is baseless for two reasons: First, Plaintiffs have willfully ignored relevant sections of the statutes they cite, which include, for example, numerous exceptions to the timetables set for termination of parental rights, exceptions that permit, on appropriate Family Court findings, the continuation of foster care placements when case-specific circumstances warrant. *See, e.g.*, 42 U.S.C. § 675(5)(E)(ii); SSL § 384-b(3)(l); *see also* City Defendant Opposition to Motion for Class Certification, Dkt No. 205, pp 8-9. Second, given that Plaintiffs' case depends upon their arguing that the Plaintiff Children remain in care for years (irrespective of whether or not there may be statutory justification for

that duration), Plaintiffs cannot simultaneously argue, with any credibility, that injury thereby suffered over those years somehow evades judicial review.

Moreover, that some of the Plaintiff Children have left the foster care system since litigation began does not demonstrate the claims at issue evade review. That argument, carried to its logical conclusion, would suggest that any harm that ultimately ends, no matter how many years it lasted, should be treated as evading review, simply because, once it ends, it is no longer amenable to prospective injunctive relief. Such a theory would have the "evading review" exception swallow the doctrine of mootness altogether for any non-eternal harm.

In sum, Plaintiffs have failed to demonstrate that the claims of the six Plaintiff Children who have left care are both capable of repetition and evading review. As a consequence, the Court should dismiss the claims of these Plaintiffs as moot.

POINT II

THE RELATION BACK DOCTRINE DOES NOT PERMIT PLAINTIFFS TO CONTINUE TO LITIGATE THEIR CLAIMS

Plaintiffs also attempt to argue that even if the claims of the six Plaintiff Children are moot, these Plaintiffs nevertheless may assert claims on behalf of other children in the foster care system under the relation back doctrine. This position is untenable for two reasons; first, the claims at issue cannot be considered "inherently transitory" as is necessary to permit plaintiffs whose claims become moot during the class certification process to continue to represent the class, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980), and second, there is neither a certified class nor a class certification motion pending in the instant action.

As discussed above, Plaintiffs advance claims based on the premise that children in New York City foster care spend years in care without a permanent home. Children who experience the more common stays of weeks or months and for whom a termination of parental

rights is not pursued are not represented here. *See generally* Amended Complaint. Nevertheless, Plaintiffs assert that the claims at issue are so transitory that they constitute the types of claims that would be expected to expire before the Court reached a decision on class certification—a theory that is particularly difficult for Plaintiffs to assert in this action where the challenged actions took place over a period of years, and where this Court did, in fact, consider Plaintiffs' class certification motion and denied it in a matter of mere months.

But assuming, arguendo, that the argument could be credibly asserted on the substantive and procedural facts of this case, as with their assertions that the claims evade review, Plaintiffs cite no case law in which a court identified a period of years as inherently transitory. *See* Pl. Mem. pp 20-22. Instead, Plaintiffs attempt to analogize the foster care system to pretrial detention, emphasizing the Supreme Court's observations that it is unknown whether a person's stay in custody will persist beyond the time needed to rule on a motion for class certification and that pretrial detention may end at any time. *See, e.g.*, *Geraghty*, 445 U.S. at 399. Yet, as noted above, Plaintiffs' claims are necessarily grounded in a theory of the case holding that the Plaintiff Children remain in care for a period of years, so they cannot plausibly argue that the time a child stays in care is so variable or unknown that claims are likely to expire in the months in which a motion for class certification is under consideration. While six of the Plaintiff Children happened to have left care since the action was filed, Plaintiffs themselves calculate that these children spent an average of seven and a half years in the foster care system, a period of time Plaintiffs cannot credibly characterize as transitory. *See* Pl. Mem. p. 22.

Any suggestion that City Defendant can somehow end a child's stay in foster care at will, purely for purposes of evading judicial review, not only strains credulity but suggests an ignorance of the foster care system that is inconsistent with Plaintiffs' counsel's expertise in the

field. Once a child is placed in the foster care system, virtually no decision regarding the duration of that placement can be taken without Family Court review and approval. To imply that City Defendant can somehow remove a child from foster care, without court approval and under a cloak of darkness, is patently absurd, as Plaintiffs' counsel well know.[5,6]

Moreover, Plaintiffs' counsel claim to have been unable to predict the timing of the six Plaintiff Children's discharge from care, but this ignorance does not establish that the disposition of a case is sudden and unpredictable, but rather, as presented in City Defendant's opposition to Plaintiffs' motion for class certification, that Plaintiffs' counsel are unfamiliar with the progress of their clients' cases in Family Court, having chosen not to consult with their clients or their clients' Family Court attorneys. *See* Dkt 205, p. 16.

In any event, even if Plaintiffs' claims could be considered inherently transitory, the relation back doctrine cannot be invoked here. While some courts within the Second Circuit have certified classes with named plaintiffs whose claims became moot before the filing of the class certification motion, no courts have applied the relation back doctrine where there is only a theoretical possibility that a denied class certification motion might be renewed at some unknown future date. Certainly, Plaintiffs have cited no decision, and City Defendant is aware

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[5] City Defendant's lack of control over the duration of a foster care case was described in some detail in the filings of local children's foster care advocates in their submissions opposing Plaintiffs' settlement with the State Defendants in this action. *See* Children's Advocates' Objections to Settlement, Dkt. No. 187, at ¶¶ 5-6.

[6] In fact, City Defendant's lack of control over the duration of foster care proceedings, and thus its inability to strategically render moot the claims of the named Plaintiffs, strongly suggests that this is not the type of action for which use of the relation back doctrine was intended. *See, e.g., Giovanniello v. Carolina Wholesale Office Mach. Co*, No. 06 Civ. 10235, 2007 U.S. Dist. LEXIS 60671, at *4 (S.D.N.Y. Aug. 20, 2007) (courts will relate class certification back to the filing of complaint in "only two circumstances:" 1) when the claims are inherently transitory and 2) "where the defendant attempts to pick off lead plaintiffs by settling their claims in an effort to avoid class certification").

of none, where a court applied the relation back doctrine based upon a class certification motion that had been denied. Indeed, there is substantial authority for City Defendant's contrary argument that relation back is unavailable once class certification has been denied and no renewed motion has been filed. *See, e.g.*, *Lasky v. Quinlan*, 558 F.2d 1133, 1136 (2d Cir. 1977) ("While under *Gerstein* and *Sosna* a belated certification may be said to 'relate back' to the filing of the complaint, such an argument is unavailable where, as here, the District Court expressly denied class certification and there was no appeal from that determination."); *Giovanniello*, 2007 U.S. Dist. LEXIS 60671, at *7 ("Nor is this the proper case to relate class certification to back to the filing of the complaint. Plaintiff's motion for class certification has already been ruled on. . ."). To permit Plaintiffs to invoke the relation back doctrine upon a mere representation that they may renew their motion for class certification at some indeterminate point in the future would allow them to litigate indefinitely moot claims without ever having to certify a class.

In addition, Plaintiffs should not be permitted to blame their insufficient evidentiary showing in support of class certification, or their delay in renewing their motion, upon City Defendant's allegedly inadequate discovery. Plaintiffs were always free to stay the briefing schedule and seek class-certification-related discovery prior to filing their reply papers once they saw that City Defendant's opposing papers called into question the truthfulness of the allegations in the Amended Complaint. They chose not to do so. Further, the facts discussed in City Defendant's opposition papers, identifying the positions advanced by Plaintiffs' counsel's own clients regarding adoption or reunification, or reciting other equally fundamental case facts, should not have come as a surprise to Plaintiffs' counsel, and would have been known to them had they ever troubled to meet with their clients or with their clients' Family Court attorneys.

Moreover, Plaintiffs' attempt to blame discovery disputes for their failure to prevail on class certification, or to promptly renew their motion, fails for another reason. This Court did not merely fault the sufficiency of Plaintiffs' evidence showing compliance with Rule 23(a)'s requirements. It also faulted "the very breadth of the common questions framed by Plaintiffs" which the Court found "undermined Plaintiffs' ability to demonstrate that certification of a broad unitary class of children who are or will be in foster care is appropriate." *See* Dkt No. 292, p. 3. Paradoxically, Plaintiffs' response to the Court's overbreadth concerns is to expand the scope of claimants from those claiming a current need for prospective injunctive relief to those who once claimed such need but can no longer do so. If anything, such a response would only render the claims of any future proposed class even broader and more diffuse.[7]

Plaintiffs conclude their opposition with a plea that the Court exercise a flexible approach and essentially ignore standing requirements because their cause is allegedly just. But the exceptions to standing do not turn on the claimed legitimacy or compelling nature of mooted plaintiffs' claims, but, rather, on whether a claim's temporal qualities render it unlikely to survive to adjudication. Here, dismissing the six Plaintiff Children whose claims are moot will not terminate the entire action, as thirteen Plaintiff Children remain in care with live claims.[8]

There is an additional reason why artificially maintaining the viability of the mooted Plaintiff Children's claims is unwarranted and ill-advised. Plaintiffs brought this action on behalf of Plaintiff Children through next friends, presumably because the Plaintiffs, as

[7] Indeed, the mooted Plaintiffs would no longer be members of the class Plaintiffs last sought to certify. *See* Notice of Am. Mot. for Class Certification (Dkt. No. 87) (defining proposed class as "[c]hildren who are now or will be in the foster care custody of [the ACS Commissioner]").

[8] Even if that were not so, as long as any Plaintiff had a live claim and a class certification motion was not pending, it would be Plaintiffs' counsel's obligation to add additional children as plaintiffs—an obligation that cannot credibly be characterized as an unreasonable one if, as they claim, the purported harm at issue is so widespread.

children in the foster care system for whom legal custody was disputed, lacked legal guardians who could advance their interests. Five of the Plaintiff Children have now achieved permanency through adoption or reunification and thus have legally-recognized and Family Court-approved biological or adoptive parents. Yet, in hopes of breathing life into mooted and moribund claims, Plaintiffs' counsel argue—allegedly on behalf of these children—that there is some likelihood that the children's biological or adoptive parents will fail them so that they will reenter the foster care system—a position that appears to rest upon the potential inadequacy of their permanent placements. No evidence has been presented that Plaintiffs' counsel or the next friends have spoken to the Plaintiff Children or made any attempt to ascertain whether the arguments made on their behalf echo their wishes—a continuing failure of Plaintiffs' counsel, given this Court's having called into question whether the allegations in the Amended Complaint reflected the perspective of the named Plaintiffs. *See* Dkt No. 282, p. 2.

Plaintiffs' counsel's cynical view of the likely permanency of their clients' placements, bolstered not by individual consultation with those clients, but with State-wide statistics about broken placements (statistics that, in fact, evidence a 90% success rate) only highlights a newly complicating factor in their representing children who now have parents to look after their natural or adoptive children's best interests. These complications further demonstrate that an exception to the mootness doctrine should not be made for the six Plaintiff Children who are no longer in care.

CONCLUSION

Based on the foregoing, City Defendant respectfully requests that the Court grant its motion for partial summary judgment and dismiss Plaintiffs Elisa W., Alexandria R., Olivia R., Ana-Maria R., Xavion M., and Dameon C. from this action on grounds of mootness.

DATED: December 19, 2016
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