UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., by her next friend, Elizabeth Barricelli, et al., Plaintiffs, - against - THE CITY OF NEW YORK, et al., Defendants.	15 Civ. 5273 (LTS) (HBP)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT POOLE'S PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT

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REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT POOLE'S PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Poole respectfully submits this memorandum of law in further support of her motion for partial dismissal of the Amended Complaint and in reply to the Memorandum of Law in Opposition to State Defendant's Motion to Dismiss submitted by Plaintiff James, ECF Docket No. 353 ("Pl. James Mem."), and the Named Plaintiff Children's Memorandum of Law in Opposition to State Defendant's Motion to Dismiss, ECF Docket No. 352 ("Pl. Children Mem.").

As demonstrated in Defendant Poole's moving brief, the Public Advocate for the City of New York lacks capacity or standing to sue Defendant Poole, the Acting Commissioner of the New York State Office of Children and Family Services ("OCFS"). In addition, the Adoption Assistance and Child Welfare Act ("AACWA") does not give rise to a private cause of action under § 1983. See ECF Docket No. 341, Mem. Law Supp. Def. Poole's Partial Mot. Dismiss ("Def. Poole Mem."). In opposition, both Plaintiff James and Named Plaintiff Children fail to put forth any cogent or legally-supportable argument sufficient to defeat Defendant Poole's partial motion to dismiss the Amended Complaint.

First, Plaintiff James does not—because she cannot—proffer any case law to support her incredible argument that the Public Advocate of the City of New York, based solely on her status as "an independently elected [municipal] official," has the capacity and standing to sue a State official. Instead, she claims that Defendant Poole has waived the capacity and standing defense by raising the defense with this motion—Defendant Poole's first responsive pleading. As demonstrated herein, such an argument contravenes both established legal precedent and common sense. (See Points I and II, infra.)

Second, Plaintiff James and Named Plaintiff Children's arguments regarding their putative claims under the AACWA are equally unavailing. Plaintiff James makes no attempt

whatsoever to address the AACWA's failure to give rise to a private right of action under § 1983. Named Plaintiff Children similarly seek to evade the fact that the remaining AACWA claims should be dismissed by raising the law of the case doctrine. As shown herein, the law of the case doctrine does not apply because this Court has not ruled on these claims with respect to Defendant Poole and it has the discretion to reconsider the AACWA's failure to give rise to a private right of action. (See Point III, infra.) Finally, Plaintiffs set forth no convincing arguments against dismissal of the AACWA claims. (See Points IV and V, infra.) Accordingly, Defendant Poole's motion for partial dismissal should be granted.

I. THE PUBLIC ADVOCATE OF THE CITY OF NEW YORK HAS NO ABILITY TO SUE DEFENDANT POOLE, A STATE OFFICIAL

Plaintiff James cites to no case law permitting the New York City Public Advocate to bring an action against a State entity—because no such case law exists. Indeed, as recognized by Plaintiff James, the New York Supreme Court for Kings County has ruled on the precise issue of the Public Advocate's inability to sue a State entity. See Pl. James Mem. at 11 n.5 (citing Matter of de Blasio v. State Univ. of N.Y., Index No. 13007/13 (N.Y. Sup. Ct. Sept. 12, 2013), available at http://www.lichmedicalstaff.org/doc/JudgeBaynesSept.12DecisionIndex13007.pdf). In de Blasio, that court explicitly stated that then-Public Advocate "[d]e Blasio's powers derive from, and are circumscribed by, the City Charter. His powers under the City Charter are limited to those over the City agencies and may not extend to encompass State agencies." No. 13007/13 at *3 (citing Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth., 19 A.D.3d 284, 285 (N.Y. App. Div. 1st Dep't), lv. denied, 5 N.Y.3d 878 (N.Y. 2005)). This holding is well-supported by New York case law. See Matter of James v. Donovan, 130 A.D.3d 1032, 1035 (N.Y. App. Div. 2d Dep't 2015) (holding that the Public Advocate had no capacity to sue a District Attorney to obtain records that were "not generated by city agencies"); Madison Square Garden, 19 A.D.3d

at 285 (finding that the Public Advocate lacked capacity to sue the New York Metropolitan Transportation Authority (MTA), a state agency, because the Public Advocate's "duty is to be 'a watchdog over City government'[,] but the MTA is not part of city government"); cf. Matter of Long Island Coll. Hosp., 980 N.Y.S.2d 276, 2013 WL 5575873, at *6 (N.Y. Sup. Ct. 2013) (discussed below).

Moreover, this holding is not contradicted by the case law on which Plaintiff James relies. Plaintiff James cites only decisions recognizing the Public Advocate's capacity to sue New York City entities. See Pl. James Mem. at 8-9 (citing the following cases in which the Public Advocate's capacity to sue a State entity was not at issue); Matter of James v. City of N.Y., 53 Misc. 3d 821 (N.Y. Sup. Ct. 2016) (recognizing the Public Advocate's capacity to sue the New York City Department of Education); Matter of James v. Farina, 53 Misc. 3d 704 (N.Y. Sup. Ct. 2016) (same); Matter of Thomas v. N.Y. City Dep't of Educ., 145 A.D.3d 30 (N.Y. App. Div. 1st Dep't 2016) (same); Green v. Giuliani, 721 N.Y.S.2d 461 (N.Y. Sup. Ct. 2000) (involving the Public Advocate's inquiry into the New York City mayor's conduct); Green v. Safir, 174 Misc. 2d 400 (N.Y. Sup. Ct. 1997), aff'd, 255 A.D.2d 107 (N.Y. App. Div. 1st Dep't 1998) (finding that the Public Advocate could sue the New York City Police Department to obtain access to the New York City Police Department's records).

The one case Plaintiff James cites that does involve a State defendant, Long Island Coll. Hosp., itself recognizes that "several authorities . . . have found that the Public Advocate does not have authority to bring an Article 78 proceeding against a state government agency." 980 N.Y.S.2d 276, 2013 WL 5575873, at *6 (citing de Blasio, No. 13007/13; Madison Square Garden, 19 A.D.3d 284) (internal citations omitted). In granting the Public Advocate intervenor status, the court distinguished its holding from those cases: "this Court does not deviate from

those rulings as the instant matter does not challenge the actions of a state agency acting as such[.] Moreover, the Public Advocate has not 'initiated' this proceeding, but merely seeks to participate as a representative of that public interest which may not be adequately represented by the original parties to the proceeding." Id. (emphasis added). Accordingly, the case law confirms that New York City's Public Advocate has no authority to sue State officials such as Defendant Poole, the Acting Commissioner of a State agency.[1]

II. DEFENDANT POOLE HAS NOT WAIVED THE DEFENSE OF CAPACITY OR STANDING

Plaintiff James's argument that Defendant Poole somehow waived the defense of lack of capacity or standing before submitting this motion—her first responsive pleading in this action—is illogical and unsupported. Plaintiff James ignores that the concept of "standing" includes not only Article III standing, but also the "prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." Warth v. Seldin, 422 U.S. 490, 500 (1975); accord Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 84 (2d Cir. 2014). It is well-established that the requirement of standing cannot be waived. See Thompson v. Cnty. of Franklin, 15 F.3d 245, 248 (2d Cir. 1994); cf. Fed. R. Civ. P. 12(h)(3).

Moreover, it is equally axiomatic that the lack of capacity defense is not waived if, as here, it is raised in an initial responsive pleading. Fed. R. Civ. P. 8(c), 12(h); Gelfman Int'l Enters. v. Miami Sun Int'l Corp., No. 05-CV-3826, 2009 WL 2242331, at *5 (E.D.N.Y. July 27, 2009) (citing Pressman v. Estate of Steinvorth, 860 F. Supp. 171, 176 (S.D.N.Y. 1994)). Indeed,

[1] Cf. Jattan v. Queens Coll. of City Univ. of N.Y., 64 A.D.3d 540, 542 (N.Y. App. Div. 2d Dep't 2009) ("[T]he City of New York does not have the power to waive the State's sovereign immunity by passing an anti-discrimination code provision applicable to instrumentalities of the State. . . . As an instrumentality of the State, Queens College is not subject to the provisions of the New York City Human Rights law.").

courts in the Second Circuit have even allowed the lack of capacity defense to be asserted after an initial responsive pleading has been filed. See Asbestos Workers Syracuse Pension Fund by Collins v. M.G. Indus. Insulation Co., 875 F. Supp. 132, 137 (N.D.N.Y. 1995) (finding that the capacity defense was properly asserted after filing of an answer); Windbourne v. E. Air Lines, Inc., 179 F. Supp. 1130, 1155-57 (E.D.N.Y. 1979), rev'd on other grounds, 632 F.2d 219 (2d Cir. 1980) (considering the defense when it was raised at least three years into the litigation).

There is no support for Plaintiff James's claim that Defendant Poole somehow waived the defense by engaging in settlement negotiations with Plaintiffs at the outset of this litigation. See Pl. James Mem. at 16 (citing no case law). To hold that Defendant Poole thereby waived the defense would be to discourage settlement in contravention of public policy. See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"). Further, Plaintiff James's contention is unsupported by the plain language of the Proposed Consent Decree, which expressly does not admit liability or waiver on the part of Defendant Poole. ECF Docket No. 96-1, Proposed Consent Decree at 17-18. Nor did the Proposed Consent Decree, drafted prior to Defendant Poole's first responsive pleading, purport to exhaustively assert or otherwise waive all defenses on behalf of Defendant Poole.[2] See generally id. Thus, Plaintiff James's waiver argument is legally and factually unsupported and unavailing.

III. THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE DEFENDANT POOLE'S MOTION TO DISMISS PLAINTIFFS' PUTATIVE AACWA CLAIMS

Plaintiff James makes no argument against dismissal of the AACWA claims, instead

[2] Contrary to Plaintiff James's contention, the Proposed Consent Decree only references Eleventh Amendment sovereign immunity to demonstrate why then-Defendants the State of New York and OCFS were not parties to the Proposed Consent Decree. See id. at 2.

relying on Named Plaintiff Children's opposition. Pl. James Mem. at 1 n.1. In turn, Named Plaintiff Children misguidedly point to the law of the case doctrine.[3] See Pl. Children Mem. at 3-8. As stated in her moving brief, Defendant Poole by this partial motion seeks to preserve her objection to Plaintiffs' AACWA claims on the grounds that the provisions cited by Plaintiffs do not provide a private right of action. See Def. Poole Mem. at 11 n.6. Named Plaintiff Children's reliance on the law of the case doctrine is thus inapt.

The law of the case doctrine is also irrelevant here because it "may be properly invoked only if the parties had a full and fair opportunity to litigate the initial determination." Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 219 (2d Cir. 2002) (internal quotation marks omitted). Named Plaintiff Children correctly note that the law of the case doctrine provides that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." In re Bisys Sec. Litig., 496 F. Supp. 2d 384, 386 (S.D.N.Y. 2007); see Pl. Children Mem. at 4 (quoting Bisys Sec. Litig.). However, they fail to concede that Defendant Poole has not yet "battled for the court's decision" as to the putative AACWA claims. Prior to the instant motion, Defendant Poole had not raised arguments or defenses regarding the viability of those claims. Accordingly, the law of the case doctrine does not apply to Defendant Poole's motion. See Sawyer v. N.Y. State Dep't of Corr. Servs., No. 11-CV-152S, 2015 WL 6641471, at *2 (W.D.N.Y. Oct. 28, 2015) ("The law of the case doctrine, in addition to being discretionary, . . . does not control different factual situations or different parties."); E. End Eruv Ass'n, Inc. v. Town of Southampton, No. CV 13-4810, 2014

[3] It should be noted that Named Plaintiff Children mistakenly identify the remaining City Defendant as former Commissioner Gladys Carrión. Pl. Children Mem. at 1, 2. The only remaining City Defendant is the City of New York ("City"). See Elisa W. v. City of N.Y., No. 15 CV 5273, 2016 WL 4750178, at *9 (S.D.N.Y. Sept. 12, 2016).

WL 4826226, at *13 (E.D.N.Y. Sept. 24, 2014) ("The law of the case doctrine does not operate to preclude the court from revisiting an issue, particularly with reference to the different factual circumstances of different parties.").

Moreover, "[t]he law of the case doctrine is admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (citations omitted); see Pl. Children Mem. at 4 (quoting Virgin Atl. Airways); see also Arizona v. California, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); Bonano v. Doe, 628 Fed. Appx. 25, 27 (2d Cir. 2015) (finding that the law of the case doctrine was discretionary and therefore did not limit the district court's authority to consider a second motion for summary judgment). The doctrine "permits a change of position if it appears that the court's original ruling was erroneous." DiLaura v. Power Auth. of State of N.Y., 982 F.2d 73, 77 (2d Cir. 1992) (quoting Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 825 n.9 (2d Cir. 1968)); see Pl. Children Mem. at 4. Accordingly, this Court may in any event properly reconsider whether the AACWA provisions at issue provide a private right of action. Named Plaintiff Children make no convincing arguments to counter Defendant Poole's well-supported argument that no private right of action exists. See Def. Poole Mem. at 11-20.

IV. THE AACWA CONFERS NO RIGHTS UPON THE PLAINTIFFS

Despite citing to Gonzaga in their opposition brief, Named Plaintiff Children wholly overlook the directive of that case for the application of the Blessing test's first prong. Named Plaintiff Children may be correct that "Congress intended the AACWA provisions at issue to benefit" children in the foster care system. Pl. Children Mem. at 11 (emphasis added). However, as set forth in Defendant Poole's moving brief, it is a right, not a mere benefit, that

must be found in the AACWA for it to give rise to a privately-enforceable § 1983 claim. See Def. Poole Mem. at 17-18. Neither Named Plaintiff Children nor Plaintiff James make the requisite claim that the AACWA provisions were intended to confer a right upon them.

In Gonzaga, the Supreme Court declined to find "that a federal statute confers such rights [under § 1983] so long as Congress intended that the statute 'benefit' putative plaintiffs." Gonzaga Univ. v. Doe, 536 U.S. 273, 282 (2002). Like Named Plaintiff Children, the Gonzaga plaintiff pointed to Blessing and Wilder, "which, he sa[id], used the term 'benefit' to define the sort of statutory interest enforceable by § 1983." Id. (citing Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990)); see also Pl. Children Mem. at 9, 11-12 (same). The plaintiff's argument proved unavailing, as the Gonzaga Court "reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." Gonzaga, 536 U.S. at 283. Rather, the Supreme Court held, "it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Id.

Here, Named Plaintiff Children's argument parallels that made by the Gonzaga plaintiff and is thus also unavailing. That the AACWA provisions at issue may benefit foster children bears no import to whether the provisions give rise to a private right of action. See Gonzaga, 536 U.S. at 283; see also California v. Sierra Club, 451 U.S. 287, 294 (1981) ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries."). Named Plaintiff Children fail to argue that the AACWA provisions confer any rights upon them. See Pl. Children Mem. at 8-23. Plaintiff James makes no argument that the AACWA even benefits, let alone confers any right upon, the Public

Advocate.[4] See Pl. James Mem. at 1 n.1. Plaintiffs' failure to show that the AACWA provisions at issue confer a private right of action dooms their claims. See Gonzaga, 536 U.S. at 280 ("[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983.").[5]

V. PLAINTIFFS' RELIANCE ON THE "SUTER FIX" TO SALVAGE THEIR AACWA CLAIMS IS MISGUIDED AND INEFFECTIVE

There is no support for Named Plaintiff Children's argument that "the text of the 1994 amendment to [the] AACWA (the so-called Suter Fix), stands in direct contradiction to [Defendant Poole's] position." Pl. Children Mem. at 21. The "Suter Fix" only overruled that portion of Suter v. Artist M., 503 U.S. 347 (1992), that would have allowed courts to decline to find a § 1983 federal right based solely on a statute's "State plan" requirement. See 42 U.S.C. § 1320a-2 (the "Suter Fix"); Suter, 503 U.S. at 359-60. The Suter Fix certainly did not, as Named Plaintiff Children claim, "signal[] Congress's understanding that various provisions of Title 42, Chapter 7 of the U.S. Code, including [the] AACWA, were privately enforceable." Pl. Children Mem. at 21; see Developmental Servs. Network v. Douglas, 666 F.3d 540, 548 n.28 (9th Cir. 2011) (finding that the Suter Fix makes it clear that it did not "expand the grounds for

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[4] Relatedly, Plaintiff James cannot show statutory standing because she does not fall within the zone of interests protected by the AACWA. See Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388-89 (2014).

[5] Named Plaintiff Children attempt to rebut Defendant Poole's argument that "'no implied right of action exists' under [the] AACWA" by claiming that "Plaintiffs do not rely on an 'implied' right of action. They bring their claims under Section 1983, which establishes an express, statutory right of action." Pl. Children Mem. at 10 n.11. This attempted rebuttal is unavailing, however, as the Supreme Court has explicitly "reject[ed] the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." Gonzaga, 536 U.S. at 283.

determining the availability of private actions" and "do[es] not help to answer the question . . . whether a private action is available"). Indeed, the Suter Fix itself specifies that it "importantly did not 'limit or expand the grounds for determining the availability of private actions to enforce State plan requirements.'" Pl. Children Mem. at 21 (quoting § 1320a-2) (emphasis added).

By discussing the 1996 Removal of Barriers Amendment, Defendant Poole does not, as Plaintiff asserts, "fail[] to recognize" the Suter Fix. Pl. Children Mem. at 21. Rather, the chronological sequence of the 1994 Suter Fix and the 1996 Removal of Barriers Amendment evidences Congress's determination that a post-Suter Fix limit on private rights of action under the AACWA was appropriate. See Def. Poole Mem. at 19-20. Nothing in Plaintiffs' opposition briefs demonstrates otherwise. Accordingly, the Removal of Barriers Amendment, enacted post-Suter Fix, counsels that no private right of action exists under the AACWA provisions at issue.

CONCLUSION

For the reasons set forth herein and in the Memorandum of Law in Support of Defendant Poole's Partial Motion to Dismiss the Amended Complaint, ECF Docket No. 341, Defendant Poole respectfully requests that this Court grant her motion for partial dismissal of the Amended Complaint, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 24, 2017

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