15 Civ. 5273 (LTS) (HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., *et al.*,

Plaintiffs,

-against-

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CITY OF NEW YORK'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON GROUNDS OF MOOTNESS

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street, Room 2-167
New York, N.Y. 10007

Lauren Almquist Lively
Tel: (212)356-0885
Matter No. 2015-034233

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

LEGAL STANDARD 3

ARGUMENT

POINT I

THE CLAIMS OF PLAINTIFFS WHO ARE NO LONGER IN THE CITY'S FOSTER CARE SYSTEM ARE MOOT AND SHOULD BE DISMISSED 3

POINT II

THE RELATION BACK DOCTRINE IS INAPPLICABLE 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Pages**

31 Foster Children v. Bush,
329 F.3d 1255 (11th Cir. 2003) 4

Allen v. Coughlin,
64 F.3d 77 (2d Cir. 1995) 3

Christopher P. v. Marcus,
915 F.2d 794 (2d Cir. 1990).....4

Cty. of Riverside v. McLaughlin,
500 U.S. 44 (1991).....6, 7

Foreman v. Heineman,
240 F.R.D. 456 (D. Neb. 2006).....4, 5

Fox v. Bd. of Trs. of the State Univ.,
42 F.3d 135 (2d Cir. 1994).....3

J.B. v. Valdez,
186 F.3d 1280 (10th Cir. 1999) 4

Los Angeles v. Lyons,
461 U.S. 95 (1983).....4

Martin-Trigona v. Shiff,
702 F.2d 380 (2d Cir. 1983).....4

O'Shea v. Littleton,
414 U.S. 488 (1974).....6

Patton v. Dumpson,
425 F. Supp. 621 (S.D.N.Y. 1977).....6

Powell v. McCormack,
395 U.S. 486 (1969).....3

Spencer v. Kemna,
523 U.S. 1 (1998).....5, 7, 8

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980).....7

Federal Rules

Federal Rule of Civil Procedure 23(a)…….1

Federal Rules **Pages**

Federal Rule of Civil Procedure 56(c)…….3

PRELIMINARY STATEMENT

Plaintiffs, ten children in foster care in New York City and the New York City Public Advocate, commenced this action in July 2015, alleging that State Defendants and the City of New York,[1] as a result of systemic failures in the New York City foster care system, violated Plaintiffs' rights and the rights of putative class members they purported to represent. *See* Dkt No. 1. Nine children were added as plaintiffs to the Amended Complaint, filed on December 29, 2015. *See* Dkt No. 91. Plaintiffs seek prospective injunctive relief in the form of changes to the foster care system and a declaration that their rights were violated. *See* Amended Complaint, pp. 119-124.

On December 28, 2015, Plaintiffs filed a motion for class certification, which the Court denied in a decision dated September 27, 2016, on the grounds that Plaintiffs failed to meet the requirements of Federal Rule of Civil Procedure 23(a). *See* Dkt Nos. 87, 282. Accordingly, due to the absence of a certified class, each Plaintiff may present only his or her individual claims for adjudication. Yet, since the action began, six of the nineteen Plaintiffs have left foster care and ACS custody: Elisa W., Alexandria R., Olivia R., Ana-Maria R., Xavion M., and Dameon C.[2] While Plaintiffs' counsel are free to continue litigating this action on behalf of those named Plaintiffs still in care, there is no basis for them to assert claims for equitable relief

[1] State Defendants are The State of New York, the New York State Office of Children and Family Services ("OCFS"), and Acting OCFS Commissioner Sheila J. Poole. Plaintiffs originally also sued the New York City Administration for Children's Services ("ACS") and ACS Commissioner Gladys Carrión; however, following the Court's dismissal of ACS and Commissioner Carrión, Dkt No. 278, the City of New York is the sole remaining City Defendant. Moreover, the Public Advocate's claims against the City were abandoned in Plaintiffs' Amended Complaint. *See* Dkt No. 91.

[2] In this motion, Plaintiffs are identified by the pseudonyms used in the Amended Complaint.

on behalf of the six Plaintiff children no longer in care who will not be affected by the relief sought.[3] The claims of those six Plaintiff children should therefore be dismissed as moot.

STATEMENT OF FACTS[4]

Plaintiffs' Amended Complaint alleges, inter alia, that the City fails to ensure that the rights of children in foster care are protected, that their cases are appropriately handled, and, most importantly, that they achieve permanency quickly and do not remain in foster care for an extended period of time. *See generally* Amended Complaint. Plaintiffs allege that children in the New York City foster care system, including the Plaintiff Children, remain in the foster care system for years without permanent homes. *See, e.g., id.* ¶ 249.

After Plaintiffs filed their Amended Complaint, six of the nineteen Plaintiff Children have left the foster care system and ACS custody. Olivia R. and Ana-Maria R. were adopted on or about June 14, 2016; Dameon C. on or about August 2, 2016; and Alexandria R. on or about September 13, 2016. *See* City's Local Civil Rule 56.1 Statement of Material Facts, dated November 16, 2016, ¶¶ 1-3 ("56.1 Statement"). Xavion M. was final-discharged to his mother on or about March 31, 2016; and Elisa W. voluntarily elected to leave foster care, which became effective on her eighteenth birthday, on September 3, 2016. 56.1 Statement ¶¶ 4-5. Accordingly, none of these Plaintiffs remain in the New York City foster care system or in ACS custody.

[3] To the extent Plaintiffs' counsel might argue that dismissal of the six Plaintiff children is a mere housekeeping exercise, the characterization would be without merit. The dismissal of mooted Plaintiffs' claims will have a significant effect on the scope of discovery regarding both those six children and the voluntary agencies in whose care they were placed. Of the eleven voluntary agencies that currently or previously served the nineteen named Plaintiff children, four agencies have no connection with the non-mooted Plaintiff children and so appropriately should be excluded from any future discovery, and certainly from the extremely burdensome non-party subpoenas already served upon the voluntary agencies by Plaintiffs' counsel. *See* 56.1 Statement ¶ 6; Pls' seventy-plus item subpoenas served upon voluntary agencies (Dkt. 287-2).

LEGAL STANDARD

Summary judgment should be rendered only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a summary judgment motion, the Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (internal citation and quotations omitted).

ARGUMENT

POINT I

THE CLAIMS OF PLAINTIFFS WHO ARE NO LONGER IN THE CITY'S FOSTER CARE SYSTEM ARE MOOT AND SHOULD BE DISMISSED.

Because Plaintiffs seek only prospective injunctive and declaratory relief concerning purported systemic deficiencies in the foster care system, the claims of the Plaintiff Children who have left foster care and thus achieved permanency are moot. It is well-established that "a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (internal quotations omitted). "The required legally cognizable interest has . . . been described as a requirement that plaintiff have a personal stake in the litigation." *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 140 (2d Cir. 1994) (internal citation omitted).

[4] The City respectfully refers the Court to its accompanying Local Civil Rule 56.1 Statement of Material Facts, which also sets forth the relevant undisputed facts.

Here, the six Plaintiff Children no longer in ACS custody have no such interest, and any changes made to the foster care system, including the injunctive relief identified in the Amended Complaint, will have no impact on these Plaintiffs.[5] *See Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) ("The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed."); *see also Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (plaintiff must demonstrate "likelihood of substantial and immediate irreparable injury" to be entitled to equitable relief). Nor does the request for declaratory relief preserve the claims of these Plaintiffs. *See Christopher P. v. Marcus*, 915 F.2d 794, 802 (2d Cir. 1990) ("A litigant may not use the declaratory judgment statute to secure judicial relief of moot questions."). Courts have repeatedly dismissed as moot claims for prospective equitable relief brought against foster care systems once plaintiffs had aged out or otherwise left the defendant agencies' custody. *See, e.g., Foreman v. Heineman*, 240 F.R.D. 456, 511 (D. Neb. 2006) (Report and Recommendation) (recommending dismissal as moot of such claims for prospective injunctive relief regarding foster care policies and practices as were brought by subset of plaintiffs who had aged out of foster care), *adopted sub nom. Carson P. v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007); *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (dismissing as moot claims for injunctive relief against foster care system brought by two plaintiffs who had been adopted); *J.B. v. Valdez*, 186 F.3d 1280, 1290 (10th Cir. 1999) (affirming dismissal on mootness grounds of claims of subset of plaintiffs who "have reached the

[5] Moreover, to the extent Plaintiffs attempt to argue that they might have contact with ACS or the foster care agencies following their adoption or exit from the foster care system, the Amended Complaint is entirely devoid of post-placement factual allegations. *See generally* Amended Complaint.

age of majority or otherwise fallen outside of state custody"). Accordingly, the six Plaintiff Children no longer have live claims that can be pursued in the instant action.

While courts have recognized an exception to the mootness doctrine, it applies "only in exceptional situations" where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). The six Plaintiff Children who are no longer in care cannot satisfy either requirement. First, Plaintiffs cannot credibly argue that the challenged occurrence, a child's stay in foster care, is too short to be fully litigated prior to cessation when thirteen of the nineteen Plaintiffs remain in foster care, the six Plaintiffs who have left foster care were each in care for at least four years,[6] and Plaintiffs' own Amended Complaint alleges that "children languish in ACS custody for years without a permanent home or family to call their own." Amended Complaint, ¶ 248. *See, e.g.*, *Foreman v. Heineman*, 240 F.R.D. at 511 (rejecting argument that claims were transitory, as plaintiffs alleged that they "were allowed to languish or were required to remain in [foster care] for many years"), *adopted sub nom. Carson P. v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007); *Spencer*, 523 U.S. at 29 (rejecting plaintiff's argument that his moot claim should be adjudicated as he failed to show "that the time between parole revocations and expiration of sentence is always so short as to evade review").

Moreover, Plaintiffs cannot demonstrate that there exists a reasonable expectation that the six Plaintiff Children will be "subject to the same action again." *Id.* at 17. To the extent

[6] Plaintiffs allege that at the time the Amended Complaint was filed, Elisa W. had been in ACS custody for thirteen years; Alexandria R. for eight years; Xavion M. for six years; and Dameon C, Olivia R. and Ana-Maria R. for more than four years. *See* Amended Complaint ¶ ¶ 9, 20 77, 90, 104.

Plaintiffs might argue that the Plaintiff Children could reenter care if they were subjected to abuse or neglect in the future, that argument is wholly speculative and does not constitute a reasonable expectation, as any child could be said to have such a risk. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (rejecting "general assertions or inferences" that respondents who had previously been prosecuted would be prosecuted in the future). Moreover, courts have expressly held that once a child is adopted, his claims for injunctive relief concerning the foster care system are moot. *See, e.g., Patton v. Dumpson*, 425 F. Supp. 621, 623 n.4 (S.D.N.Y. 1977) (in action brought on behalf of a child no longer in foster care alleging improper placement and other harms while in care, court held that "since [plaintiff's] adoption, his prayers for declaratory and injunctive relief are moot"). Thus, the claims of the six Plaintiff Children who are no longer in the foster care system are moot, and these Plaintiffs should be dismissed from the action.

POINT II

THE RELATION BACK DOCTRINE IS INAPPLICABLE.

In a submission to Magistrate Judge Pitman opposing the City's request for a discovery conference to be held and a briefing schedule for the instant motion set, Plaintiffs asserted that the claims of the Plaintiff Children no longer in care "relate back" to the filing of the Complaint and so these Plaintiffs have standing to assert them. *See* Dkt No. 288, p.5. Plaintiffs' argument is wholly without merit, as the relation back doctrine is inapplicable here.

The Supreme Court has held that in cases where a plaintiff class is certified after the named plaintiffs' claims become moot *and* where the claims are "so inherently transitory that the trial court will not even have time to rule on a motion for class certification," the subsequent certification of the class preserves the claims for review. *Cty. of Riverside v. McLaughlin*, 500

U.S. 44, 51-52 (1991) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)).

Yet Plaintiffs' contention that their claims relate back fails on two obvious grounds. First, as discussed above, the six Plaintiff Children who have left the foster care system were each in care for at least four years, hardly a period so inherently transitory that the Court could not rule on a motion for class certification. *Compare Cty. of Riverside*, 500 U.S. at 52 (claims regarding the timing of probable cause determinations following warrantless arrests, which occur within days of such arrests, were "inherently transitory"). Indeed, Plaintiffs were clearly not thwarted by any inherent transience of their claims: They succeeded in filing their Motion for Class Certification on December 28, 2015, and the Court had time to render its decision denying class certification on September 27, 2016.[7] Given Plaintiffs' own characterization of their claims as years in duration, and the Court's ability to entertain, and reject, the non-mooted Plaintiffs' fully-briefed certification motion, the relation back doctrine as articulated in *Riverside* offers Plaintiffs no protection.

Second, and most importantly, *Riverside* preserved transitory claims rendered moot during the class certification process w*hen a plaintiff class was ultimately certified*. 500 U.S. at 52. Here, the Court rejected Plaintiffs' motion for class certification, and thus, in the absence of a certified Plaintiff class, each Plaintiff proceeds only on behalf of him or herself, subject to both the continuing requirements of Article III standing and the corresponding risks of mootness.

[7] Because thirteen named Plaintiff children continued to have non-mooted claims as of the date of decision, Plaintiffs cannot credibly argue that the mootness of the six Plaintiffs' claims deprived this Court of an opportunity to adjudicate the class certification motion making invocation of the relation back doctrine necessary.

It is undisputed that the six above-identified Plaintiffs are no longer in ACS custody and that they seek only prospective injunctive and declaratory relief in the form of changed policies and practices against the City Defendant. As noted above, there is simply no basis for Plaintiffs' counsel to assert claims for prospective equitable relief on behalf of children who will not be affected by the relief sought. *See, e.g., Spencer*, 523 U.S. at 18 ("[M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong."). Accordingly, these six Plaintiff Children do not have live claims for the Court to adjudicate and should therefore be dismissed from the action.

CONCLUSION

Based on the foregoing, Defendant the City of New York respectfully requests that its Motion for Partial Summary Judgment be granted together with such additional relief as the Court deems appropriate.

Dated: New York, New York
November 16, 2016

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 2-167
New York, New York 10007
Phone: (212) 356-0885

By: /s/Lauren Almquist Lively
Lauren Almquist Lively
Assistant Corporation Counsel