LEXSEE 2005 U.S. DIST. CT. MOTIONS 10446

Go To U.S. District Court Opinion

M.K.B., O.P., L.W., M.A., MARIEME DIONGUE, M.E., P.E., ANNA FEDOSENKO, A.I., L.A.M., L.M., DENISE THOMAS, and J.Z., on their own behalf, and on behalf of their minor children and all others similarly situated, Plaintiffs, - against - VERNA EGGLESTON, as Commissioner of the New York City Human Resources Administration; ROBERT DOAR, as Commissioner of the New York State Office of Temporary and Disability Assistance; and ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, Defendants.

05 CV 10446 (JSR) (ECF CASE)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2005 U.S. Dist. Ct. Motions 10446; 2006 U.S. Dist. Ct. Motions LEXIS 20887

September 13, 2006

Motion for Reconsideration

COUNSEL: [**1] ELIOT SPITZER, Attorney General of the State of New York, Attorney for State defendants, 120 Broadway, 24th Floor, New York, New York 10271, (212) 416-8632.

ROBERT L. KRAFT, Assistant Attorney General, of Counsel.

TITLE: STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF CLASS CERTIFICATION ORDER

TEXT: PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted in support of the motion of defendants ROBERT DOAR, as Commissioner of the New [**2] York State Office of Temporary and Disability Assistance and ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health (collectively "State defendants"), pursuant to Local Rule of Civil Procedure 6.3 for reconsideration of so much of this Court's Opinion and Order entered August 29, 2006 ("Opinion and Order"), as certified a class including "(3) lawful permanent residents who have been in that status for less than five years; and (4) persons who are Permanently [*2] Residing Under Color of Law (PRUCOL)." Opinion and Order, at 78-79. n1 As relief, the State defendants request an order striking the above-quoted language from the definition of the class.

n1 Page references are to the copy of the Opinion and Order filed as Document 150.

This Court accurately described most of the claims made and evidence adduced in this litigation in the opening sentence of the Opinion and Order as follows:

It is not the policy of the United States, nor of the State of New York, to leave destitute [**3] the

> battered immigrant wives and children of lawful U.S. residents just because their abusive husbands are no longer supporting them or providing them with a basis for obtaining aid.

id. at 1. Because the challenged portions of the definition of the certified class are not encompassed in this description, and for the reasons set out below, they should be struck from the definition of the certified class.

ARGUMENT

A motion to reconsider should be granted when the movant demonstrates that the court overlooked factual matters or controlling authority that had been presented to it in the proceedings on the underlying motion. *Caleb & Co. v. E.I. DuPont De Nemours & Co., 624 F. Supp. 747 (S.D.N.Y. 1985); Beatty v. United States, 2001 U.S. Dist. LEXIS 6895 (S.D.N.Y. 2001).*

[*3] **POINT I**

LAWFUL PERMANENT RESIDENTS WHO HAVE BEEN IN THAT STATUS FOR LESS THAN FIVE YEARS ARE NOT PROPERLY INCLUDED IN THE CERTIFIED CLASS SINCE NO CLASS REPRESENTATIVES DEMONSTRATE THE VARIOUS CLAIMS SUCH PERSONS MAY HAVE

The class action device was designed as "an exception to the usual rule that litigation is conducted by and [**4] on behalf of the individual named parties only." *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982)* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).* It is appropriate where the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." Id. (quoting *Califano, 442 U.S. at 701).* Given the limited circumstances in which class actions are appropriate, "actual, not presumed conformance" with the prerequisites set forth in Rule 23 is "indispensable." *457 U.S. at 160;* see also *Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 596-97 (2d Cir. 1986)* (same). Thus, a class action may be certified only if the trial court is satisfied, "after a rigorous analysis," that those prerequisites have been satisfied. *457 U.S. at 161;* see, e.g., *Bishop v. New York City Dep't of Housing Preservation and Development, 141 F.R.D. 229, 124 (S.D.N.Y. 1992)* (same).

While the Court's decision found that defendants' acts or omissions adversely affected battered immigrants and PRUCOLs, [**5] there was no evidence presented by plaintiffs-- and the Court's decision found none-- that lawful permanent residents ("LPRs") who have been in that status for less than five years were being systemically denied benefits by the practices which affected the two other immigrant groups. Indeed, there is only one plaintiff with the immigration status of LPR, i.e., Anna Fedosenko ("Fedosenko"), and she did not testify at the hearing nor [*4] prosecute her claim that she is entitled to federal food stamps by reason of her State Medicaid eligibility. Plaintiffs presented at the hearing a proposed LPR intervenor, Galina Rybalko ("Rybalko"), whose claim did not support Fedosenko's claim.

LPRs who have been in that immigration status for less than five years are not properly certified as part of a class in this litigation, which is concerned with whether the defendants properly applied *8 U.S.C. §§ 1612* and 1641(c) to battered aliens, because the benefits LPRs who have been in that status for less than five years may receive depend on the manner in which they became LPRs. There are various types of LPR categories for which no claims--let alone--claims supported by [**6] evidence of numerosity-- were presented herein but which are, nonetheless, potentially covered by the Court's overbroad definition. The difference in treatment, and in possible relief necessary to insure proper treatment, goes to the lack of commonality and typicality of class claims.

One group of LPRs who have been in that status for less than five years includes aliens who entered the United States in LPR status and aliens who obtain LPR status after being in a non-qualified alien status. n2 Such aliens are not eligible to receive Federal benefits until they have been five years in LPR status. *8 U.S.C. § 1613*(a). They may only

receive State benefits, Safety Net Assistance and State Medicaid. New York Social Services Law ("NY SSL §§ 158, 366; *Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418, 730 N.Y.S.2d 1,* (2001). Plaintiff [*5] Fedosenko is in this category, but she does not raise a claim of non-receipt of these benefits since she received Safety Net Assistance and State Medicaid after she applied for benefits. Her claim is that some law requires the defendants to refer her for a disability Medicaid determination and that, after this [**7] is done, she is eligible to receive Food Stamps due to her disability. This claim was not pursued by plaintiffs at the fact-finding hearing and is not related to her LPR status. Therefore, she is not a valid class representative with standing to assert a claim that she was denied State benefits during her first five years in LPR status when she is, indisputably, not entitled to receive Federal Medicaid.

n2 This group also includes aliens who are the beneficiaries of I-130 petitions, who gain LPR status as a result. Although many plaintiffs had I-130 petitions on their behalf, Plaintiffs do not have a representative of this group of lawful permanent residents who have been in that status for less than five years. This group also includes beneficiaries of I-140 petitions (by employers), and aliens who are beneficiaries of the diversity lottery visa, none of whom were represented in the litigation but are all covered by the proposed class definition.

A second group of LPRs who have been in that status for less than [**8] five years includes aliens who entered the United States in a qualified alien status, such as a parolee, and changed to LPR status thereafter. Proper treatment of such aliens is to add the time in the other qualified status to the time in LPR status, and if the sum of these time periods exceeds five years, such aliens, if otherwise eligible, may receive Federal benefits. Intervenor Rybalko is such a person. Rybalko was paroled into the United States for an indefinite period on April 5, 2000 (Pl. Ex. 173), and became a lawful permanent resident on June 13, 2003 (Pl. Ex. 173). Rybalko received State benefits in the form of Safety Net Assistance since September 2004 and State Medicaid since in or about 2002 (Tr. 322:11-22). To have received the State Medicaid, Rybalko's date of parole was entered into the Welfare Management System ("WMS") since she had not yet attained LPR status. Thus far, Rybalko, like Fedosenko, was not adversely affected by being a lawful permanent resident who has been in that status for less than five years.

Rybalko's claim is that, when she first applied for food stamp benefits in the beginning of April 2005, five years after she was paroled into the United States, [**9] (Tr. 323:3-9), she was denied [*6] food stamps because a City worker relied on the LPR date and did not include the time in qualified status as a parolee. However, as this Court noted at page 48 of the Opinion and Order, State defendants made a change to the WMS, referred to as the "lock," that resolves the problem demonstrated by Rybalko. The lock ensures that, once a qualified status such as a date of parole is entered into the WMS, it cannot be updated. This solution of the problem affects not only Rybalko but also affects others similarly situated to her. To the extent the Court based this portion of the class definition on Rybalko's now moot claim, the court has identified a class that has no members at all. The claim of the single named plaintiff has become moot. In fashioning this portion of the class definition, the Court improperly adopts plaintiffs' assumption that other similarly situated individuals exist. See *Falcon, 457 U.S. at 160-61* (without "reasonable specificity" by plaintiff, court cannot define a class and defendant does not know how to defend).

A third group of LPRs who have been in that status for less than five years includes aliens who [**10] entered the country in what is known as a "specially qualified" status. These aliens, who include refugees, asylees, aliens whose deportation is withheld, Cuban or Haitian entrants and Amerasians, *8 U.S.C. § 1613*(b)(1), are eligible to receive Food Stamps and Medicaid for a period of seven years from the date they enter the United States. *8 U.S.C. § 1612*(a)(2)(A). If such aliens become LPRs during that seven year period, they continue to receive Food Stamps because of their initial specially qualified status. Plaintiffs did not present a class representative of this type, although this type of alien is clearly within this portion of the certified class definition.

A fourth group of LPRs who have been in that status for less than five years includes aliens who are children under eighteen years of age, *8 U.S.C. § 1612*(a)(2)(J), aliens who receive [*7] certain disability payments, *8 U.S.C. § 1612*(a)(2)(F), and aliens who have worked or can be credited with forty qualifying quarters of coverage as defined

under Title II of the Social Security Act *8 U.S.C. § 1612*(a)(2)(B). [**11] Persons in this group are eligible for Food Stamp benefits regardless of what their prior immigration status was before becoming an LPR. Plaintiffs did not present class representatives of this type, although these types of alien are clearly within this portion of the certified class definition.

For the foregoing reasons, State defendants respectfully request the Court to strike lawful permanent residents who have been in that status for less than five years from the definition of the certified class.

POINT II

PERSONS WHO ARE PERMANENTLY RESIDING UNDER COLOR OF LAW ARE NOT PROPERLY INCLUDED IN THE CERTIFIED CLASS SINCE THE PROVISION OF RELIEF WILL UNAVOIDABLY REQUIRE ENFORCEMENT OF STATE LAW AGAINST THE STATE DEFENDANTS IN VIOLATION OF THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Court's Opinion and Order acknowledges, as plaintiffs do, that Persons who are permanently residing under color of law ("PRUCOL") are not eligible for Federal benefits but may be eligible for State benefits under State law in pertinent part as follows:

> While some non-qualified aliens are not eligible for any benefits, one exception is the group known as "PRUCOL [**12] aliens," i.e., aliens living in the United States with the knowledge and permission or acquiescence of the federal immigration authorities and whose departure the federal immigration authorities do not contemplate enforcing. See *Lewis v. Thompson, 252 F.3d 567, 571-72 (2d Cir. 2001).* For example, PRUCOL status is frequently accorded to applicants for so-called "V" [sic] visas, which are available to victims of crimes including crimes of domestic violence who have cooperated in the investigation or prosecution of those crimes. PRUCOL aliens, although ineligible for many federal benefits, see *8 U.S.C. § 1611*(a), may [*8] nonetheless qualify in New York for state-funded Medicaid and Safety Net Assistance, see N.Y. Soc. Serv. Law §§ 158(1)(g), 122(c), 366(1)(a).

Id. at 5. The Opinion and Order made further findings about the relationship between the State defendants, the New York State Office of Temporary and Disability Assistance ("OTDA"), and the New York State Department of Health ("DOH"), and the City defendant ("HRA") in pertinent part as follows:

> New York State has elected to delegate the administration of [**13] public benefits program [sic] to agencies of local government under the supervision of state agencies. New York is divided into 58 local social services district, [sic] with the City of New York constituting one such district. Tr. 643: 6-16; see also N.Y. Soc. Serv. Law §§ 56, 61. HRA is the agency responsible for administering these public assistance programs for residents of New York City.
>
> In New York State, DOH supervises the provision of federal and state Medicaid, and OTDA supervises the administration of the Family Assistance, Safety Net Assistance, and Food Stamp programs. The State Defendants' supervision of the City Defendant consists, in relevant part, of OTDA's policy directives and instructions issued to HRA, OTDA's regular meetings and communications with HRA staff (including availability for on-call assistance), the State's conduct of the "fair hearing" system of appeals from HRA determinations, the State Defendants' computerized Welfare Management System ("WMS"), and the State's occasional training of HRA staff. Also, HRA may not issue policy directives or policy bulletins without the approval of OTDA. Tr. 728:7-10.

id. at 7. The Opinion and Order [**14] notes that "OTDA and DOH have different interpretations of who is and is not

PRUCOL," Id. at 32, and anticipates the future course of providing relief regarding this issue as follows:

> After the evidentiary hearing in this case, the City, upon receiving approval from OTDA, issued Policy Directive PD 06-24-ELI, titled "Determining Qualified Alien Status for Battered/Abuse Noncitizens and PRUCOL Eligibility." By letter dated August 1, 2006, however, plaintiffs lodged various objections concerning the discussion of PRUCOL eligibility in PD 06-24-ELI, such as that the revised Policy Directive fails to explain DOH and OTDA's different definitions of PRUCOL. To the extent these objections are not mooted by what follows below, they will be considered by the Court as part of the further proceedings in this case.

[*9] id. at footnote 6 (emphasis added). This language overlooks the fact that review of plaintiffs' objections concerning the discussion of PRUCOL eligibility places this Court in the shoes of OTDA and DOH as an interpreter of state law, and in conflict with the Eleventh Amendment of the United States Constitution. If, arguendo, HRA seeks approval [**15] of a revised policy directive from OTDA or DOH and does not receive it, for whatever reason, HRA may not issue the proposed revised document and this Court is unable to compel action by either State defendant. For that reason, it is improvident for the Court to certify a class that includes PRUCOL aliens. Doing so does not leave these aliens without a remedy. Their complaints about PRUCOL eligibility should be brought in State Court. See, Aliessa v. Novello Supra.

The Opinion and Order refers to Lewis v. Thompson, when describing the concept of PRUCOL. But in doing so, the Court has overlooked the fact that the statutory history explained at length in Lewis indicates that Congress has abandoned the concept of PRUCOL aliens, replacing it with the concept of qualified aliens found in *8 U.S.C. §§ 1612,* 1613, and 1641(c). In fact, a number of the federal regulations referred to in Lewis have been repealed in the last six years. This matter of State law should be left to State Courts for resolution.

PRUCOLs are not properly included in the certified class in this litigation because federal law does not apply to these persons, and to the extent this [**16] Court directs the City defendant, the State defendants' purported agent to take actions, while at the same time finding that City defendant cannot act without approval from the State defendants, the Court is violating the Eleventh Amendment's ban on enforcement of state law against a State agency. *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Alabama v. Pugh, 438 U.S. 781 (1978).*

[*10] Since the proposed class members cannot receive relief from the State defendants, the Court should reconsider its determination to include them as part of the certified class and upon reconsideration should remove them from the definition of the certified class.

CONCLUSION

For the foregoing reasons, the State defendants respectfully request this Court to grant their motion for reconsideration of that portion of its Opinion and Order including lawful permanent residents who have been in that status for less than five years and persons who are Permanently Residing Under Color of Law as part of the definition of the certified class, and, upon reconsideration, enter an order striking that portion of the definition of the certified [**17] class.

Dated: New York, New York
September 13, 2006

Respectfully submitted,

ELIOT SPITZER

Attorney General of the State of New York

Attorney for State Defendant

ROBERT L. KRAFT (RK5418)

Assistant Attorney General

120 Broadway, 24th Floor

New York, New York 10271

(212) 416-8632