2018 WL 5284267 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
El Paso County

Saul CISNEROS, et al., Plaintiffs,
v.
Bill ELDER in his Official Capacity, Defendant.

No. 2018CV030549.
May 1, 2018.

**Order Re Class Certification**

Eric Bentley, Judge.

***1** Division: 8

Courtroom: W550

Before the Court is Plaintiffs' motion for class certification. I have reviewed the motion, the response, and the reply, along with the case file and applicable law.

Plaintiffs seek to represent two classes of inmates at the CJC. The first class (the ICE Hold Class) is defined as "all current and future prisoners in the Jail who are, or will be, the subjects of immigration detainers (ICE Form I-247A) and/or administrative warrants (ICE Form T-200) sent to the Jail by officers of United States Immigration and Customs Enforcement." Amended Complaint, ¶ 63. The second class (the Bond Class) is defined as "all current and future pretrial detainees in the Jail for whom a court has set bond, and who are the subjects of immigration detainers (ICE Form I-247A) and/or administrative warrants (ICE Form I-200) sent to the Jail by officers of United States Immigration and Customs Enforcement." Amended Complaint, ¶ 69.

**A. Applicable Law.**

"The basic purpose of a class action is 'to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit.'" *Jackson v. Unocal Corp.*, 262 P.3d 874, 880 (Colo. 2011). Class actions also provide plaintiffs with access to judicial relief when they might not otherwise have such access, and they protect defendants from inconsistent obligations. *Id.* In light of these important purposes, Colorado has a "policy of favoring the maintenance of class actions." *Id.*

To certify a class, the movant must establish the four elements of Rule 23(a) and at least one of the subsections of Rule 23(b). Rule 23(a) requires that; (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the 3 claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Plaintiffs in this case seek declaratory and injunctive relief under Rule 23(b)(2), which applies when "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole".

The burden is on the class action advocate to demonstrate that each requirement of Rule 23 is met. While the court "generally should accept plaintiffs' allegations in support of certification," if there are disputes regarding the Rule 23 requirements, the

trial court should look beyond the pleadings and conduct "'some inquiry into the plaintiffs theory of the case."*Jackson*, 262 P.3d at 881. While doing so, the court may not prejudge the merits of the case. *Id.* at 885. The key question is not whether plaintiffs will prevail on their claims, but whether, assuming those claims have merit, one of more of the claims is subject to class-wide proof. *Id.* at 882.

**B. Analysis.**

**1. Rule 23 Requirements.**

***2** As demonstrated in Plaintiffs' motion, both proposed classes clearly meet the requirements of Rule 23(a). Both classes are sufficiently numerous; there are questions of law and fact common to both classes; Plaintiffs' claims are typical of both classes in that they arise from the same allegedly unlawful practice of the Sheriff's Office and allege the same remedial theories; and the named Plaintiffs and their counsel are adequate representatives of both classes, with aligned interests and no apparent conflicts of interest.

In addition, both classes squarely satisfy Rule 23(b)(2), in that Sheriff Elder has acted on grounds generally applicable to both classes, thereby making final injunctive relief and/or declaratory relief appropriate with respect to the class as a whole. The challenged policies apply generally to both classes of prisoners, and thus general, class-wide relief would be appropriate.

Elder does not contest that the requirements of Rule 23 have been met. Accordingly, I need not make any more detailed findings with respect to these requirements.

**2. Justiciability Issues.**

Rather than challenge the Rule 23 requirements, Elder raises three justiciability concerns: he contends that neither proposed class is cognizable, that Plaintiffs lack standing, and that their claims are moot. All three contentions rest on the Sheriff's contention that he is complying with the Court's preliminary injunction order (the Injunction), he has stopped the challenged practices, and he is no longer housing prisoners under the Intergovernmental Services Agreement (the IGSA).

**a. Ascertainability of the Classes.**

Elder states that, in response to the Injunction, he has not only ceased admitting ICE detainees into the CJC under the IGSA, but he has also stopped housing them pursuant to that agreement; and, in addition, he no longer detains anyone based upon ICE detainer forms at the CJC, nor does he use the flagging term "ICE Hold." Thus, he contends, there are no longer any persons who meet the definition of either proposed class.

This argument fails for reasons discussed more fully below, in the discussion of mootness. Elder's contention that there are no longer any class members presupposes that his cessation of the challenged conduct moots the claims of Plaintiffs and putative class members. As discussed below, it does not.

In addition, both classes are ascertainable because each class can be, and has been, defined by objective criteria, and the description of each class is sufficiently definite that it is feasible for the court to ascertain whether a particular individual is a member. *See Morris v. Davita Healthcare Partners, Inc.*, 308 F.R.D. 360, 370 (D. Colo. 2015).

**b. Standing.**

Elder contends that Plaintiffs lack standing for purposes of the two proposed classes because they have both posted bond and been released. Having been released, Elder contends, Plaintiffs are no longer either suffering a continuing injury or under an imminent threat of being injured in the future.

This argument fails because whether a plaintiff has standing is determined as of the time the action is filed. *Grossman v. Dean*, 80 P.3d 952, 958 (Colo. App. 2003). "Standing concerns whether a plaintiff's action qualifies as a case or controversy when it is filed; mootness ensures it remains one at the time a court renders its decision."*Brown v. Buhman*, 822 F.3d 1151, 1163 (10th Cir. 2016). There is no question Plaintiffs had standing at the time the action was filed, when they were both detained as a result of ICE holds. Thus, Elder's standing argument fails.

**c. Mootness.**

***3** Elder contends that Plaintiffs' claims, and those of prospective class members, are now moot, for three reasons: first, the Injunction is an intervening factor that renders Plaintiff's claims moot; second, the Sheriff has abandoned the challenged practices; and third. Plaintiffs' decisions to post bond and obtain release from the CJC had the effect of removing them as real parties in interest from the proposed classes they are seeking to certify.

These contentions fail for the reasons set forth in Plaintiffs' reply.

First, *Buckley*, cited by Elder is not on point. In that case, a trucking company challenged certain tax statutes as unconstitutional. During the pendency of that case, the Colorado Supreme Court issued a ruling in another case, declaring the challenged statutes unconstitutional. That intervening decision provided permanent, statewide relief on the merits; thus, the Supreme Court held that Buckley's action had been rendered moot. There is no such intervening decision in this case. The Injunction is no more than a preliminary ruling; it marks the beginning of this case, not its end.

Second, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012). That is particularly true where the defendant continues to defend the legality of the challenged conduct. *Id.* While Elder has ceased the challenged conduct following the Injunction, he has not in any way abandoned his position that his office's former practices are lawful and the Injunction unlawful. He continues to vigorously defend this action, both in the courts and in public, and he sought to overturn the Injunction through his mandamus petition to the Colorado Supreme Court. 'The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Roy v. County of Los Angeles*, 2018 WL 914773, at *20 (CD. Cal. Feb. 7, 2018). Elder has not met that burden.

Third, the fact that the two individual Plaintiffs have been released from jail does not make this case moot. The case is not moot either with respect to Plaintiffs' individual claims or to their status as prospective class representatives.

As for Plaintiffs' individual claims, there are two exceptions to mootness under Colorado law, and both apply. "First, a court may resolve what is an otherwise moot case when the issue involved is one that is capable of repetition, yet evading review. Second, a court may decide a moot case involving issues of great public importance or recurring constitutional violations." *Grossman*, 80 P.3d at 960.

There is no doubt this case raises issues of substantial public importance which are being intensely debated in courts and public forums around the state and the country. Resolution of these issues by the courts, and especially the higher courts of Colorado and the United States, is badly needed in order to remove the substantial uncertainty that attends these issues. To date, this Court has issued only a preliminary ruling that addressed only the rights of the two named Plaintiffs and did not reach the merits of the proposed classes' claims.

Further, the issues this case raises, while recurring and persisting at the institutional level, are short-lived at the individual level: the institutional practices, along with the broad legal and policy issues, persist, while the circumstances of individual parties are transitory and ever- changing. Were it not for the court-created exceptions to mootness, the short time period in which Plaintiffs and other inmates are subject to the challenged practices would render the practices immune to judicial review as a practical matter. *See, e.g.*, *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1148 (Mass. 2017); *Grossman*, 80 P.3d at 960: *Nowak v. Slithers*, 320 P.3d 340, 343-44 (Colo. 2014) (although prisoner's release on parole otherwise mooted his challenge to DOC policy of calculating parole eligibility dates, the issue could recur and habeas petitions have short fuses, and thus the issue was capable of repetition yet evading review). The case fits squarely into the category of "capable of repetition, yet evading review."

***4** Further, even if Plaintiffs' individual claims had become moot (which they have not), the named Plaintiffs may still prosecute this case as class representatives. A class action does not necessarily become moot upon the involuntary mootness of the named plaintiffs' substantive claims. "Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11 (1975) (addressing the inherently transitory nature of pretrial detention). The fact that the named Plaintiffs' claims may have become moot before the class is certified does not deprive the court of jurisdiction; the court may apply the "relation back" doctrine to certify the class and preserve the merits of the case for judicial resolution. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *and see United States Parole Commission v. Geraghty*, 445 U.S. 388, 399-402 (1980); *Milonas v. Williams*, 691 F.2d 931, 937 (10th Cir. 1982) (students who were no longer attending a private school could continue representing a class of students challenging the school's behavioral modification program).

I find the principles of the above-cited cases applicable here, and find it is appropriate to apply the "relation back" doctrine to certify the class and preserve the merits of the case for judicial resolution.

Accordingly, the motion for class certification is GRANTED.

DONE and ORDERED May 1, 2018.

BY THE COURT:

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Eric Bentley

District Court Judge