2016 WL 11783303
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida,
Fort Lauderdale Division.

A.R., BY AND THROUGH her next friend, Susan ROOT, et al., Plaintiffs,
v.
Elizabeth DUDEK, in her official capacity as Secretary of the Agency for Health Care Administration, et al., Defendants.
United States of America, Plaintiff,
v.
State of Florida, Defendant.

CASE NO. 12-60460-CIV-ZLOCH/HUNT
|
Signed 06/14/2016

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REPORT & RECOMMENDATION ON DEFENDANTS' SUGGESTION OF MOOTNESS AS TO PLAINTIFF A.R.

PATRICK M. HUNT, UNITED STATES MAGISTRATE JUDGE

***1** This matter is before this Court on the State Defendants' Suggestion of Mootness as to Plaintiff A.R., filed April 19, 2016. ECF No. 480. The Honorable William J. Zloch previously referred this case to the undersigned for a report and recommendation concerning disposition of all dispositive motions. ECF No. 275; *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. The undersigned construes the motion as a Motion to Dismiss for Lack of Subject-Matter Jurisdiction. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 (11th Cir. 2007). Having carefully reviewed the Motion, the Response, the Reply, the supporting documents, the entire case file, and applicable law, and being otherwise fully advised in the premises,[1] the undersigned hereby RECOMMENDS that Defendants' Motion to Dismiss, ECF No. 480, be GRANTED.

I. Background

Plaintiff A.R. is one of nine private plaintiffs in this case seeking system-wide declaratory and injunctive relief against Defendants (State of Florida officials) for allegedly discriminating against children with disabilities in violation of several federal statutes.[2] The Complaint specifically alleges that Plaintiff A.R. "is at risk of residing in a [Florida] nursing facility based upon the current policies and practices of the Defendants." ECF No. 62 ¶ 195. At the time the Complaint was first filed, March 13, 2012, Plaintiff A.R. was a recipient of private duty nursing services, funded by Medicaid and administered by Defendants, and she lived with her next friend and mother, Susan Root, and her brother and sister, in Edgewater, Florida. ECF No. 1 ¶¶ 8, 20.

Plaintiff A.R. is no longer a recipient of the Florida Medicaid program. ECF No. 480-1. Over a year ago, Plaintiff A.R. moved with her mother to Colorado "to get services that [A.R.] requires, and also to explore alternative seizure therapies." ECF No. 480-2 at 9, 12.[3] Plaintiff A.R. is now receiving services she could not get in Florida, such as music therapy, massage therapy, and extended homemaker (cleaning) services, through Colorado's Medicaid waiver program.[4] *Id.* at 16–17. On more than one occasion, Mrs. Root has publicly stated that moving to Colorado has been "a good thing" for her and her daughter. *Id.* at 31–33, 53. She also stated that "[Colorado] is going to be home. We have no intention of returning to Florida." *Id.* at 53.

On January 25, 2016, Ms. Root was deposed in connection with this lawsuit. *Id.* at 3. Ms. Root testified that her prior statement that she had no intent to return to Florida was accurate "at that moment." *Id.* at 55–56. However, she clarified that her current intention is not necessarily to *never* return to Florida. *Id.* She stated that her "intention is to return to Florida under the right circumstances for [A.R.]" *Id.* at 55. When asked what those circumstances entail, Ms. Root stated that she intends to move back to Florida "[w]hen there is enough care in place for my daughter that's guaranteed." *Id.* at 36. By "guaranteed," Ms. Root meant "that there is a court order signed by a judge, or something done by the legislature, that ... guarantees [her] child's rights to [specific] services." *Id.* at 36, 44–45, 48–49.

***2** Defendants now argue that A.R.'s claims for declaratory and injunctive relief are moot considering her family has no concrete plans to ever return to Florida. ECF No. 480. According to Defendants, A.R. no longer faces a real and imminent threat of injury, so her claims should be dismissed. *Id.* For the following reasons, the undersigned agrees.

II. Analysis

"Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of 'Cases' and 'Controversies.' " *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001) (citing U.S. Const. art. III, § 2). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). The Eleventh Circuit Court of Appeals "has often emphasized that to obtain prospective injunctive relief a plaintiff must show that [s]he faces a substantial likelihood of injury in the future." *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001); *see also Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1241 (11th Cir. 2003)). "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea*, 414 U.S. at 494 (citations omitted). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court stated that " 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." 504 U.S. at 564.

The State Defendants' instant Motion to Dismiss argues that Plaintiff A.R.'s claims are moot following her move to Colorado. ECF No. 480 at 1. As explained by the Eleventh Circuit Court of Appeals in *Ashcroft*:

> The doctrine of mootness derives directly from the case-or-controversy limitation because "an action that is moot cannot be characterized as an active case or controversy." "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." As this Court has explained, "[p]ut another way, 'a case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.' " If events that occur subsequent to the filing of a lawsuit

> or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed.

273 F.3d at 1335–36 (alterations in original) (citations omitted).

Here, the undersigned finds that Plaintiff A.R. currently lacks a legally cognizable interest in the outcome of this case because she no longer lives in the State of Florida and has nothing more than "some day" intentions to return. More specifically, Plaintiff A.R.'s mother has not offered any "concrete plans" that would support a finding of any imminent injury to A.R., which is a necessary element to her claims for declaratory and injunctive relief. While she may honestly intend to return to Florida some day in the future, her intent to return is admittedly conditioned on hypothetical events that may not occur. *See* ECF No. 480-2 at 36, 44–45, 48–49, 55–56. At this point in time, there is certainly no "guarantee" that this Court will sign an order, or that the Florida Legislature will enact a bill, that "guarantees [A.R.'s] rights to [specific] services," whatever those may be. *Id.* at 45. And, it is equally unclear when that would occur, if it were to occur at all. *See id.* at 37 ("I would intend to move back in the future. I cannot say when at this point."). As a result, Plaintiff A.R. no longer faces a "real and immediate threat" of unnecessary institutionalization in a Florida nursing home. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1334 (11th Cir. 2013) (quoting *Shotz v. Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001)). Therefore, her claims are moot and must be dismissed. *See Ashcroft*, 273 F.3d at 1336.

***3** Plaintiff A.R. argues that her request for injunctive relief should not be dismissed because Defendants' motion was filed after the dispositive motion deadline. ECF No. 485 at 1–2. However, "dismissal is required because mootness is jurisdictional." *Ashcroft*, 273 F.3d at 1336 (citing *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dept. of Health & Rehab. Servs.*, 225 F.3d 1208, 1227 n.14 (11th Cir. 2000)). Indeed, "[a]ny decision on the merits of a moot case or issue would be an impermissible advisory opinion." *Id.* (quoting *Fla. Ass'n of Rehab. Facilities*, 225 F. 3d at 1217).

Plaintiff A.R. also argues, "In as much as the Defendants question Ms. Roots [sic] statements that she intends to return, there must be an evidentiary hearing in which the motion must be heard, or the motion must be denied."[5] ECF No. 485 at 2. However, Defendants clearly stated in their motion that they assume "Ms. Root's intentions are those reflected in the deposition that she gave under oath." ECF No. 480 at 4 n.1. Although not required in this factual challenge to subject matter jurisdiction, *see Houston*, 733 F.3d at 1336, the undersigned similarly assumes her statements that form the basis of this Report & Recommendation are true as well. Therefore, no evidentiary hearing was conducted or required. *See Bischoff v. Osceola Cty., Fla.*, 222 F.3d 874, 882 (11th Cir. 2000) (concluding that an evidentiary hearing is required when "making *disputed* factual findings and judgments regarding witness credibility that [are] essential to its determination of standing" (emphasis added)); *see also Sheely*, 505 F.3d at 1182 ("Whether a case is moot is a question of law...." (citing *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004))).

Finally, Plaintiff A.R. suggests that the Eleventh Circuit Court of Appeals' decision in *Houston* controls. ECF No. 485 at 5–6. In *Houston*, Plaintiff Houston sued the Presidente Supermarket in Miami–Dade County, Florida ("Supermarket") for allegedly violating Title III of the ADA. 733 F.3d at 1325. The Supermarket moved to dismiss his complaint on the ground that he lacked standing. *Id.* at 1326. Specifically, the Supermarket argued that "Plaintiff Houston's litigation history cast doubt on his sincerity to return to the Presidente Supermarket and face future discrimination" and that "Plaintiff Houston could not demonstrate the required imminent threat of future discrimination because there was no 'continuing connection' between Houston and the Presidente Supermarket." *Id.* at 1326–27. "In response, Plaintiff Houston submitted an affidavit providing details about his prior visits to the Presidente Supermarket and his ... plans to visit the store ... 'in the near future.' " *Id.* at 1327.

The Eleventh Circuit Court of Appeals concluded that "Plaintiff Houston's intent to return to the Presidente Supermarket cannot be characterized as the unspecified 'some day' intentions that the Supreme Court found too speculative in *Lujan*." *Id.* at 1340. The court stated that Plaintiff Houston satisfied *Lujan*'s immediacy requirement because he has frequently visited the area near the store in the past and will maintain the same frequency. *Id.* "Indeed, he drives right by the store on a regular basis, he entered the store on two prior occasions, and he would do so again if the store were ADA compliant," the court stated. *Id.* The court also stated that Plaintiff Houston offered a "concrete and realistic plan of when he would visit the store again" because he "visits his lawyer's offices near the Presidente Supermarket on a frequent basis and, thus, drives by the store frequently." *Id.*

***4** The undersigned finds *Houston* to be highly distinguishable from the instant case. Here, Plaintiff A.R. does not live in Florida and has not offered any "concrete

plans" to return to Florida anytime in "the near future." Moreover, although A.R. has some family that still lives in Florida, A.R. and her mother have not returned to Florida once since moving to Colorado over a year ago. ECF No. 480-2 at 26. Additionally, A.R.'s mother let her Florida driver's and nursing licenses expire and no longer has a home or other property in Florida; she is currently residing and employed in Colorado. *Id.* at 25–26, 36. Finally, and perhaps most importantly, unlike in *Houston*, Plaintiff A.R.'s plan to return is hypothetical or conditional and, thus, fails to satisfy *Lujan*'s immediacy requirement. *See Lujan*, 504 U.S. at 560 (stating that "conjectural" or "hypothetical" injury is insufficient to satisfy Article III (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))).

III. Recommendation

Based upon the foregoing, the undersigned concludes that Plaintiff A.R.'s claims are moot. Accordingly, the undersigned recommends that Defendants' Motion to Dismiss, ECF No. 480, be granted and that A.R.'s claims against Defendants be dismissed as moot.

Unless otherwise modified by the Honorable William J. Zloch, United States District Judge, the parties will have fourteen days after service of a copy of this Report and Recommendation within which to file written objections, if any. *See* 28 U.S.C. § 636(b)(1) (providing procedure for review of magistrate judge's proposed findings and recommendations). Failure to timely file objections shall bar the parties from a de novo determination by Judge Zloch of any issue covered in the Report and from challenging, on appeal, the factual findings accepted or adopted by this Court, except on grounds of plain error or manifest injustice. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985) (holding that "a court of appeals may exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment"); *Dupree v. Warden*, 715 F.3d 1295, 1300 (11th Cir. 2013) ("[U]nder our current rule, a party's failure to object to factual findings and legal conclusions in a magistrate judge's report and recommendation in civil cases has limited consequences. Despite a party's failure to object, we seem to consistently review unobjected-to factual findings for plain error, and we review the unobjected-to legal conclusions de novo."); *Smith v. Potter*, 310 F. App'x 307, 309 (11th Cir. 2009) ("This court has held that the failure of a party to object to the magistrate judge's report precludes review of findings of fact except on grounds of plain error or manifest injustice, but does not limit review of legal conclusions." (citing *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993))).

DONE and SUBMITTED at Fort Lauderdale, Florida this 14th day of June, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 11783303

Footnotes

[1] The parties expressly waived oral argument on this matter. ECF No. 496 at 103.

[2] Plaintiffs raise claims under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and 42 U.S.C. § 1983. ECF No. 62 at 40–45.

[3] Unless otherwise noted, all ECF pin cites refer to the ECF page number in the top, right-hand corner of the document, not the page number identified by the parties.

[4] Colorado pays Ms. Root, a registered nurse, $23 per hour, for 30–50 hours per week, to provide nursing services to A.R. ECF No. 480-2 at 21.

[5] Plaintiffs later argue that the evidentiary hearing "should be conducted during trial because it is too difficult for Susan Root to make arrangements to travel different times due to the fact that she is the primary care giver of two minor children including A.R." ECF No. 485 at 3 n.1.

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