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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HUGH HELD and KELLY RICHARDSON-WRIGHT, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

Case No.: 2:15-cv-1732

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Hearing on Motion

Date: August 3, 2015
Time: 1:30 p.m.
Place: 312 North Spring Street, Los Angeles, CA 90012, Courtroom 15

Honorable Percy Anderson

Date: July 20, 2015

Respectfully submitted,

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INTRODUCTION

Plaintiffs' claims – all of which seek to have their previously assessed Supplemental Security Income ("SSI") overpayments set aside – have been mooted; the Social Security Administration ("SSA") has waived recovery of those overpayments, thereby relinquishing any right to recovery. Plaintiffs have also failed to administratively exhaust their claims as required under 42 U.S.C. § 405(g); this provides an independent basis for lack of jurisdiction in this Court.

In opposition, Plaintiffs sensibly opt not to contest the mootness of their own claims, instead relying on their motion for class certification – which they filed six weeks after their claims were mooted – to argue that their proposed class claims survive the mootness of their individual claims. But Plaintiffs' claims fall outside the "narrow class" of "inherently transitory" claims in which class claims may proceed despite the termination of the named plaintiffs' claims.

And in opposition to Defendant's exhaustion argument, Plaintiffs essentially attempt to reframe the claims actually pleaded. Plaintiffs suggest that what they really seek to challenge is the "dignitary harm" of being informed they were overpaid and being asked to repay those overpayments to SSA, which they characterize as "collateral" to any claim of entitlement to have those overpayments waived; on that basis, in part, they suggest that the Court should waive the jurisdictional exhaustion requirement of § 405(g). But the actual complaint – which governs the definition of Plaintiffs' claims – makes clear that Plaintiffs in fact seek to have their overpayments

waived. Thus, there is no colorable argument that Plaintiffs are entitled to judicial waiver of the exhaustion requirement as to claims that essentially seek a judicial determination that they were "without fault" for their acknowledged overpayments, that recovery of those overpayments would be "against equity and good conscience," and thus, that they are entitled to have the overpayments waived. And as it turns out, that is precisely the relief Plaintiffs obtained through the administrative process when SSA waived recovery of their overpayments, which further underscores the judicial economy of requiring them to exhaust their administrative remedies before proceeding to federal district court.

For each of these reasons, Plaintiffs' claims should be dismissed.

ARGUMENT

Defendant's opening brief explained why Plaintiffs' claims fall outside the Court's subject-matter jurisdiction. Plaintiffs' opposition fails to show otherwise.

I. THIS CASE IS MOOT NOTWITHSTANDING PLAINTIFFS' CLASS CLAIMS.

Plaintiffs do not dispute that their own claims have been terminated, and thus are moot. Pls.' Opp. at 12. Nor could they, as it is clear that SSA's waiver of recovery of their overpayments leaves nothing for this Court to resolve. Def.'s Mem. at 8-13. Instead, Plaintiffs pin their argument on the notion that simply having asserted class claims in their complaint – and having moved for class certification six weeks after their own claims were mooted – means they are entitled to continue pressing class claims. Pls.' Opp. at 12-16. That notion is wrong.

Courts have recognized a "narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975) (citing Sosna v. Iowa, 419 U.S. 393 (1975)). But any argument that a claim falls within that narrow class depends on a showing that such claim is "inherently transitory" – that is, that it would dissipate before the court has had "even enough time to rule on a motion for class certification[.]" Sze v. I.N.S., 153 F.3d 1005, 1008-10 (9th Cir. 1998).

This is the exception to mootness on which Plaintiffs seek to rely. But examination of the cases they cite in that effort confirms precisely why their claims do not fall within the narrow class of cases where the exception applies. In Sosna, the Supreme Court considered a plaintiff's challenge to Iowa's one-year residency requirement for obtaining a divorce under state law, but first had to address mootness, as the plaintiff had satisfied the residency requirement (and obtained a divorce elsewhere, in any event) by the time the case was before it. 419 U.S. at 397-403. Such a challenge – premised on a controversy limited by its very nature to a one-year lifespan – should not be limited from judicial review by the mootness of the named plaintiff's claim, the Court held: "the issue sought to be litigated escapes full appellate review at the behest of any single challenger" and thus "does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs." Id. at 401. In stating the principle, the Court simultaneously recognized its limitation: "We note, however, that the same exigency that justifies

this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation." Id. at 401-02.

Subsequent Supreme Court decisions reinforced Sosna's limitation on the class-action exception to mootness. In Gerstein, decided the same term as Sosna, the Court addressed whether a class of plaintiffs charged with certain crimes under Florida law was entitled to probable-cause hearings while detained pending trial. 420 U.S. at 105-07. Noting that the named plaintiffs had been convicted during the pendency of the case – ending their pretrial detentions and thereby mooting their own challenges to the lack of probable-cause hearings – the Court determined that the class claims nonetheless were not mooted given their temporary nature: "This case belongs [] to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'" Id. at 410 n.11.

Applying the same rationale, the Court held similarly in United States Parole Commission v. Geraghty, 445 U.S. 388, 404 (1980). The claim in Geraghty involved a scenario similar to that of Gerstein – a proposed class action based on a plaintiff's individual challenge to federal parole guidelines that was likely to expire on its own, prior to the conclusion of the litigation, through the plaintiff's release. Id. at 394. Indeed, that is precisely what happened: "before any brief had been filed in the Court of Appeals, Geraghty was mandatorily released from prison[.]" Id. Thus, in holding that the dissipation of the named plaintiff's claims did not moot those of the proposed class, the Court relied on the same rationale expressed in Gerstein: "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." Id. at 398-99 (emphasis added); see also County of Riverside v. McLaughlin, 500 U.S. 44 (1991); Gomez v. Campbell-Ewald, 768 F.3d 871, 874-76 (9th Cir. 2014), cert. granted, 83 U.S.L.W. 3637, 83 U.S.L.W. 3851, 83 U.S.L.W. 3855 (U.S. May 18, 2015) (No. 14-857); Pitts v. Terrible Herbst, 653 F.3d 1081, 1090-92 (9th Cir. 2011).

By contrast, nothing about Plaintiffs' claims here even suggests that they are inherently transitory. Unlike the claims of the plaintiffs in Sosna, Gerstein, Geraghty, and McLaughlin, Plaintiffs' here did not expire on their own terms before there had been a meaningful opportunity for a judicial resolution – that is, they did not "dissipate during the normal time required for resolution of the controversy[.]"

Sosna, 419 U.S. at 401-02. Rather, they were resolved – fully and in Plaintiffs' favor – at an early stage of the administrative-review process when SSA waived recovery of their overpayments, thereby relinquishing any right to recover them.[1]

Moreover, Plaintiffs' overpayment determinations were attributable to a watershed sequence of events: the change in their marital-recognition status resulting from the Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013), coupled with the inevitable (and, given the facts, reasonable) reality that SSA did not instantaneously process their changes in status while it implemented the decision in Windsor across its numerous benefits programs. The jurisdictional upshot of that fact is that there is no reasonable likelihood that Plaintiffs "face[] some likelihood of becoming involved in the same controversy in the future," Geraghty, 445 U.S. at 398, or that "the constant existence of a class of persons suffering the [alleged] deprivation is certain[,]" Gerstein, 420 U.S. at 110 n.11. Satisfaction of these elements is an integral part of Plaintiffs' burden to show that their claims are so "inherently transitory" that termination of their claims does not moot those of the class they seek to represent. Geraghty, 445 U.S. at 398. Their inability to make such a showing further undermines any notion that their proposed

[1] And even if SSA's administrative process had ended with a determination that waiver was not warranted as to either Plaintiff, there is nothing to suggest that the resulting controversy would not persist for the time needed for completion of district court (and appellate) review. That is illustrated by the Ninth Circuit's decision in Quinlivan v. Sullivan, 916 F.2d 524 (9th Cir. 1990), which like this case concerned waiver of overpayments. That the plaintiff's claim remained live from administrative review all the way to the Ninth Circuit underscores that challenges to overpayment determinations simply are not the kind of "inherently transitory" claims that tend to "dissipate" before judicial review can be completed. Sosna, 419 U.S. at 401-02.

class claims are analogous to those in Sosna, Gerstein, Geraghty, or McLauglin, and thus ought to survive the mootness of their own claims. Geraghty, 445 U.S. at 398.

Finally, Plaintiffs' conclusory assertion that SSA's decision to waive recovery of their overpayments represents a "token waiver" of their "monetary injury," Pls.' Opp. at 2, does not bring their proposed class claims within the exception to mootness for "inherently transitory" class claims. SSA determined that waiver of Plaintiffs' overpayments was appropriate in light of the governing regulations, see 20 CFR § 416.550 et seq., and communicated that determination to Plaintiffs, thereby relinquishing any right to recover those overpayments and actually ending any controversy between the parties. There is nothing "token" about SSA's decision, and no reason to infer that SSA applied an administrative decision-making calculus any different than that it would apply to other SSI beneficiaries similarly situated to Plaintiffs. See Def.'s Opp. to Pls.' Mot. for Class Cert at 4-7 (ECF No. 37) (describing regulatory provisions governing waiver decisions).

In sum, there is no controversy left to resolve between Plaintiffs and Defendant following SSA's decision to waive recovery of their overpayments, and there is nothing about the proposed class claims to even suggest they are "inherently transitory." Without such a showing, the proposed class claims cannot survive the undisputed termination of Plaintiffs' individual claims; the entire case is thus moot and should be dismissed for want of jurisdiction.

II. PLAINTIFFS HAVE FAILED TO EXHAUST THEIR CLAIMS.

Defendant's opening brief also explained why, as an alternative to dismissal for mootness, Plaintiffs' claims should be dismissed for failure to exhaust under 42 U.S.C. § 405(g). Def.'s Mem. at 14-24. Plaintiffs do not dispute that exhaustion is required in the first instance; instead, they argue that the requirement should be judicially waived as to their claims. Pls.' Opp. at 18-24. To obtain judicial waiver of the exhaustion requirement, Plaintiffs must satisfy a three-part test: "The claim must be (1) collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that denial of relief will cause irreparable harm (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility)." Johnson v. Shalala, 2 F.3d 918, 921 (9th Cir. 1993). Plaintiffs cannot do so.

Plaintiffs' primary argument under the three-part exhaustion-waiver test – that requiring them to exhaust their claims would be futile, Pls.' Opp. at 19-22 – is not even plausible, as SSA's administrative decision to waive recovery of their overpayments underscores that requiring exhaustion of those claims would be anything but futile. The gist of Plaintiffs' complaint is that they were "without fault" for their post-Windsor SSI overpayments, that SSA's recovery of those overpayments would be "against equity and good conscience," and thus, that they should not be required to pay them back. Compl. ¶¶ 6-9. That is the determination that SSA itself reached on consideration of the facts of Plaintiffs' administrative requests to have their assessed overpayments wiped away. Against that reality,

Plaintiff's argument that it would be "futile" to require them to administratively exhaust their claims – the very process that resulted in SSA's waiver of recovery of their overpayments – is essentially nonsensical.

Plaintiffs' secondary argument – that their claims are "collateral" to a substantive claim of entitlement, Pls.' Opp. at 22-24 – also fails, as each of their pleaded claims seeks the same non-collateral outcome: a determination that they are entitled to have their overpayments wiped away. E.g., Compl. ¶¶ 84-86, 98, 104-07, Request for Relief ¶ G. Collaterality may be established where "'the plaintiff's attack is essentially to the policy itself, not to its application to them, nor to the ultimate substantive determination of their benefits. Their challenge to the policy rises and falls on its own, separate from the merits of their claim for benefits.'" Kildare v. Saenz, 325 F.3d 1078, 1082-83 (9th Cir. 2003) (quoting Johnson, 2 F.3d at 921-22). Plaintiffs cannot meet that showing, as the essence of their claims – that they received overpayments for which they were not at fault and that recoupment would be against equity and good conscience – is by definition a claim of entitlement to have recovery of those overpayments waived. Thus, Plaintiffs' challenge to some alleged SSA "policy" – which they never identify – "rises and falls" hand-in-hand with "the merits of their claims for benefits[]" – here, waiver of their overpayments. That is the very opposite of "collateral," and thus cannot satisfy the collaterality element of the test governing waiver of exhaustion. See Kildare, 325 F.3d at 1083.[2]

[2] Plaintiffs' third argument – that denial of relief will cause irreparable harm, Pls.' Opp. at 24 – is

Having failed to establish that exhaustion of their claims would be futile or that those claims are collateral to their substantive claims for entitlement, Plaintiffs cannot demonstrate that waiver of the exhaustion requirement of 42 U.S.C. § 405(g) is appropriate. Thus, their failure to exhaust their claims – which have been administratively resolved in their favor in any event – constitutes an independent bar to judicial review of their complaint.

III. PLAINTIFFS' INVOCATION OF MANDAMUS DOES NOT BRING THE CASE WITHIN THE COURT'S JURISDICTION.

Plaintiffs' final argument – that the Court may exercise Article III jurisdiction under the Mandamus Act, 28 U.S.C. § 1361, Pls.' Opp. at 24-25 – fails for several reasons. First, § 1361 is not a jurisdictional "cure-all" for claims otherwise outside of district court jurisdiction on mootness or failure-to-exhaust grounds. Second, Plaintiffs could not meet the requirements for mandamus jurisdiction in any event.

A writ of mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues and only if the defendant owes him a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616 (1984). Thus, mandamus jurisdiction under § 1361 exists only "when a plaintiff has a clear right to

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immaterial to the outcome, as they cannot obtain waiver of the exhaustion requirement having failed to satisfy the other two elements of the governing test. In any event, however, the record before the Court (as opposed to the unsubstantiated assertions as to a proposed class) belies Plaintiffs' characterization of economic harm. By virtue of their acknowledged receipt of SSI overpayments for a period following the decision in Windsor, coupled with SSA's administrative decision to waive recovery of those overpayments, Plaintiffs ultimately received more than the total amount of SSI benefits for which they were eligible over the two years following Windsor. Defendant is sympathetic to the uncertainty Plaintiffs experienced after they were notified that they had been overpaid, see Pls.' Opp. at 24, but the outcome of the administrative-review process for each means that they received a surplus of SSI benefits they will not have to pay back.

relief, a defendant has a clear duty to act and no other adequate remedy is available." Pit River Home & Agr. Co-op Ass'n v. United States, 30 F.3d 1088, 1097 (9th Cir. 1994) (internal citations omitted). Mandamus is "drastic; it is available only in extraordinary situations; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a clear and indisputable right to relief; and even if the plaintiff overcomes all of these hurdles, whether mandamus relief should issue is discretionary." In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (internal citations omitted); Kildare, 325 F.3d at 1084.

Plaintiffs' mandamus argument fails because their claims are moot, see Part I, supra, and because they have not satisfied the administrative exhaustion requirement of 42 U.S.C. § 405(g), see Part II, supra. Section 1361 waives the United States' sovereign immunity against certain types of relief, but it does not otherwise confer jurisdiction over claims that fall outside the jurisdiction of the courts because they are moot, or because required administrative remedies have not been exhausted. Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1236-38 (10th Cir. 2005).

Further, Plaintiffs' mandamus argument fails because Plaintiffs' relevant claim for relief – an order "directing SSA to refrain from collecting SSI overpayments resulting from SSA's delayed treatment of Plaintiffs as married couples[,]" Compl., Request for Relief ¶ F – fails to satisfy the irreducible requirements for mandamus to issue. First, it implicates no clear right to relief for Plaintiffs and no clear duty to act by Defendant. To even meet the threshold for mandamus, Defendant's duty must

be "so plainly prescribed as to be free from doubt and equivalent to a positive command . . . . [W]here the duty is not thus plainly described, but depends on a statute or statutes the construction of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." Con. Edison Co. of New York v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) (citing Wilbur v. United States, 281 U.S. 206, 218-19 (1930)). Plaintiffs point to no such statutory command, thus failing to meet their heavy burden under the Mandamus Act. Second, at least one adequate remedy is available, as illustrated by SSA's administrative decision to waive recovery of Plaintiffs' overpayments; the fact that Plaintiffs (or others similarly situated) can succeed through SSA's administrative-review process means ipso facto that there is an adequate alternative remedy to the "drastic" remedy of mandamus. Kildare, 325 F.3d at 1084-85.

Consequently, Plaintiffs' reliance on 28 U.S.C. § 1361 is misplaced.

CONCLUSION

For the reasons set forth supra, as well as those set forth in Defendant's opening brief, Plaintiffs' claims should be dismissed for lack of jurisdiction.