

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MABLE RIVERA, et al.,	:	
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Plaintiffs,	:	06 Civ. 7077 (TPG)
	:	
- against -	:	<u>OPINION</u>
	:	
JOHN MATTINGLY, et al.,	:	
	:	
Defendants.	:	
	:	
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The claims in this case arise from the decision of New York City’s Administration for Children’s Services (“ACS”) to remove three children—the infant plaintiffs in this action—from the home of Mable and Anthony Rivera, the children’s foster parents and relatives. In particular, plaintiffs bring claims against the City of New York, Family Support Systems Unlimited, Inc. (“FSSU”), and several city, FSSU, and state employees. Plaintiffs allege that ACS and its contracted social service agency, FSSU, removed the infant plaintiffs from the Riveras’ kinship foster home without due process of law. Plaintiffs also allege that this removal constituted an unlawful seizure in violation of the Fourth Amendment and state law. Plaintiffs seek declaratory and monetary relief.

FSSU and certain FSSU employees (the “agency defendants”) moved for summary judgment on all claims, and plaintiffs cross-moved for summary judgment against agency defendants. The court granted defendants’ motion for summary judgment.

Plaintiffs now move for reconsideration of that decision, arguing that the court wrongfully refused to recognize a fundamental substantive due process right to the integrity of kinship foster families, and that the court incorrectly denied plaintiffs' pre-removal and post-removal procedural due process claims. Specifically, plaintiffs assert that the emergency removal of the minor plaintiff children without a hearing violated plaintiffs' procedural due process rights, and that the cumulative post-removal delays in the case also violated due process. Defendants oppose the motion on the ground that it does not meet the strict standard for granting such motions.

The motion is denied.

FACTS

A full account of the facts underlying this litigation and its procedural history prior to the present motion can be found in this court's opinion deciding the summary judgment motions in the case. See Rivera v. Mattingly, 2011 U.S. Dist. LEXIS 102903, No. 06-cv-07077, at *4-17 (S.D.N.Y. Sept. 12, 2011). The present motion relies entirely on the factual record already before the court.

THE COURT'S SUMMARY JUDGMENT DECISION

On September 1, 2010, FSSU, agency defendants Ms. Cummings, and Ms. Bukenya moved for summary judgment, and on November 5, 2010, plaintiffs cross-moved for summary judgment. The court granted defendants' motion and denied plaintiffs' motion on September 12, 2011.

In its opinion, the court, after disposing of threshold matters not

germane to the current motion, held that the plaintiffs “possess a constitutionally protected liberty interest in the integrity of their kinship foster family as a matter of law.” See Mattingly, 2011 U.S. Dist. LEXIS 102903, at *24. The court then turned to the question of how much process the plaintiffs were due in the circumstances.

With respect to the pre-removal procedural due process claim, the court held that the emergency removal of the minor plaintiff children without prior notice did not violate due process, because defendants’ actions satisfied the standard for emergency removal of foster children without notice contained in state regulations previously upheld by the Supreme Court against constitutional challenge (albeit in the context of non-kinship foster families). Id. at *23. In particular, the court noted that the regulations allow emergency removal without notice “where necessary to protect the health and safety of the child.” Id. at *13. The court then held that the “decision to remove the children did not violate procedural due process in light of [the] serious allegations of child abuse in the Rivera’s home.” Id. at *24.

With respect to the post-removal procedural due process claim of delay, the court held that the interval between the Independent Review on April 18, 2006 and the Fair Hearing on October 2, 2006 did not deprive the plaintiffs of due process. Rather, the court found that “there was considerable activity in this period of time. There was not mere delay.” Id. at *13, 25. In particular, the court noted:

[T]he Independent Review Officer issued her report on May 8. OCI

issued its report on July 14. Mrs. Rivera spoke with Warren, an ACS Case Manager, in late July and went to FSSU's office to discuss OCI's report on August 18. FSSU performed a safety assessment on August 23 and determined that it was safe to return the children to the Riveras' home. As a result of this determination, the Fair Hearing was adjourned to August 30 to allow the return of the children. However, ACS overruled FSSU and did not allow the children to be returned, thus requiring the Fair Hearing to be held.”

Id. at *25-26.

The court also noted the complexity of the investigation and that during this time it was resolved that “Ashley, Laporsha, E.S., and B.C. would return to their mother and that J.C. would be adopted by the Riveras.” Id. at *27-28. The court concluded that “[v]iewing this entire picture, it cannot be said that there was a ‘delay’ which deprived plaintiffs of due process.” Id. at *28.

Lastly, with respect to plaintiffs’ substantive due process claims, the court held that since “the court is aware of no cases in this circuit holding that a biologically-related foster parent has a fundamental right to maintaining the stability of her family” and “courts should proceed cautiously when entertaining claims that would broaden the scope of substantive due process protections,” it would not recognize a fundamental substantive due process right to the integrity of kinship foster families. Id. a *29-30.

The Court’s further findings with respect to plaintiffs’ remaining due process claims and their Fourth Amendment claims are not disputed in the

present motion and need not be reviewed to decide it. The court now turns to the plaintiffs' motion for reconsideration.

DISCUSSION

A) Standard

A motion for reconsideration under Local Rule 6.3 “may be granted to correct clear error, prevent manifest injustice or review the court's decision in light of the availability of new evidence.” Parrish v. Sollecito, 253 F. Supp. 2d 713, 715 (S.D.N.Y. 2003). Such motions should be “employed sparingly in the interests of finality and conservation of scarce judicial resources.” In re Health Mgmt. Sys., Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000). These motions “must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court,” Range Road Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000), and a losing party may not use a motion for reconsideration “to advance new theories that the movant failed to advance in connection with the underlying motion[.]” Sollecito, 253 F. Supp. 2d at 715. Ultimately, the decision whether to grant a motion for reconsideration rests within the court’s discretion. See McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983).

B) Substantive Due Process

Plaintiffs allege that the court misconstrued governing law by refusing to find a substantive due process right in the integrity of kinship foster families. Specifically, plaintiffs allege that the court erred in treating Rivera v. Marcus,

696 F.2d 1016 (2d Cir. 1982), as a case recognizing only a liberty interest in kinship foster families sufficient to trigger a procedural due process analysis. Plaintiffs allege that Marcus actually held that kinship foster families enjoy a fundamental substantive due process right meriting more sweeping protection against government encroachment. In support of this reanalysis, plaintiffs cite decontextualized language from Marcus and a 2003 district court decision allegedly recognizing such a profound right.

This court can hardly be accused of overlooking Marcus, the very case underlying its holding that plaintiff possessed a liberty interest entitled to the protections of procedural due process. On its face, Marcus follows the standard template of a procedural due process case. It establishes the existence of a liberty interest and then assesses the quantum of process due before or after a deprivation of that interest under the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976). See Marcus, 696 F.2d at 1026-1029. Indeed, plaintiffs pull most of the language to support their argument from the Marcus court's analysis of the first prong of the Eldridge test, which assesses the magnitude of the private interest at stake. Id. at 1027 (finding the interest "substantial" and "important"). But not all important liberty interests are substantive due process rights. What's more, the primary text of Marcus mentions substantive due process exactly once in a parenthetical, see id. at 1027, and the single footnote that invokes the doctrine does so with, at most, ambivalence. See id. at 1022 n. 10.

Nor does plaintiffs' favored district court case clearly recognize a

substantive due process right to the integrity of kinship foster families. Rather, it applies a standard that originated in the context of substantive due process—the standard for emergency removal of children from natural, custodial parents—to a procedural due process analysis, without discussing in depth why that particular standard should apply to emergency removal of kinship foster children or whether the court meant to recognize a more sweeping substantive due process right. See Johnson v. City of New York, 2003 U.S. Dist. LEXIS 5670, No. 99 Civ. 0048, at *27-29 (S.D.N.Y. Apr. 8, 2003).

This is not the stuff of which fundamental rights are made. The court did not make a clear error by refusing to infer an expansion of substantive due process rights from an ambiguous district court case and a controlling precedent overwhelmingly, if not exclusively, about procedural due process. As such, the court declines to reconsider its holding on this issue.

C) Pre-Removal Procedural Due Process

Plaintiffs also assert that the court erred in holding that the emergency removal of the minor plaintiffs comported with procedural due process. Plaintiffs note that the Administrative Law Judge (“ALJ”) at the Fair Hearing ultimately found the removal arbitrary and capricious and lacking a rational basis. Plaintiffs now contend, for the first time, that this administrative finding forecloses a judicial inquiry into the constitutionality of the emergency removal. They claim that under the doctrine of collateral estoppel, defendants cannot relitigate either the factual findings of the ALJ or her ultimate determination as to the validity of the emergency removal, and that the ALJ’s findings compel the

court to, at a minimum, reconsider its decision to grant summary judgment to defendants on the question of whether the emergency removal violated plaintiffs' due process rights.

Putting aside the questionable merits of plaintiffs' collateral estoppel claim, the court declines to hear a new argument not put before it on the underlying motion. See Sollecito, 253 F. Supp. 2d at 715. Plaintiffs urge the court to revisit their motion papers and divine an inchoate form of a collateral estoppel argument from sundry mentions of the ALJ decision. The court will not. Not only did the plaintiffs neglect to mention the doctrine by name, they further neglected to argue any of the prerequisites for the doctrine's application. It is too late to do so now.

Plaintiffs also question whether the record in any event warranted summary judgment for defendants on this issue. In particular, they allege that an emergency removal pursuant to serious allegations of child abuse later found baseless in the administrative process cannot be held constitutional, and that the court misunderstood the regulation allowing for emergency removals of foster children in its holding to the contrary.

The court also declines to revisit its decision on this issue. The court correctly noted the language of the regulation in its summary of the statutory framework governing the case and rendered its holding by reference to that language. See Rivera v Mattingly, 2011 U.S. Dist. LEXIS 102903, at *13. The fact that the court did not again parrot the language in the dispositive sentence of its holding is immaterial. Furthermore, prior decisions support the court's

holding that the emergency removal of the plaintiff foster children was not so egregious as to violate the United States Constitution. See Renaud v. Mattingly, 2010 U.S. Dist. LEXIS 83799, No. 09 Civ. 9303, at *19-20 (S.D.N.Y. Aug. 9, 2010) (“Since the agency thought the children were in imminent danger due to the history of Plaintiff’s OSI investigations and the current allegations of abuse made by some of the children themselves, the removal was permissible and appropriate.”). The subsequent administrative state-law finding in this case demonstrates the value of due process, not its absence. Thus the court declines to reconsider its holding regarding the constitutionality of the emergency removal of the plaintiff minor children.

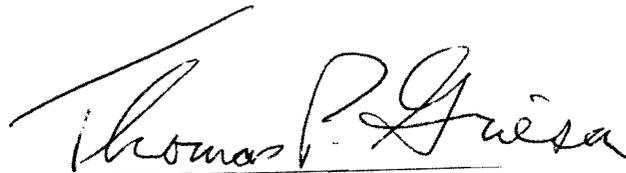
D) Post-Removal Due Procedural Due Process

Lastly, plaintiffs assert that the court erred by holding that the interval between the removal of the children in March and their return some nine months later did not violate due process. The relevant interval for due process purposes, however, is not that between the deprivation of a constitutionally protected interest and its restoration, but between the deprivation and a subsequent hearing. See Spinelli v. City of New York, 579 F.3d 160, 173 (2d Cir. 2009). The court fully considered that issue in the underlying motion, see Rivera v Mattingly, 2011 U.S. Dist. LEXIS 102903, at *27-28, and it need not do so again in a motion for reconsideration. See Range Road Music, 90 F. Supp. 2d at 391-92.

Conclusion

For the foregoing reasons, plaintiffs’ motion for reconsideration is denied.

Dated: New York, New York
January 10, 2012



Thomas P. Griesa
U.S.D.J.

