IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY SALTER, Plaintiff, v. PHILADELPHIA HOUSING AUTHORITY, SOPHIA ALEXANDER, LEONARD JAMES & MIRANDA CRAWFORD, Defendants.	: : : : : : : : : :	CIVIL ACTION No. 99-1681

Memorandum and Order

YOHN, J. November 2, 1999

The Philadelphia Housing Authority, Sophia Alexander, Leonard James, and Miranda Crawford ("defendants") have filed a motion to dismiss the complaint or, in the alternative, for summary judgment.

Plaintiff Gary Salter ("plaintiff") filed a complaint on behalf of himself and "all Philadelphia Housing Authority (hereinafter "PHA") Section 8 tenants who have been or will be terminated from the PHA Section 8 program without advance written notice and an opportunity for an administrative hearing based on a default judgment taken against them by their landlord." Plaintiff's motion to certify a class action was denied without prejudice to his right to conduct further discovery on the factual basis for a class action. The denial also established new dates for termination of discovery and re-filing of the motion. Shortly after I denied the motion for class certification, the parties agreed that plaintiff's individual claims had become moot. The

defendants have now moved to dismiss the class action complaint for lack of a live case or controversy. The essential question is whether, at the time that plaintiff's individual claims became moot, the motion for class certification was pending. I hold that it was pending for this purpose. Thus, a live controversy exists as to whether to certify a class action. Accordingly, I will deny the defendants' motion to dismiss the class action complaint.

BACKGROUND

Section 8 is a rental assistance program whereby federal money is disbursed to local housing authorities to assist low-income families in paying rent. See 42 U.S.C. § 1437f(a) (1994 & Supp. 1999). In Philadelphia, those funds are administered by the Philadelphia Housing Authority ("PHA"). The purpose of Section 8 funding is to make available adequate housing to those who might otherwise not be able to afford it. See 42 U.S.C. § 1437f(a). Plaintiff is a long-time Section 8 participant. See Compl. ¶ 4 (Doc. No. 6 filed Apr. 8, 1999).

In December of 1997, plaintiff signed a lease agreement to rent an apartment in Philadelphia. See Compl. ¶ 32. Section 8 funds were to be used to pay the rent, and plaintiff was to be responsible for both the security deposit and utility bills. See id. ¶ 32-34. Plaintiff alleges that he stopped making the required payments because the owner failed to maintain properly the apartment. See id. ¶¶ 35-36. An eviction action was commenced against plaintiff in November of 1998. See id. ¶ 37. On November 24, 1998, a default judgment was entered against plaintiff in that eviction action. See id. ¶ 42.

Plaintiff alleges that in January of 1999, he was informed orally that his Section 8

eligibility had been terminated. See id. ¶ 44. On January 22, 1999, he requested a termination hearing. See id. ¶ 46. No hearing was held. See id. ¶ 47. Plaintiff was evicted and rendered homeless. See id. ¶¶ 47-52. This class action complaint was filed on April 8, 1999. See Doc. No. 6. The complaint sought a preliminary injunction restoring plaintiff to the Section 8 program, declaratory judgments that federal law had been violated, permanent injunctive relief requiring notice and a hearing prior to any future termination, damages, and attorneys fees. See Compl. at 10-11.

On May 17, 1999, I denied the motion for class certification without prejudice to plaintiff's right to conduct further discovery within 60 days on class composition (and, in particular, numerosity) and to refile the motion within in 90 days. See May 17, 1999 Order (Doc. No. 14 filed May 18, 1999). On June 2, 1999, after a conference with the parties and by agreement of the parties, a defense motion to dismiss the class action complaint was denied as moot. See June 2, 1999 Order (Doc. No. 16 filed June 4, 1999). PHA had both reinstated plaintiff and promised notice and a hearing before any future termination. See id.

Defendants then filed a motion to dismiss the complaint as moot. See Defs. Mot. to Dismiss (Doc. No. 18 filed June 22, 1999). In their motion, defendants argue that because plaintiff's individual claim became moot when no motion for class certification was pending, there is no Article III "case or controversy" and the court lacks jurisdiction over the matter. See Defs. Mem. of Law in Support of Mot. to Dismiss (Doc. No. 17 filed June 22, 1999). Plaintiff replies that the motion still is pending, that the nature of the action meets exceptions to the

mootness doctrine,[1] and that plaintiff retains a cognizable interest in the question of class certification. Because I find that the motion for class certification was pending when plaintiff's individual claims became moot, I will deny the defendants' motion to dismiss the complaint.

STANDARD OF REVIEW

Defendants' have moved to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6). The essence of such a motion is that the complaint fails "to state a claim upon which relief may be granted." See Fed. R. Civ. P. 12(b)(6).

In considering a Rule 12(b)(6) motion to dismiss, the court must accept as true all well-pleaded allegations of fact in the plaintiff's complaint, and any reasonable inferences that may be drawn therefrom, and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted); Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (citations omitted). Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Id. If on consideration of a motion under Rule 12(b)(6) "matters outside the pleading are presented to and

[1] Because I hold that the motion still is pending, I do not reach the question whether an exception to the mootness doctrine is applicable.

not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." See Fed. R. Civ. P. 12(b).

DISCUSSION

For purposes of this motion, there are no disputes of fact. The question presented is a legal one: If the named plaintiff's individual claims became moot after the order denying without prejudice the motion for class certification, is the entire action now moot? I find that it is not.

I. The Court Lacks Jurisdiction Over A Matter Without A Live Case or Controversy.

Article III of the United States Constitution gives federal courts power to adjudicate only a limited number of cases and controversies. See U.S. Const. art. III, § 2, cl. 1; United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-96 (1980); Johnson v. Horn, 150 F.3d 276, 287 (3d Cir. 1998). It is axiomatic that there must exist a proper plaintiff and a proper defendant presenting a live controversy at all stages of the proceeding. See Geraghty, 445 U.S. at 396; Rosetti v. Shalala, 12 F.3d 1216, 1224 (3d Cir. 1993). The mootness doctrine deprives federal courts of jurisdiction over matters in which no live controversy exists. See Geraghty, 445 U.S. at 396; Johnson, 150 F.3d at 287. The doctrine tests whether each party retains a personal stake in the outcome sufficient to ensure zealous advocacy. See Geraghty, 445 U.S. at 396-97; Johnson, 150 F.3d at 287-88. A plaintiff's claims become moot when, subsequent to the filing of a suit, complete relief is afforded in full satisfaction of plaintiff's claims. See Deposit Guaranty Nat'l

Bank v. Roper, 445 U.S. 326, 332 (1980); Johnson, 150 F.3d at 287-88.

The application of the mootness doctrine to class action complaints requires a proper characterization of the class action mechanism. See Geraghty, 445 U.S. at 401-03; Rosetti, 12 F.3d at 1225-27. A named plaintiff in a class action presents to the court two claims for review. See Geraghty, 445 U.S. at 402; Rosetti, 12 F.3d at 1226. The first claim presented is the individual claim on the merits. See Geraghty, 445 U.S. at 402; Rosetti, 12 F.3d at 1226. The second claim presented is the claim of entitlement to represent a class. See Geraghty, 445 U.S. at 402; Rosetti, 12 F.3d at 1226. The second claim is premised on the "right to have a class certified if the requirements of the Rules are met. This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." Geraghty, 445 U.S. at 403; Rosetti, 12 F.3d at 1226.

Consistent with a traditional understanding of mootness, when there is no motion for class certification pending and the individual claims of a named plaintiff become moot, the entire action must be dismissed because the plaintiff retains no personal stake in the outcome of any controversy before the court. See Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976); Lusardi v. Xerox Corp., 975 F.2d 964, 983 (3d Cir. 1992). When a named plaintiff's individual claims become moot after a motion for class certification is denied on its merits, that plaintiff still retains a stake in the outcome of the class certification determination on appeal. See Geraghty, 445 U.S. at 404; Rosetti, 12 F.3d at 1227; Lusardi, 975 F.2d at 981.

In the Third Circuit, the threshold inquiry is whether the motion for class certification was pending before the court at the time the named plaintiff's individual claims became moot. See Rosetti, 12 F.3d at 1225-26; Lusardi, 975 F.2d at 977 n.19; Wilkerson v. Bowen, 828 F.2d 117,

121 (3d Cir. 1987). In cases where no motion was pending when the individual claims were mooted, dismissal for lack of subject matter jurisdiction is proper. See Lusardi, 975 F.2d at 983. In cases where individual claims became moot while a motion for certification was pending, the action is not moot and the plaintiff may continue to pursue the question of class certification. See Rosetti, 12 F.3d at 1227, 1228; Wilkerson, 828 F.2d at 121. Whether plaintiff's motion for certification was pending after the denial without prejudice is the next issue that must be considered.

II. Plaintiff's Motion For Class Certification Still Is Pending Before the Court.

On May 17, 1999, I denied plaintiff's motion for class certification without prejudice to plaintiff's right to refile the motion. See May 17, 1999 Order (Doc. No. 14). Additional discovery deadlines were established. Rights were not to be prejudiced. The plain language of the order makes clear that the parties were to have additional time so that the class certification question properly could be considered.

The Fifth Circuit confronted a similar situation in Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981). In that case, the district court issued an order denying without prejudice a motion to certify a class. See id. at 1035. The order was accompanied by a memorandum explaining that all the requirements of class certification had been met except for numerosity. See id. The order provided additional time for discovery and presentation of evidence on that issue. See id. At the same time the additional evidence was presented, the named plaintiffs' claims were mooted. See id. at 1036. The district court then dismissed the named plaintiffs' individual claims, refused to reconsider the motion to certify the class, and

dismissed the action. See id. The plaintiffs appealed on behalf of the class. See id. at 1032. Over the objection of the defendants in that matter, the Fifth Circuit held that its decision was not to be controlled by the label on an order but rather by its content. See id. at 1037. Examining all the circumstances, the court concluded that the district court's clear intent was not to deny the motion on the merits but rather was to permit additional time to produce necessary evidence. See id. Although my order was not accompanied by such an explanatory memorandum, it was designed similarly to permit additional discovery and a refiling of the motion for class action status, as it explicitly stated.

The suggestion that a denial without prejudice is not dispositive of the merits of the question finds support in the opinion of the Third Circuit in Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993). In Rosetti, the named plaintiffs filed a class action on behalf of persons "who had not received or would not receive fully favorable decisions in response to their claims for disability benefits based on HIV-related illness." See Rosetti, 12 F.3d at 1220. While the motion to certify the class was pending, the named plaintiffs' claims became moot. See id. Thereafter, the district court dismissed without prejudice the motion to certify on the ground that resolution of other pending motions would render it moot. See id. The dismissal granted the right to refile the motion by letter if the other pending motions were decided favorably to the plaintiffs. See id. The Third Circuit held that the district court still had jurisdiction over the question of class certification because the motion had been pending at the time the named plaintiffs' claims were mooted. See id. at 1232. The court remanded the case to the district court for consideration of the class certification motion, explaining that a dismissal without prejudice, "for purely administrative reasons," was not a decision on class certification or representation. See id.

Neither was my denial of the motion a decision on the class action question.[2]

Moreover, although the determination whether the action should be certified as a class action is to be made as soon as practicable, see Fed. R. Civ. P. 23(c)(1), discovery may be granted on questions necessary to resolve the class certification question. See E.D. Pa. Loc. R. Civ. P. 23.1(c); Vargas v. Calabrese, 634 F. Supp. 910, 917 (D.N.J. 1986) (noting that discovery on class question may be proper prior to certification); Zeidman, 651 F.2d at 1037; 7B Charles Alan Wright et al., Federal Practice and Procedure § 1785 at 107 (2d ed. 1986). A motion to certify a class action should be considered on an adequate record. See Link v. Mercedes-Benz N.A., Inc., 550 F.2d 860, 864 (3d Cir. 1977), vacated in part on other grounds, 788 F.2d 918, 928-29 (3d Cir. 1986) (vacating dismissal of parts of a claim); Zeidman, 651 F.2d at 1037; Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978). To compile such a record, discovery was granted in this matter.

The denial without prejudice did not remove the motion from the court's jurisdiction; it postponed a final decision on the motion itself. It is a practice neither unfamiliar to litigants nor unique in this court. See E.D. Pa. Loc. R. Civ. P. 23.1(c) (permitting court to allow class action, disallow and strike class allegations, or postpone decision pending discovery); Meyers v. Board

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[2] Defendants argue that the plaintiff has lost the opportunity to appeal the denial of the class certification motion. This is incorrect. Even a final denial of class certification is interlocutory and traditionally has not been appealable of right until a final decision on the merits. See Geraghty, 445 U.S. at 399; In re School Asbestos Litig., 921 F.2d 1338, 1342 (3d Cir. 1991). Although not briefed by the parties, I note that Rule 23(f) now permits, under limited circumstances, an interlocutory appeal from an order affirming or denying class certification. See Fed. R. Civ. P. 23(f) (amend. Apr. 24, 1998 eff. Dec. 1, 1998). However, such an appeal does not appear compulsory. See Hayes v. Sheahan, 1999 U.S. App. Lexis 19664, at *1-2 (7th Cir. Aug. 19, 1999). The amendment to Rule 23 does not appear to change the rule that an appeal from the grant or denial of a motion to certify a class action is proper after final judgment on the merits of the case. Consequently, the time for appeal has not yet begun to run.

of Ed. of San Juan Sch. Dist., 905 F. Supp. 1544, 1578 (D. Utah 1995) (denying without prejudice a motion to certify a class on the ground that ruling on the question would be premature where additional discovery could narrow the issues and class definition). In providing the opportunity to further develop the factual basis for a motion to certify, I sought to ensure fair consideration of the motion on a adequate record.

CONCLUSION

Because the motion for class certification was denied without prejudice to the right to conduct further discovery and to refile the motion, it remained pending when the plaintiff's individual claims became moot. Therefore, plaintiff retains a personal stake in the outcome of the certification question and the court has jurisdiction over the action. I will deny the defendants' motion to dismiss.

An appropriate order follows.

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ORDER

And now, this day of November, 1999, upon consideration of the defendants' motion to dismiss the class action pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative for summary judgment (Doc. No. 18 filed June 22, 1999), and the plaintiff's response thereto (Doc. No. 21 filed July 16, 1999), it is HEREBY ORDERED AND DECREED that the motion is DENIED.

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William H. Yohn, Jr., Judge