

No. 15-15712

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHELLE-LAEL B. NORSWORTHY,

Plaintiff-Appellee,

v.

JEFFREY BEARD, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
in Case Number C 14-00695 JST (PR)

**PLAINTIFF-APPELLEE'S OPPOSITION TO DEFENDANTS-
APPELLANTS' MOTION FOR VACATUR AND REMAND**

**Submitted on the briefs to Judges Reinhardt,
Tashima and Callahan on August 13, 2015**

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INTRODUCTION

Defendants' Motion for Vacatur and Remand requests that the Court "vacate the district court's preliminary injunction, and remand with instructions to dismiss the case." (Dkt. No. 59-1 at 7.) However, Defendants' Motion should be denied because there are multiple issues that still require factual development and resolution before the district court before they may be addressed by this Court.

First, as this Court has made clear "when an appellant renders his appeal moot by his own act, our established procedure is not to vacate the district court's decision automatically, but to remand so the district court can decide whether to vacate its judgment." *Dilley v. Gunn*, 64 F.3d 1365, 1371 (9th Cir. 1995). Defendants argue that the appeal has been rendered moot as a result of Plaintiff's parole by the California Department of Corrections and Rehabilitation ("CDCR"), headed by Defendant Jeffrey Beard. As in *Dilley*, the facts surrounding Plaintiff's parole "are not sufficiently developed in the record" for the Court to determine whether vacatur is appropriate. *Id.*

Second, Plaintiff's operative complaint before the district court asserts claims both for adequate medical care, including sex reassignment surgery, and for access to a legal name change. The district court's order granting injunctive relief on review before this Court considered only Plaintiff's claims for medical care. The parties have not yet conducted any discovery or otherwise litigated Plaintiff's

claim for access to a legal name change. Nor is Plaintiff's claim seeking a name change mooted by her parole; Plaintiff's access to a name change is still controlled by Defendants. *See* Cal. Code Civ. Pro. § 1279.5(c) (requiring approval from CDCR for parolee to obtain legal name change).

Third, the district court has not yet considered whether Plaintiff is entitled to an award of costs and attorneys' fees. The district court previously granted Plaintiff's motion to delay resolution of this issue until after Plaintiff's name change claim has been resolved; Defendants did not oppose that motion. (CD 112 (Order Granting Administrative Motion to Enlarge Time to File Motion for Costs and Attorneys' Fees).) Regardless, as Defendants concede, the district court's order "essentially grant[ed] summary judgment" to Plaintiff on her claims for medical care (*see* Dkt. No. 62 at 1), and thus she is entitled to costs and attorneys' fees in connection with the district court's grant of mandatory injunctive relief.

Defendants' Motion thus should be denied and the Court should remand to the district court for further proceedings.

ARGUMENT

I. The Court Should Remand to the District Court to Determine Whether to Vacate Its Order Granting Injunctive Relief

As this Court has made clear: "when an appellant renders his appeal moot by his own act, our established procedure is not to vacate the district court's decision automatically, but to remand so the district court can decide whether to vacate its

judgment in light of ‘the consequences and attendant hardships of dismissal or refusal to dismiss’ and ‘the competing values of finality of judgment and right to relitigation of unreviewed disputes.’” *Dilley*, 64 F.3d at 1370-71 (quoting *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)).

Defendants’ self-interested contention that Plaintiff’s parole was the result of “an independent parole suitability process” and thus justifies automatic vacatur by this Court is legally insufficient and unsupported by the record evidence. (Dkt. No. 59-1 at 6.) The CDCR defendants in *Dilley* made a similar argument,¹ contending that the lower court’s order should be vacated because “Dilley was transferred pursuant to prison regulations which permit an inmate to transfer to a lower security institution once he has served a specific amount of time as a Class IV inmate without substantial disciplinary problems.” *Dilley*, 64 F.3d at 1372. Despite this representation, the Court remanded to the district court to consider the issue of vacatur because “[t]he facts surrounding Dilley’s transfer from Calipatria are not sufficiently developed in the record.” *Id.* at 1371. Similarly, here, there has been no development of the facts surrounding Plaintiff’s parole.

Defendants’ contention that Plaintiff “cites no evidence that her grant of parole was related to this litigation” highlights the need for remand to the district

¹ Defendants acknowledge that *Dilley* is controlling but misstate its holding. (See Dkt. No. 64 at 4 (“As in *Dilley v. Gunn*, ...”).

court to allow development of the factual record. (Dkt. No. 64 at 2.) Defendants' contention also is based upon a misunderstanding of the law. As this Court has made clear, the district court may refuse to vacate its order "even if the appellant engaged in the conduct which caused the mootness for a purpose other than to prevent the appellate court's review of the district court order." *Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (internal quotation omitted). Thus, contrary to Defendants' baseless representation, Plaintiff does not – and is not required to – contend that she was granted parole as "a litigation tactic." (Dkt. No. 64 at 1.) Rather, Plaintiff merely argues that the grant of parole resulted from Defendants' exercise of discretion and thus requires more factual development before the district court prior to a decision on vacatur.

Although Defendants claim that it "mischaracterizes the statutory scheme governing California's parole process" to contend that Plaintiff's parole was the result of an "exercise of discretion" (*id.* at 2), Defendants themselves acknowledge that the Parole Board's "discretion in parole matters has been described as 'great' and 'almost unlimited'" (*id.* at 3 (quoting *In re Rosenkrantz*, 29 Cal. 4th 616, 655 (Cal. 2002) (internal citation omitted))). Defendants further acknowledge that, although Plaintiff was denied parole in March 2013 for a three-year period, the Parole Board advanced Plaintiff's hearing on June 19, 2014 – approximately two months after the district court appointed counsel to represent Plaintiff to pursue her

claims against CDCR in this litigation. (Dkt. No. 64 at 3; *see also* CD 7.) Defendants offer no explanation for why Plaintiff's hearing was accelerated. Subsequently, the Parole Board made a recommendation for Plaintiff's parole less than two months after the district court granted her injunctive relief, and Plaintiff was released from prison two days before this Court was set to hear oral argument on Defendants' appeal. (Dkt. No. 64.) As in *Dilley*, remand to the district court is necessary for more factual development before a determination can be made with regard to whether Plaintiff's parole was due to "happenstance" or whether Defendants were responsible. *Dilley*, 64 F.3d at 1371.

II. The Court Should Remand for Resolution of Plaintiff's Claim for a Name Change

Remand for further proceedings also is required to resolve Plaintiff's claim seeking access to a legal name change. The district court's order currently on appeal addressed only Plaintiff's claims for medically adequate care, including sex reassignment surgery. Plaintiff's First Amended Complaint, however, also alleges that Defendants violated the Fourteenth Amendment by refusing to allow Plaintiff to petition for a legal name change. (CD 10.) The parties have not yet conducted any discovery or otherwise litigated this claim before the district court and thus it is not ripe for review by this Court.

Regardless, contrary to Defendants' contention, Plaintiff's release from prison does not "effectively moot[]" this claim as well given the changed custodial

circumstances.” (Dkt. No. 64 at 1.) CDCR denied Plaintiff’s request for a legal name change based upon a policy that discriminates on the basis of gender and transgender status by refusing to allow transgender inmates access to a name change unless or until they have received sex reassignment surgery. (*See* CD 10.) Specifically, Plaintiff’s request for a name change was denied because “it would not be appropriate to approve a name change to the feminine until [Plaintiff] is determined to meet the criteria to be assigned to an institution for female offenders.” (ER 264 ¶ 65.) This decision was approved within CDCR at all levels of review and thus was endorsed and affirmed by Defendant Beard as CDCR policy. (*See* ER 264-65.)

Plaintiff’s access to a legal name change as a parolee still requires CDCR approval and thus is still subject to CDCR’s policy which prohibits transgender inmates from obtaining a legal name change until they have obtained sex reassignment surgery – *e.g.*, “until [they] . . . meet the criteria to be assigned to an institution for female offenders.” *See* Cal. Code Civ. Pro. § 1279.5(c) (requiring approval from CDCR for parolee to obtain legal name change). Defendants’ self-serving conclusion that “whatever grounds might exist for opposing a request, they would not be the same factors that went into the decision challenged in Ms. Norsworthy’s current complaint” is contradicted by the allegations in the

complaint and unsupported by the factual record, which has not yet been developed with regard to Plaintiff's name change claim.

Defendants' request that the action be remanded "with instructions to dismiss the action" thus should be denied to allow for litigation of Plaintiff's name change claim.

III. The Court Should Remand for a Determination of Whether Plaintiff May Recover Costs and Attorneys' Fees

The district court has not yet resolved the issue of attorneys' fees. To the contrary, the district court granted Plaintiff's motion requesting an extension of time to file its motion for attorneys' fees until "14 days after the later of (i) the resolution of Defendants' appeal of the [district court's] order granting Plaintiff's motion for preliminary injunction; or (ii) the resolution of Plaintiff's remaining claim for a legal name change under the Fourteenth Amendment." (CD 112 (Order Granting Administrative Motion to Enlarge Time to File Motion for Costs and Attorneys' Fees).) Defendants should not now be heard to complain about the district court's order both because they did not oppose Plaintiff's motion and because it furthers the interests of judicial economy by avoiding piecemeal litigation of motions for costs and attorneys' fees. Plaintiff's request for attorneys' fees should be heard by the district court after all of Plaintiff's claims have been fully and finally resolved, as contemplated by the district court's current order.

Regardless, contrary to Defendants' contention, the Prison Litigation Reform Act ("PLRA") does not preclude Plaintiff from obtaining an award of costs and attorneys' fees in connection with the district court's grant of injunctive relief. (See Dkt. No. 59-1 at 6 n.2; Dkt. No. 64 at 4 n.2.) Defendants' argument relies entirely upon cases that arise in the context of a district court's grant of "temporary" injunctive relief. (*Id.* (citing *Siripongs v. Davis*, 282 F.3d 755, 758 (9th Cir. 2002) (affirming denial of attorneys' fees incurred to obtain temporary restraining order); *Kimbrough v. California*, 609 F.3d 1027, 1031-32 (9th Cir. 2010) (reversing grant of attorney's fees where plaintiff had obtained "temporary relief . . . in the form of a preliminary injunction").

However, as Defendants repeatedly have emphasized to this Court, the district court here granted a mandatory preliminary injunction that would "provide Ms. Norsworthy with all the relief she seeks." (See, e.g., Dkt. No. 8 at 2.) The district court's order granting a mandatory injunction thus applied a more exacting standard and granted permanent rather than "temporary" relief. The cases relied upon by Defendants are inapposite. Instead, as Defendants themselves have acknowledged, the district court's order "essentially grant[ed] summary judgment" to Plaintiff. (See Dkt. No. 62 at 1.) Thus Plaintiff is entitled to costs and attorneys' fees under the PLRA. See, e.g., *Webb v. Ada County*, 285 F.3d 829, 833 (9th Cir. 2002) (affirming, in part, an award of attorneys' fees after the district

court granted partial summary judgment finding that a jail's overcrowding was unconstitutional); *see also Balla v. Idaho*, 677 F.3d 910, 919 (9th Cir. 2012) (finding that "the Prisoner Litigation Reform Act's 'prov[e] an actual violation' requirement is satisfied when the prisoners have previously won an injunction").

CONCLUSION

For the foregoing reasons, the Court should deny the motion for vacatur and remand.

Dated: August 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: Michelle-Lael B. Norsworthy v. J. Beard, et al.

Case No. 15-15712

I hereby certify that on August 20, 2015, I caused the following documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system:

**PLAINTIFF-APPELLEE'S OPPOSITION TO DEFENDANTS-
APPELLANTS' MOTION FOR VACATUR AND REMAND**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the United States Court of Appeals CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 20, 2015, at San Francisco, California.

Respectfully submitted,

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