UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

CARL BERNOFSKY and SHIRLEY G. BERNOFSKY	*	**CIVIL ACTION**
versus	*	**NO. 09-1919**
THE ROAD HOME CORPORATION, ICF EMERGENCY MANAGEMENT SERVICES, LLC, LOUISIANA RECOVERY AUTHORITY, and LOUISIANA DIVISION OF ADMINISTRATION THROUGH THE OFFICE OF COMMUNITY DEVELOPMENT	*	**JUDGE STAGG**
	*	**MAG. JUDGE HORNSBY**

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REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The Louisiana Recovery Authority (LRA) and the Office of Community Development (OCD) submit this reply brief to respond to the Plaintiffs Carl Bernofsky and Shirley G. Bernofsky's ("Plaintiffs") opposition to the motion to dismiss. Plaintiffs' claims against both LRA and OCD must be dismissed since LRA and the OCD are state agencies and thus are entitled to Eleventh Amendment immunity; Plaintiffs have failed to prove the state has waived its immunity in this suit. Alternatively, Plaintiffs suit should be dismissed because they cannot maintain a claim upon which relief can be granted for such claims.

II. FACTS

The facts asserted by Plaintiffs are taken as true, and for purposes of this motion to dismiss, are not in dispute. Importantly, Plaintiffs concede the OCD and the LRA are agencies of the State of Louisiana. In addition, while Plaintiffs contend they are qualified to receive benefits under the Road Home Program, they also concede they failed to timely submit a Road Home application by the statutory deadline. (See Rec. Doc. 30-1, p. 4.) Instead, Plaintiffs now suggest to the Court LRA and/or OCD can seek a waiver of the application deadline for their case to HUD and/or re-budget funds from another activity to provide them with assistance. Again, despite the fact that Plaintiffs admittedly did not complete or submit a timely application for a Road Home grant, Plaintiffs essentially seek this Court to either award them the funds they would have received from the Road Home program, or, alternatively, compel LRA and OCD to award them funds under the Road Home.

III. LAW AND ARGUMENT

A. Plaintiffs' Claims Against the LRA and/or the OCD are Barred under the Eleventh Amendment

1. The Louisiana Constitution and Louisiana Statutes Do Not Waive The State's Eleventh Amendment Immunity

Plaintiffs suggest the LRA has consented to suit in federal court, and thus waived its Eleventh Amendment immunity, by statute, in particular La. Rev. Stat. Ann. § 49:220.4. While this statute creates the LRA and specifically states the LRA is a corporate body which can sue and be sued, the statute does not address whether the State consents to suit in federal court. Indeed, the State has not waived its Eleventh

Amendment immunity by this statute. The LRA can be sued, however any suit against it must be filed in state court in a proper venue.

Likewise, Plaintiffs reliance on La. Const. art. 12, § 10(A) and the cases of *Rhodes v. State Through Dept. of Transp. and Development*, 95-1848 (La. 5/21/96), 674 So.2d 239, and *Rogers v. State of Louisiana Through the Dept. of Public Safety and Corrections*, 07-1060 (La. App. 3 Cir. 1/30/08), 974 So.2d 919, *writ denied*, 2008-0504 (La. 4/25/08), 978 So.2d 367, is also inapposite. The cited Louisiana Constitution article and the *Rhodes* and *Rogers* cases concern statutory immunities under Louisiana law and whether a state agency can be sued for negligence and/or strict liability in state court and do not address federal Eleventh Amendment immunity.

Again, by statute, Louisiana has specifically retained its Eleventh Amendment immunity by providing that provides that "[n]o suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." La. Rev. Stat. Ann. § 13:5106(A). In other words, the State does not consent to suit in federal court and has not waived its Eleventh Amendment immunity.

2. Louisiana's Receipt of Federal Funding For The Road Home Program Was Not Conditioned Upon Waiver of the State's Eleventh Amendment Immunity

Relying largely on the case of *Pace v. Bogalusa City School Board*, 403 F.3d 272 (5th Cir. 2005), Plaintiffs suggest that state agencies who accept federal funds lose any Eleventh Amendment immunity. However, that is not an accurate statement of the law. Instead, the Supreme Court has held that "a state does not waive its sovereign immunity through its mere receipt of federal funds or participation in a federal program."

Atasendero State Hospital v. Scanlon, 473 U.S. 234, 246–47, 105 S.Ct. 142, 87 L.Ed.2d 171 (1985).

As the *Pace* court explained, there are two fundamental exceptions to the general rule that bars an action against a state in federal court: (1) a state's Eleventh Amendment immunity may be *abrogated* when Congress acts under § 5, the Enforcement Clause of the Fourteenth Amendment; or, (2) a state may knowingly and voluntarily *consent* to suit in federal court, *i.e.*, when Congress conditions the availability of federal funds on a state's waiver of its Eleventh Amendment immunity. *See South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Indeed, in *Pace*, the Fifth Circuit held the State knowingly and voluntarily accepted federal funds pursuant to 42 U.S.C. § 20000d-7 and 20 U.S.C. § 1403, which explicitly conditioned the receipt of federal funds on the State's waiver of the Eleventh Amendment immunity.

However, the same is not the case with the federal funds at issue in this suit. The federal funds used to establish the Road Home Program contained no condition that the State waive its Eleventh Amendment immunity in exchange for the receipt of the funds. Therefore, without such express condition, and the State's knowing and voluntary consent to the condition, the State has not waived its Eleventh Amendment immunity. Likewise, the Spending Clause statutes at issue in this case do not contain any unequivocal statement of congressional intent to abrogate under § 5, the Enforcement Clause of the Fourteenth Amendment. *See Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001). Therefore, the State has neither waived its Eleventh Amendment immunity nor has Congress abrogated the State's Eleventh Amendment immunity through the receipt of federal funds used to fund The Road Home Program.

3. The State's Eleventh Amendment Immunity Applies to Suits Filed By Citizens of Louisiana

Finally, Plaintiffs ask this Court to disregard clearly established United States Supreme Court authority holding the Eleventh Amendment not only bars suits against the state by citizens of another state, but also applies equally to suits against a state initiated by that state's own citizens. *Edelman v. Jordan,* 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 1662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 13-15, 10 S.Ct. 504, 33 L.Ed. 842 (1890). There is simply no basis for this Court to disregard Supreme Court precedent. While Plaintiffs suggest they will be deprived of their rights and the State will have license to engage in illegal activity and be shielded from liability and be allowed the violate the law without impunity, this is simply not the case; Plaintiffs could pursue their claims against the LRA and/or the OCD in state court in the proper venue.

B. Plaintiffs' 42 U.S.C. § 1983 Claims Should be Dismissed

In asserting their § 1983 claim, Plaintiffs seemingly argue they were deprived rights, privileges or immunities secured by the United State Constitution because they were not allowed to register for the Road Home Program after the statutory deadline. Again, Plaintiffs fail to state a claim under § 1983, especially in light of their admission that they did not timely file an application for Road Home benefits. In any event, even if the Eleventh Amendment did not absolutely bar any § 1983 claim against the LRA and the OCD, those claims still must be dismissed since the State of Louisiana and its agencies are not "persons" capable of being sued under § 1983. *See Will v. Michigan Department of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989);

Searls v. Louisiana, 2009 WL 653043, at *3 (E.D. La. Jan. 21, 2009).[1] This issue is unrefuted by Plaintiffs.

C. Plaintiffs' Fourteenth Amendment Equal Protection Claim Should be Dismissed

Plaintiffs also claim the OCD and LRA subjected them to "disparate treatment" in "violation of plaintiffs' right to equal protection under the law as guaranteed by the 14th Amendment of the U.S. Constitution . . .. " (Complaint, ¶ 27). Again, these claims are barred by the Eleventh Immunity, but, in any event, Plaintiffs have failed to state a claim under the Fourteenth Amendment. First, Plaintiffs offer no legal authority or argument to controvert the legal conclusion that courts do not allow a private right of action under the Fourteenth Amendment *The Hearth, Inc. v. Department of Public Welfare*, 612 F.2d 981 (5th Cir. 1980), modified 617 F.2d 381 (5th Cir. 1980)(per curium). Likewise, Plaintiffs fail to address how they are members of a "suspect class" or that their "fundamental right," were deprived. Plaintiffs fail to identify any alleged disparate treatment. Therefore, Plaintiffs Fourteenth Amendment claims should be dismissed.

D. Plaintiffs' State Law Claims Should be Dismissed

Plaintiffs have failed to address their state law claims in the opposition brief. Again, the State is entitled to immunity under the Eleventh Amendment for these claims. Nevertheless, Plaintiffs fail to allege sufficient facts to state a negligence claim, and, further, Plaintiffs' negligence claim is barred under the Louisiana discretionary function immunity, codified as La. Rev. Stat. Ann. § 9:2798.1. This statute shields state agencies from suit for the exercise or performance or the failure to exercise or perform policymaking or discretionary acts. Under the discretionary function doctrine,

[1] Defendants the OCD and the LRA also adopt by reference ICF's arguments on this claim. See Rec. Doc. 26, pp. 5-6.

governmental decision-makers exercising discretionary functions are immune from suit, because the courts should not chill legislative discretion in policy formation by imposing tort liability for discretionary decisions. *Hardy v. Bowie*, 98-2821 (La. 9/8/99), 744 So.2d 606.

To the extent Plaintiffs claim the OCD and/or the LRA should be forced to file exceptions on their behalf to HUD, or re-direct funds to provide them with grant awards, these are discretionary functions of the State and Plaintiffs by law cannot compel the State to act and/or claim the State's failure to act is negligence. Again, any such claims are barred by the discretionary function immunity.

IV. CONCLUSION

Defendants, the Louisiana Recovery Authority and the Louisiana Division of Administration through the Office of Community Development, respectfully request this Court to grant their Motion to Dismiss and dismiss with prejudice Plaintiff's Complaint against the LRA and the OCD in its entirety, at Plaintiffs' costs.

Respectfully submitted,

/s/ Renee Culotta
A.J. KROUSE (La. Bar #14426)
RENEE CULOTTA (La. Bar #24436)
CHERYL D. COMER (La. Bar #32111)
FRILOT L.L.C.
1100 Poydras Street, 37th Floor
New Orleans, LA 70163
Telephone: (504) 599-8085
Facsimile: (504) 599-8267
akrouse@frilot.com
rculotta@frilot.com
ccomer@frilot.com
ATTORNEYS FOR DEFENDANTS,
THE LOUISIANA RECOVERY AUTHORITY AND
LOUISIANA DIVISION OF ADMINISTRATION

THROUGH THE OFFICE OF COMMUNITY DEVELOPMENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of March 2010, I electronically transmitted a PDF version of this document to the Clerk of Court, using the CM/ECF System, for filing and for transmittal of a Notice of Electronic Filing upon all CM/ECF registrants.

/s/ Renee Culotta