UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Cole-Kelly v. Yee

Cole-Kelly · No. 22-cv-02841-HSG · Decided March 13, 2023

SUMMARY

The United States District Court for the Northern District of California granted defendants' motions to dismiss three related putative class actions challenging the constitutionality of California's Unclaimed Property Law. The court held that claims seeking interest accrued on unclaimed property were barred by sovereign immunity and that the constitutional claims were foreclosed by controlling Ninth Circuit precedent. The court denied a request for a three-judge panel, dismissed the cases without leave to amend, terminated the pending class-certification and related motions as moot, and directed entry of judgment for defendants.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Haywood S. Gilliam, Jr.
JURISDICTION	United States District Court for the Northern District of California
DECIDED	March 13, 2023
DOCKET	22-cv-02841-HSG
DISPOSITION	dismissed
PROCEDURAL POSTURE	Putative class action challenging the constitutionality of California's Unclaimed Property Law. The district court considered defendants' Rule 12(b)(6) motions to dismiss and plaintiffs' motions for partial summary judgment, class certification, and consolidation.
STANDARD OF REVIEW	The court reviewed the complaints under Federal Rule of Civil Procedure 12(b)(6), accepting well-pleaded factual allegations as true and construing the pleadings in the light most favorable to plaintiffs, but disregarding conclusory allegations, unwarranted deductions, and unreasonable inferences.
PRECEDENTIAL VALUE	Unpublished district court order; persuasive value only.
PARTIES	Alison Cole-Kelly v. Betty T. Yee, Defendants

TOPICS

motions to dismiss · eleventh amendment immunity · takings clause · due process · civil procedure

PRACTICE AREAS

constitutional law · civil procedure · civil rights · remedies

QUESTIONS PRESENTED

1. Whether the actions required a three-judge district court under 28 U.S.C. § 2284.
2. Whether the Eleventh Amendment barred claims seeking payment of interest or other additional compensation for unclaimed property held by California.
3. Whether California's Unclaimed Property Law violates the Fifth Amendment Takings Clause by failing to pay owners interest earned on unclaimed property.
4. Whether the derivative due process and equal protection claims stated viable claims.
5. Whether the complaints could be cured by amendment.

HOLDINGS

1. The action did not require a three-judge district court because it did not concern apportionment of congressional districts or a statewide legislative body, and the former statutory requirement for a three-judge court in constitutional challenges to state statutes had been repealed.
2. Claims against California and its agencies seeking payment of interest or other additional compensation earned on unclaimed property while held by the State were barred by the Eleventh Amendment.
3. The plaintiffs failed to state a viable Fifth Amendment Takings Clause claim because Ninth Circuit precedent squarely rejected a compensable right to interest earned on unclaimed property that escheats to California and held the current version of the Unclaimed Property Law facially constitutional.
4. The plaintiffs' due process and equal protection claims failed because they were derivative of the rejected Takings Clause theory and therefore failed for the same reason.
5. Dismissal without leave to amend was proper because the pleading could not possibly be cured by alleging additional facts.

KEY QUOTATIONS

> *"The Ninth Circuit could not be more clear: Plaintiffs' claims are not legally viable."* (at 6)

> *"Because the "pleading[s] could not possibly be cured by the allegation of other facts,""* (at 7)

FACTUAL BACKGROUND

The three related putative class actions challenge California's Unclaimed Property Law, which requires holders such as banks, insurers, corporations, and utilities to report and transfer certain inactive property to the State's custody. Plaintiffs alleged that California retains and uses interest, dividends, investment returns, and other benefits earned on the property while in state custody, without paying those amounts to property owners. They characterized the State's failure to pay the property's alleged time value as a taking and as a violation of due process and equal protection.

PROCEDURAL HISTORY

Cole-Kelly, Coté, and Sykes filed related putative class actions alleging that California's Unclaimed Property Law unconstitutionally deprives property owners of interest or other time-value benefits earned while unclaimed property is held by the State. Defendants moved to dismiss. The court denied the request for a three-judge panel, granted the motions to dismiss without leave to amend, terminated the Cole-Kelly plaintiffs' other motions as moot, directed entry of judgment for defendants, and closed the three cases.

DISPOSITION

dismissed

CASES CITED

- Mendiondo v. Centinela Hospital Medical Center, 521 F.3d 1097, 1104 (9th Cir. 2008)
- Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)
- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
- Manzarek v. St. Paul Fire & Marine Insurance Co., 519 F.3d 1025, 1031 (9th Cir. 2008)
- In re Gilead Sciences Securities Litigation, 536 F.3d 1049, 1055 (9th Cir. 2008)
- Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)
- Fla. Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 79-80 (1960)
- Tedards v. Ducey, 951 F.3d 1041, 1060 n.37 (9th Cir. 2020)
- Larry P. By Lucille P. v. Riles, 793 F.2d 969, 978 n.4 (9th Cir. 1986)
- Suever v. Connell (Suever II), 579 F.3d 1047, 1056-59 (9th Cir. 2009)
- Turnacliff v. Westly, 546 F.3d 1113, 1115, 1119 n.3 (9th Cir. 2008)
- Schneider v. California Department of Corrections, 151 F.3d 1194, 1201 (9th Cir. 1998)
- Liu v. Securities and Exchange Commission, 140 S. Ct. 1936, 1940, 1946 (2020)
- Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc)
- Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)
- San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal. 4th 643, 664 (2002)

OPINION

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA ALISON COLE-KELLY, Case No. 22-cv-02841-HSG Plaintiff, ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS v. Re: Dkt. Nos. 16, 24, 23, 35 BETTY T. YEE, et al., Defendants. ALEXANDER COTE, Case No. 22-cv-04056-HSG Plaintiff, Re: Dkt. No. 32 v. OFFICE OF THE CALIFORNIA STATE CONTROLLER, et al., Defendants.

17 JENNIFER I. SYKES, Case No. 22-cv-04133-HSG 18 Plaintiff, Re: Dkt. No. 23 19 v. 20 OFFICE OF THE CALIFORNIA STATE 21 CONTROLLER, et al., 22 Defendants. 23 Pending before the Court are Defendants' motion to dismiss (Dkt. No. 23) in Cole-Kelly v. 24 Yee, 22-cv-02841-HSG ("Cole-Kelly"); Defendants' motion to dismiss (Dkt. No. 32) in Coté v. 25 Office of the California State Controller, 22-cv-04056-HSG ("Coté"); and Defendants' motion to 26 dismiss (Dkt.

No. 23) in Sykes v. Office of the California State Controller, 22-cv-04133-HSG. 27 Also pending before the Court are the Cole-Kelly Plaintiffs' motion for partial summary judgment 1 consolidate related cases and appoint class counsel (Dkt. No. 24).

The Court finds this matter 2 appropriate for disposition without oral argument and the matter is deemed submitted. See Civil 3 L.R. 7-1(b). The Court GRANTS Defendants' motions to dismiss and TERMINATES AS 4 MOOT the Cole-Kelly Plaintiffs' motion for partial summary judgment, motion to certify class, 5 and motion to consolidate related cases and appoint class counsel.

6 I. FACTUAL BACKGROUND 7 Cole-Kelly, Coté, and Sykes are three related putative class actions that challenge the 8 constitutionality of California's Unclaimed Property Law ("UPL"), C.C.P. § 1500 et seq., under 9 the United States Constitution and the California Constitution.1 As alleged in the Coté complaint, 10 "[t]he UPL applies to unclaimed property that is held by a third party, for example, a bank, 11 insurance company, corporation, or public utility.

Unclaimed property is generally defined as any 12 financial asset left inactive by its owner for a period of time, typically three (3) years. Under the 13 UPL... such property is temporarily transferred to the custody of the State." Coté Dkt. No. 1 at 14 ¶ 17. Plaintiffs further allege that the UPL "is not a true escheat statute; it gives the State custody, 15 not ownership, of unclaimed property." Id. Third parties are required to self-report any unclaimed 16 property and "transfer property to the State once the property meets the UPL's definition of 17 unclaimed property and pay the State interest at the rate of twelve percent (12%) per annum for 18 property not timely reported or delivered." Id. ¶ 19.

According to the Coté plaintiffs, "[t]he State 19 collects hundreds of millions of dollars in unclaimed or abandoned property annually but returns 20 just a fraction of that amount to the property owners. The State retains and uses the interest, 21 dividends, accruals, earnings, investment returns, and other benefits earned on and from unclaimed 22 property for public purposes." Id. ¶ 20.

The Coté complaint alleges that "the Controller does not 23 1 The Cole-Kelly complaint brings three claims: 1) claim for declaratory and prospective 24 injunctive relief on behalf of plaintiff and the class: unconstitutionality under 5th Amendment, 2) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class: unconstitutionality under Article I, Section 19, and 3) violation of equal protection and due process (42 U.S.C. § 1983).

See generally Cole-Kelly Dkt. No. 1. The Coté and Sykes complaints bring the same two claims: 1) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class for violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, 2) claim for declaratory and injunctive relief on behalf of plaintiff and the class for pay interest, dividends, accruals, earnings, investment returns, or other benefits above the original amount of the unclaimed property to the owner or person entitled to recover the unclaimed property and is prohibited by statute from doing so.” Id. ¶ 21.

For this reason, the Coté complaint alleges that “[t]he State deprives Plaintiff and all other Class members of just compensation on unclaimed or abandoned property it uses for public purposes.” Id. ¶ 22. The Cole-Kelly and Sykes complaints make similar allegations. See Cole-Kelly Dkt. No. 1 ¶¶ 10-38; Sykes Dkt. No. 1 ¶¶ 17- 22. The central allegation in all three cases is that the UPL is unconstitutional under both the United States Constitution and the California Constitution because it unconstitutionally deprives property owners of any “time value”2 accrued by their property during the time it is controlled by the State.

Accordingly, the constitutionality of the UPL is a dispositive issue in all three cases.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” Mendiondo v. Centinela Hosp.

Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff need only plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”

2 Plaintiffs in all three cases refer to the concept of “time value.” See e.g., Cole-Kelly Dkt. No. 40 (“Opp.”) at 1; Sykes Dkt. No. 38 (“Opp.”) at 13; Coté Dkt.

No. 49 (“Opp.”) at 13. For clarity, the Court will refer to “interest” throughout this order. Although the Court understands that “time Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” In re Gilead Scis.

Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)). Even if the court concludes that a 12(b)(6) motion should be granted, the “court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.

2000) (en banc) (quotation omitted).

III. DISCUSSION

A. Three-Judge Panel

As a preliminary matter, the Cole-Kelly Plaintiffs argue that Defendants’ motion to dismiss and Plaintiffs’ motion for partial summary judgment in Cole-Kelly should be decided by a three-judge panel under 28 U.S.C. § 2284. Cole-Kelly Opp. at 20-21. Section 2284 provides that three-judge panel “shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” 28 U.S.C. § 2284.

This case does not involve the apportionment of congressional districts or a statewide legislative body so, under § 2284, Plaintiffs must identify an applicable “Act of Congress” that requires a three-judge panel.

In support of their request, Plaintiffs argue that “[w]here, as here, an action seeks to establish the unconstitutionality of a state statute and to enjoin the state and its officers from enforcing that allegedly unconstitutional statute, a party can move, pursuant to 28 U.S.C. § 2284, to have a three-judge district court panel decide the issues.” Cole-Kelly Opp. at 20-21.

The two cases Plaintiffs cite in support both concern 28 U.S.C. § 2281, which stated: An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

also Fla. Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 79-80 (1960). Section 2281, however, was repealed in 1976. See 28 U.S.C. § 2281 (repealed 1976); see also Tedards v. Ducey, 951 F.3d 1041, 1060 n.37 (9th Cir. 2020) (stating that “[In 1968], Congress required that any case seeking an injunction against a state officer to prevent enforcement of an allegedly unconstitutional state statute be heard by a special three-judge district court,” but noting in the citation to the statute that it was “repealed 1976”); Larry P. By Lucille P. v. Riles, 793 F.2d 969, 978 n.4 (9th Cir.

1984) (explaining that § 2281 “was repealed in 1976”). The Court knows of no current authority or other basis on which it could grant Plaintiffs’ request, and Plaintiffs point to none. Accordingly, Plaintiffs’ request for a three-judge panel is DENIED. B. Sovereign Immunity Defendants argue in the Cole-Kelly motion to dismiss that “any claims against the State of California and its agencies are barred by the Eleventh Amendment.” Cole-Kelly Mot. at 8.

Defendants further argue that because “officials sued in their official capacities are not persons within the meaning of § 1983... a plaintiff is barred from suing defendants in their official capacities for money damages, absent congressional abrogation or waiver of sovereign immunity.” Id. at 8-9 (quotations omitted).

The Defendants make similar arguments in the Coté and Sykes motions to dismiss. See Coté Mot. at 9-10; Sykes Mot. 9-10. The Sykes and Coté Plaintiffs argue that “the Eleventh Amendment does not bar claims for prospective injunctive relief to remedy a state’s ongoing violations of federal law.” Coté Opp. at 16; Sykes Opp. at 16.

The Cole-Kelly Plaintiffs also argue that “the interest (or time value) on the unclaimed property is the property of the owners, not the State” so “Plaintiffs’ claim for a return of their interest is a claim for a return of their property, and not a claim for damages against the state.” Cole-Kelly Opp. at 20 (footnotes and citations omitted); see also Coté Opp. at 17 (making similar arguments); Sykes Opp. at 17 (same).

The Coté and Sykes Plaintiffs further argue that “even if retrospective relief would be sought, the self-executing aspect of the Fifth Amendment provides relief.” Coté Opp. at 16; Sykes Opp. at 16. Suever II: “while the Eleventh Amendment is no bar to Plaintiffs’ claims for return of their escheated principal and the sales proceeds therefrom, state sovereign immunity clearly precludes Plaintiffs from successfully obtaining more than that amount in the form of interest....” Suever v. Connell (Suever II), 579 F.3d 1047, 1059 (9th Cir.

2009) (emphasis in original). Plaintiffs’ argument that their claim for a return of the interest is a claim for the return of their property (and therefore not barred by the Eleventh Amendment) is foreclosed by the reasoning in Turnacliff regarding the interest earned by unclaimed or abandoned property.

In Turnacliff, Plaintiffs argued, in part, that “the Controller’s action ran afoul of the Takings Clause of the Fifth Amendment, because he did not pay to the Estate the actual interest that the unclaimed property earned while California held it.” Turnacliff v. Westly, 546 F.3d 1113, 1115 (9th Cir. 2008).

The court acknowledged that in a previous case it had held that “prisoners possess a constitutionally cognizable property right in the interest earned on the principal held in Inmate

Trust Accounts.” Id. at 1119 n.3 (citing Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1201 14 (9th Cir. 1998)).

The court discussed Schneider’s holding that “‘[t]he “interest follows principal” 15 rule’s common law pedigree, and near-universal endorsement by American courts—including 16 California’s’ left us with ‘little doubt that interest income of the sort at issue’ [there] was 17 ‘sufficiently fundamental that States may not appropriate it without implicating the Takings 18 Clause.’” Id. (quoting Schneider, 151 F.3d at 1201).

The Turnacliff court, however, also stated 19 that “[b]y contrast, we are unaware of... any authority for the proposition that interest earned by 20 unclaimed or abandoned property belongs to the property owner.” Id. 21 Given the Ninth Circuit’s statement in Turnacliff, this Court declines to find that the 22 interest earned by unclaimed or abandoned property belongs to the property owner.

Consequently, 23 Plaintiffs’ claims for the payment of any interest accrued by their property while the property was 24 in State custody are barred by the Eleventh Amendment. Suever II, 579 F.3d at 1059 (explaining 25 that “Plaintiffs are not entitled to more than the actual property that the State took into its 26 possession or the proceeds of that property....

Rather, such claims for additional compensation, 27 whether described as ‘restitution’ or otherwise, are indistinguishable in effect from claims for 1 in original) (quotations omitted)).3 2 C. Constitutionality of UPL 3 To the extent that any of Plaintiffs’ claims are not barred by the Eleventh Amendment, 4 these claims fail to state a claim upon which relief can be granted because the claims are not 5 tenable under current Ninth Circuit law.

6 The Ninth Circuit has “squarely rejected the proposition that property owners have a 7 compensable Fifth Amendment right to interest earned on unclaimed property that escheats to the 8 State of California.” Suever II, 579 F.3d at 1056.4 It has stated that “insofar as [a district court’s] 9 order requires prospective payment of interest, or payment of interest on any claims for unclaimed 10 property that escheated under the current version of the UPL...

Turnacliff requires reversal.” Id. 11 1057 (emphasis added).5 The Court has also explicitly stated that “[a]s previously noted, we have 12 declared that the current version of the UPL is facially constitutional.” Id. 13 The Ninth Circuit could not be more clear: Plaintiffs’ claims are not legally viable. If 14 Plaintiffs want to change Ninth Circuit law, they will have to persuade an en banc panel of that 15 court to do so.6 16 3 The Cole-Kelly Plaintiffs argue that “Suever and Turnacliff are not the law of the circuit” based 17 on the Supreme Court’s decision in Liu v. Securities and Exchange Commission, 140 S. Ct.

1936, 1946 (2020). See Cole-Kelly Opp. at 19-20. Liu involved a civil enforcement action brought by 18 the SEC. The Court held “that a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is equitable relief permissible under” a statute “that historically

19 exclude[d] punitive sanctions.” Liu, 140 S. Ct. at 1940. Given the different context of the Liu case and its holding, Plaintiffs have not met the high standard of “clear irreconcilability” required 20 before district courts can “consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled.” Miller 21 v. Gammie, 335 F.3d 889, 899-900 (9th Cir.

2003) (en banc). 4 The Coté and Sykes Plaintiffs argue that “[t]he law has developed since the Ninth Circuit Court 22 of Appeals determined that owners of unclaimed property have no Fifth Amendment right to interest itself actually earned on their property while held by the State...” Coté Opp. at 2; Sykes 23 Opp. at 2.

However, the cases cited by Plaintiffs are out-of-circuit cases that have no precedential value within the Ninth Circuit, and cannot override this circuit’s decisions on the question. 24 5 Suever II was decided in 2009, well after the law’s 2003 amendment. See Cole-Kelly Opp. (explaining that the current version of § 1540(c) was enacted in 2003). 25 6 The Court finds that Plaintiffs’ claims that the alleged taking also violated the due process and equal protection provisions of the Constitution are derivative and fail for the same reason.

See 26 Cole-Kelly Dkt. No. 1 ¶ 73 (“The California Controller and Treasurer violated Plaintiff’s and the Classes’ due process and equal protection rights, by taking Plaintiff’s and the Class’s property 27 without just compensation, thereby causing harm to Plaintiff and the Class.”); Coté Dkt. No. 1 IV. CONCLUSION Because the “pleading[s] could not possibly be cured by the allegation of other facts,” Lopez, 2 203 F.3d at 1127 (quotation omitted), the Court GRANTS WITHOUT LEAVE TO AMEND 3 Defendants’ motions to dismiss: Dkt.

No. 23) in Cole-Kelly, Dkt. No. 32 in Coté, and Dkt. No. 23 4 in Sykes. 5 This order also TERMINATES AS MOOT Plaintiffs’ motion for partial summary judgment 6 (Dkt. No. 35), Plaintiffs’ motion to certify class (Dkt. No. 16), and Plaintiffs’ motion to 7 consolidate related cases and appoint class counsel (Dkt. No. 24) in Cole-Kelly. 8 The Clerk is directed to enter judgment in favor of Defendants and to close the three cases.

9 IT IS SO ORDERED. 10 Dated: 3/13/2023 HAYWOOD S. GILLIAM, JR. United States District Judge 15 16 = 17 Z 18 19 20 21 22 3 to the State’s General Fund and used by the State for public purposes without the payment of just compensation to property owners, upon claiming the property, for the State’s use of that property 24 || while in its custody for public purposes.”); Sykes Compl. {| 52 (same).

95 || Defendants point out that “[a]side from a provision in California’s Constitution proscribing ‘damage’ to property without compensation, the Takings Clauses in the United States and 26 || California Constitutions have been construed ‘congruently.’” Coté Mot. at 3 n.1 (quoting San

Remo Hotel L.P. v. City and County of San Francisco, 27 Cal. 4th 643, 664 (2002)); Sykes Mot. at 3 (same); Cole-Kelly Mot. at 3 n.2 (same).

The Coté and Sykes Plaintiffs agree, and the Cole- Kelly Plaintiffs do not argue otherwise. See Coté Opp. at 1 n.2; Sykes Opp. at 1 n.2; see generally Cole-Kelly Opp. The Court therefore finds that Plaintiffs’ claims under Article I, Section 19 of the California Constitution also fail for the same reason.