

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JANE DOE, et al., . Civil Action No. 1:05cv701
 .
 Plaintiffs, .
 .
 vs. . Alexandria, Virginia
 . July 25, 2014
 YUSUF ABDI ALI, . 10:27 a.m.
 .
 Defendant. .
 .

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: TARA M. LEE, ESQ.
DLA Piper LLP (US)
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and
L. KATHLEEN ROBERTS, ESQ.
NUSHIN SARKARATI, ESQ.
The Center for Justice and
Accountability
870 Market Street, Suite 680
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FOR THE DEFENDANT: JOSEPH PETER DRENNAN, ESQ.
218 North Lee Street
Alexandria, VA 22314-5601

ALSO PRESENT: YUSUF ABDI ALI

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Fifth Floor
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(Pages 1 - 9)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

1
2 THE CLERK: Civil Action 05-701, Jane Doe, et al. v.
3 Yusuf Abdi Ali. Would counsel please note their appearances
4 for the record.

5 MS. ROBERTS: Good morning, Your Honor. I'm Kathy
6 Roberts from the Center for Justice and Accountability, for the
7 plaintiff. I'm joined here by Tara Lee from DLA Piper and
8 Nushin Sarkarati, also from the Center for Justice and
9 Accountability.

10 THE COURT: Good morning.

11 MR. DRENNAN: Good morning, Your Honor. Joseph Peter
12 Drennan on behalf of the defendant, Yusuf Abdi Ali, who is also
13 present before the Court.

14 THE COURT: Good morning, Mr. Drennan.

15 All right, this comes before the Court on the
16 defendant's renewed motion to dismiss. As you both know, we
17 issued an order earlier this week.

18 I was quite surprised, Mr. Drennan, given how
19 thorough you tend to be in your pleadings, that you had not,
20 you know, right up front in bold print brought up the *Kiobel*
21 decision and asked the Court to at least dismiss that portion
22 of the case that's based upon the ATS. Obviously, we notified
23 both sides that we felt that that ruling by the Supreme Court
24 would be dispositive of the issue.

25 You've each given us a brief, not even a response. I

1 mean, the plaintiff has brought the *Al-Shimari* decision of the
2 Fourth Circuit to our attention. *Al-Shimari*, in my view, is
3 factually significantly different from this case because CACI
4 is an American corporation that was running the Abu Ghraib
5 prison at the direction of the U.S. government. There's
6 clearly recognized by the Fourth Circuit a direct connection
7 between the United States and the events at that prison
8 sufficient to allow for jurisdiction.

9 We don't have anything like that in this case. There
10 is absolutely no connection between the United States and this
11 defendant's conduct in Somalia, and so I am on the basis of
12 *Kiobel* as well as, quite frankly, *Al-Shimari* going to dismiss
13 the ATS claims from this case, but that still leaves the TVPA
14 claims in Counts 1 and 2, correct?

15 MR. DRENNAN: Yes, Your Honor, but I'd like to
16 address that as well in light of *Kiobel*, because the Torture
17 Victim Protection Act is a statute that sets forth a cause of
18 action. It does not establish jurisdiction. Jurisdiction was
19 premised on the ATS, so all the TVPA claims are tied to the ATS
20 for purposes of jurisdiction. At least, that's our position.

21 THE COURT: What case law do you have that explicitly
22 says that?

23 MR. DRENNAN: I don't have any that explicitly says
24 that.

25 THE COURT: Well, then all right. I mean, you're

1 very articulate when you say that, but, I mean, I don't see a
2 legal basis for that.

3 Let me interrupt this proceeding for one minute.

4 (Recess from 10:13 a.m., until 10:14 a.m.)

5 THE COURT: Go ahead, Mr. Drennan.

6 MR. DRENNAN: Yes, Your Honor. I understand the
7 Court's position with regard to the TVPA claims.

8 THE COURT: Well, I'm trying to understand your
9 position. Where -- from whence do you draw your authority for
10 the position you've taken on the relationship between the two
11 statutes?

12 MR. DRENNAN: Well, the *Karadzic* decision from a
13 decade ago basically draws -- drew that distinction, that there
14 is, that a distinction be drawn between the two. That's why
15 they're pled in tandem, because the TVPA creates a federal
16 cause of action, whereas the ATS merely represents a
17 jurisdictional predicate for bringing claims, and *Kiobel*, as
18 the Court has pointed out correctly, I think, clearly has no
19 basis as a predicate for jurisdiction here, so the ATS claims
20 all fall out of the case.

21 But I'll just submit on that. I understand the
22 Court's position --

23 THE COURT: All right.

24 MR. DRENNAN: -- that the Court is not inclined to
25 dismiss the TVPA claims based upon *Kiobel*, and I would

1 apologize to the Court for not invoking *Kiobel* in my renewed
2 motion to dismiss, but as the Court may recall, I initially
3 brought *Kiobel* to the attention of the Court, asking for a stay
4 when the Supreme Court ordered reargument based on the extra
5 territoriality question a couple of years ago.

6 But with regard to our other -- the other aspects of
7 our motion, we believe that the motion is well taken. This is
8 a stale claim, and we --

9 THE COURT: Well, in terms of being stale, I mean,
10 there is a factual dispute as to whether or not these claims
11 could have been brought in Canada, right?

12 MR. DRENNAN: There's a factual dispute as to whether
13 they could have been brought in Canada. There is a factual
14 dispute with regard to the issue of equitable tolling.

15 THE COURT: All right, there are factual disputes.
16 That answers the question. That means you don't dismiss. The
17 matter will go to trial, and the issue as to the tolling and as
18 to the statute of limitations are legitimate issues for the
19 trial, when evidence can be presented and the trier of fact,
20 whoever that is, can make the determinations.

21 I mean, it may be a mixed question of fact and law,
22 but the simple fact is there are material facts in dispute at
23 this point, and so it's not proper at a motion to dismiss level
24 to be moving on that.

25 MR. DRENNAN: Very well. Your Honor, I would note

1 another issue, I understand the Court's position, but as we've
2 pointed out in earlier filings before the Court, the government
3 of Somalia has requested immunity for my client, and that
4 request for immunity remains pending with the State Department,
5 and it's possible and hopeful from Mr. Ali's standpoint that
6 the State Department ultimately will entertain favorably that
7 request and request that the case be dismissed.

8 THE COURT: Well, that's one of the risks, you know,
9 the plaintiff is taking, I mean, in terms of the costs of going
10 on with litigation. I recognize that, and I will say right now
11 for the record that if the Department of State voices a concern
12 about this case and asks this Court to not proceed with it,
13 most likely I will stop the case and dismiss it at that point,
14 but as you know, I have delayed this case and I delayed the
15 *Samantar* case an extensive period of time, almost unheard of
16 for this Court, to allow the State Department, the executive
17 branch of the United States government, to take a position,
18 because I do think that there are potentially sensitive issues
19 that this case might impact.

20 You know, the need for reconciliation in countries
21 that have been torn apart like this is very important, and I
22 can recall in earlier pleadings, you know, evidence, certainly
23 some people with expertise in the area concerned that this type
24 of litigation might simply continue the tensions and the
25 animosities, and that goes against a genuine effort at

1 reconciliation, but those reconciliation efforts are not yet in
2 place from what I can tell, and the Department of State has not
3 taken a position.

4 They have not asked us to hold on this case, and
5 we've given them many opportunities to do so. So until we
6 receive such an indication from the Department of State, this
7 case will go forward, but I do caution the plaintiff that if we
8 get that kind of concern, it is highly likely at that point
9 this Court will go ahead and dismiss the case or stop the
10 proceedings. So that's how we're going to leave it.

11 So I'm going to deny the motion to dismiss the
12 torture victim claims, but any claims based on the ATS are out
13 of this case at this point. They are dismissed. And we will
14 go forward then with the what will most likely be not
15 insignificant problems with discovery, all right?

16 I believe a scheduling order, has it been issued in
17 this case? If not --

18 MR. DRENNAN: No, it has not, Your Honor.

19 THE COURT: All right, I'm going to issue one today.

20 MR. DRENNAN: All right.

21 THE COURT: And hopefully, you can work things out
22 with the discovery. If not, the magistrate judge on this case
23 is Judge Anderson, and he will assist you with any discovery
24 problems that may arise.

25 MR. DRENNAN: All right. Your Honor, I understand

1 the Court's position. I would also advise the Court
2 preliminarily that we are contemplating an interlocutory appeal
3 on the immunity claim and would ask that the proceedings be
4 stayed upon filing of that appeal.

5 THE COURT: What's the plaintiffs' position on that?

6 MS. ROBERTS: Your Honor, I think we will likely also
7 be filing an appeal on the ATS claims, but I would request the
8 opportunity if it's possible to address the nationality of the
9 defendant in this case and its relevant connection to U.S.
10 territory or at least to supply briefing after the hearing with
11 respect to some of these very difficult questions.

12 I understand very well why the Court would be
13 interested in this case, where you have the Supreme Court with
14 four concurring opinions, only one of those opinions by only
15 two justices would have gotten rid of a case like this, which
16 has a 30-year line of authorities supporting it, cases against
17 U.S. residents, natural persons that are not addressed by the
18 corporate cases that have been laid before the Court.

19 THE COURT: Well, the only thing is the corporations
20 in the *Kiobel* case, while they were not U.S. corporations, did
21 have some connections to the United States as corporations, and
22 that was not enough to persuade the Supreme Court that there
23 was sufficient nexus.

24 MS. ROBERTS: Your Honor --

25 THE COURT: And these days, with the trend being to

1 look at corporations just like people, I don't really see how
2 there'll be a material change in the jurisprudence on that
3 issue.

4 But in any case, this is, this is premature. Nothing
5 yet has happened. There hasn't been an appeal filed either
6 way. I'm not going to, you know, predict whether I'll issue a
7 stay or not. You-all might agree that if both sides are going
8 to appeal, that a stay is the most appropriate thing, because
9 the discovery is not going to be easy in this case. There are
10 logistical problems that I can see coming down the pike.

11 But in any case, my ruling today is what it is, and
12 we'll take up those other issues if and when they occur. Thank
13 you.

14 MS. ROBERTS: Thank you, Your Honor.

15 MR. DRENNAN: Thank you, Your Honor.

16 THE COURT: Anything further on the docket?

17 (No response.)

18 THE COURT: No? We'll recess court for today then.

19 (Which were all the proceedings
20 had at this time.)

21 CERTIFICATE OF THE REPORTER

22 I certify that the foregoing is a correct transcript of
23 the record of proceedings in the above-entitled matter.

24

25

/s/

Anneliese J. Thomson