

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

3 JANE DOE and JOHN DOE, . Civil Action No. 1:05cv701
4 Plaintiffs, .
5 vs. . Alexandria, Virginia
6 YUSUF ABDI ALI, . July 13, 2005
7 Defendant. . 3:00 p.m.
8

9 TRANSCRIPT OF MOTIONS HEARING
10 BEFORE THE HONORABLE LEONIE M. BRINKEMA
11 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

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(Pages 1 - 15)

P R O C E E D I N G S

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2 THE CLERK: Civil Action 2005-701, Jane and John Doe v.
3 Yusuf Abdi Ali. Will counsel please note their appearance for the
4 record.

5 MR. JOHNSON: Good afternoon, Your Honor. Scott Johnson
6 with Cooley Godward for the plaintiffs.

7 THE COURT: All right, Mr. Johnson.

8 MR. DRENNAN: Good afternoon, Your Honor. I'm Joseph
9 Peter Drennan for your defendant, and, Your Honor, as a
10 preliminary matter, I would apologize to the Court for my
11 tardiness here. We had some logistical problems.

12 THE COURT: Are the roads a problem from flooding, or is
13 it just that you --

14 MR. DRENNAN: Well, there was an electrical storm this
15 morning that knocked out the fax machine, and I have three
16 declarations, two of them were faxed in this morning and there was
17 a problem in receipt of those, and I felt it appropriate to gather
18 the papers and bring them to the Court.

19 THE COURT: All right. Well, I obviously haven't read
20 your pleading because it just literally came in.

21 MR. DRENNAN: I understand.

22 THE COURT: So what I want to know is, you know, we've
23 been back and forth on these depositions. The plaintiffs have now
24 indicated that the government of Ethiopia is willing to allow the
25 depositions to go forward in that territory, and apparently, I'm

1 assuming the plaintiffs and their witnesses can get lawful entry
2 into that country because they'd have to be there lawfully to do
3 this.

4 That changes the parameters of where we were at before.
5 The issue about the State Department having to weigh in on this at
6 least for purposes of the discovery does not appear to be a
7 problem, and I think at this point, it's just a matter now of
8 setting up the logistics.

9 So have you not had a chance to talk with Mr. Johnson
10 and see if you can come to some agreement about dates and that
11 sort of thing?

12 MR. DRENNAN: Well, Your Honor, there's been some, some
13 preliminary talk about September -- the September-October time
14 frame. However, before we address that question, Your Honor, we
15 would respectfully invite the Court's attention to -- we learned
16 of this motion for the first time at the close of business or
17 near -- Thursday afternoon I received the telephone call from
18 counsel about it.

19 I sent an e-mail on midday Friday -- I was traveling on
20 Friday -- and set forth sort of the rough outline of what's,
21 what's fleshed out here in the declarations concerning changed
22 circumstances over in Ethiopia and Somalia, and we basically
23 invited the, the plaintiffs to forbear from bringing on this
24 motion or, in the alternative, to put it over and notice it for a
25 time at which the Court could hear from the defendant on what will

1 essentially be our renewed motion to dismiss.

2 This is a refiled action. This case is not even at
3 issue yet, and we had a standing stipulation that was entered into
4 a couple of weeks ago that made this Friday, the 15th of July, the
5 due date for a responsive pleading to the refiled complaint, and
6 in such regard, I have been working on a motion to dismiss that I
7 believe, respectfully, will, will essentially moot this matter.

8 There have been a number of developments since we last
9 appeared before Your Honor, well, with -- I'm not going to argue
10 the motion to dismiss today, but the Court has been advised of the
11 Arce decision out of the Ninth (sic) Circuit that effectively, as
12 we put it, puts paid to any notion of equitable tolling, and with
13 that, there's little question that this action is stale and
14 therefore should be dismissed.

15 But with regard to the more pressing issue of conducting
16 discovery at this time in the Horn of Africa, Your Honor, when I
17 learned that the plaintiffs were intent on going forward right
18 away with this motion, I sought out a gentleman that, that I
19 believed based upon my understanding of the region -- and I'm a
20 student of history and politics, and I'm aware of who is
21 considered to be expert in this region, and Professor Charles
22 Schaefer out of Valparaiso University is considered to be just
23 about the foremost expert on contemporary Ethiopian politics in
24 the United States today.

25 Professor Schaefer was born to missionary parents in

1 Addis Ababa and speaks Amhari as his first language, and in
2 pertinent part, Professor Schaefer in his declaration that we've
3 included with our moving papers points to the, the very delicate
4 situation in Ethiopia at the moment. Ethiopia for the first time
5 in modern history, and there's a lot of people that are hoping
6 that Ethiopia successfully makes a transition to a true democratic
7 parliamentary system, but Ethiopia has indeed a multi-ethnic
8 society that has been rife with its own conflict.

9 It didn't have Somaliland; it had Eritrea that seceded.
10 And there are a lot of Somalis that live in Ethiopia. Ethiopia
11 had its first true election with many western observers, the first
12 round of that election took place back in May. The results were
13 very, very close.

14 The opposition cried foul. They marched on the capital,
15 Addis Ababa. There were massive protests, and the government's
16 response to those protests was essentially to roll out a couple of
17 Army trucks and start shooting at the protestors and --

18 THE COURT: Well, this is fascinating, but it's been a
19 long day, and frankly, I don't really have to address that issue.
20 What has caught my attention is your earlier argument, and that
21 is, that you have a motion to dismiss that you think the Court
22 ought to look at --

23 MR. DRENNAN: Yes, Your Honor.

24 THE COURT: -- before we address any discovery issues.

25 MR. DRENNAN: That's essentially our foremost argument.

1 THE COURT: All right. I am concerned and I can
2 understand the plaintiff's concern that because of the logistics
3 here, it can take some time to set up these depositions if the
4 motion to dismiss is not successful, and that needs to be done.

5 Any argument that you're going to make about the
6 unsafety of a particular location I am not interested in hearing
7 because the way in which we have set up the alternate option on
8 this thing is the video deposition to the courthouse that allows
9 you and your client to fully participate in the depositions
10 without having to physically go over to Ethiopia.

11 So I'm not going to be terribly impressed with that
12 particular argument, but what I am going to do because I agree
13 with you that we need to look with great care at whether this case
14 should go forward and can go forward under the status of the law,
15 is to look at your motion to dismiss.

16 Now, if it's to be filed by Friday, I'm assuming it's
17 going to be noticed for argument the 22nd or the 29th.

18 MR. DRENNAN: That's correct, Your Honor.

19 THE COURT: I would recommend that you not notice it for
20 the 22nd because we may not have a regular court reporter, and I
21 really am reluctant to use contract reporters for major cases of
22 significance.

23 I could possibly hear you on a non-Friday if it's
24 necessary to expedite it and to -- let me just see here a second.

25 I could hear it, for instance, my trial for the 27th,

1 which is a Wednesday, is going to settle, and so if you wanted to
2 have it argued on the 27th rather than the 29th, if that works on
3 counsel's schedule, I could do it. I could even do it on the
4 28th, which is Thursday.

5 MR. DRENNAN: The Court's indulgence?

6 THE COURT: Yes.

7 MR. DRENNAN: We'll have to confer about that.

8 THE COURT: All right. I'll give you those options.
9 Otherwise, August 5 would be the next date. But, I mean -- or the
10 29th, which is that Friday. We're kicking a lot of stuff from the
11 22nd to the 29th, which may make it a fairly crowded docket.

12 But anyway, so I could accommodate you on either the
13 Wednesday -- actually, the Tuesday, Wednesday, or Thursday of that
14 week, which is the 26th, 27th, or 28th, we could hear you at a
15 time certain for the motion to dismiss.

16 And given the possibility that the motion might not be
17 successful, Mr. Drennan, you ought to do some preliminary
18 discussions with Mr. Johnson as to dates when you could do the
19 depositions, and then whether you-all go to Ethiopia or everybody
20 stays here, we do this -- we're becoming pretty adept at doing
21 these transcontinental depositions, both civil and criminal cases,
22 these days, and the technology upstairs is available.

23 I also have to, however, work it around some other
24 judges' trial schedules. So what you may want to do is if you
25 start talking about dates, you ought to call Lance Bachman, who is

1 the person who schedules Courtroom 700, to make sure that the
2 times you're looking at are available.

3 MR. DRENNAN: All right. Your Honor, one further point:
4 I understand the Court's position on this, but the opposition that
5 we've just submitted to the Court, the gravamen of that opposition
6 is not, is not my personal safety -- my personal safety was the
7 gravamen of the opposition with regard to the Hargeisa setting --
8 but, but rather to the issue of the implications for the very,
9 very delicate situation in that region.

10 At the moment, as we speak, Ambassador Crigler is
11 grieving right now because a former employee of his who had been a
12 peace activist was assassinated on Monday morning in Mogadishu.
13 Ambassador Crigler's daughter was present in Addis Ababa when the
14 riots took place.

15 THE COURT: Well --

16 MR. DRENNAN: But beyond that, Your Honor, I met
17 again -- once again, I actually had a face-to-face meeting with an
18 emissary from President Yusuf from the transitional government who
19 happens to be in Washington today, as I understand it, invited
20 here by Senator Coleman from Minnesota.

21 There's a very large Somalian community in Minnesota. I
22 believe there are 60,000 Somalis residing in the Minneapolis-St.
23 Paul area. And the ambassador includes a declaration in which he
24 essentially restates the earlier objections made by the foreign
25 minister there to the Court back in March of this year to this

1 case going forward.

2 It's a very delicate situation there. The, the stories
3 that appear on the Internet, Your Honor -- and your law clerk can
4 read them -- talk about impending civil war there, and there's
5 been no government there since, since 1991. And everyone is -- I
6 know that we're all waiting for the State Department hopefully to
7 weigh in with some kind of word, but for perhaps reasons best
8 known to itself, the executive branch sometimes proceeds with all
9 deliberate speed on these things.

10 THE COURT: All right. Well, at this point,
11 Mr. Johnson, is there any reason why or any special problem you've
12 got if we delay resolving this motion until we see how this motion
13 to dismiss goes?

14 MR. JOHNSON: Your Honor, I would point to two things:
15 One, obviously, the order of the Court which requires us to
16 contact the State Department to weigh in on depositions in
17 Hargeisa within 30 days of entry of the order, that's the June 27
18 order, you know, that's why primarily we moved so quickly on this
19 motion, because of that 30-day time line, and so we'd ask the
20 Court to reconsider that aspect of the June 27 motion so we're not
21 under an obligation, but also under -- and the judge certainly
22 alluded to this -- the issue of the logistics of arranging this,
23 and the Court, I know, has heard from us already that it's been an
24 incredibly difficult and time-consuming process.

25 We tried to go to Ethiopia. We weren't able to do that

1 because the motion that we filed to have depositions in Ethiopia
2 was taken under advisement. We then moved for voluntary dismissal
3 on terms and conditions. The Court ruled that we can have these
4 depositions by video conference without specifying the location.

5 What we're asking today is that the Court enter an order
6 allowing us to have depositions of the plaintiffs in Ethiopia, to
7 have video -- by video conference, to have video conference
8 depositions of the nonparty Somali -- or Somaliland-based
9 witnesses in Ethiopia, and to issue a commission for the
10 videographer to facilitate those depositions.

11 In light of the time that it takes to get this arranged,
12 the fact that we're talking about one week of the Court's time or
13 four days of the Court's time to preside over the plaintiff's
14 depositions as well as the following week to have the depositions
15 of the nonparty witnesses, in light of travel arrangements, in
16 light of arranging our videographer, Mr. -- or not a videographer,
17 our video conference expert, Mr. John Harrington, who's been in
18 constant communication with the, with the Court's videography,
19 Lance -- I apologize -- quite a bit, as a matter of fact, I think
20 just the other day helped out with some difficulties that he was
21 having here in an unrelated matter, arranging for hotel rooms, for
22 travel to get a videographer to go to Ethiopia, to get
23 interpreters there, to have interpreters here, to have a court
24 reporter here, for the attorneys to travel there or for the
25 attorneys to block off their time here, it's incredibly

1 time-consuming, and for us to simply wait and not have a ruling
2 from the Court and then once a ruling is issued one way or the
3 other on the motion to dismiss, obviously, if the case is
4 dismissed, there's no need to go forward, and we'll have no
5 depositions to be held.

6 We don't think that's the case. We think we have strong
7 arguments that will satisfy the Court that we can overcome a
8 motion to dismiss. We don't think the Arce case changes our
9 equitable tolling argument in terms of statute of limitations, and
10 we do think we'll be able to go forward.

11 But if we wait until July 27 or 29 or August 5 and only
12 then are able to try to find a two-week block for us to go to
13 Ethiopia, for us to arrange for the video conferences here, it's
14 just going to be incredibly difficult.

15 THE COURT: Well --

16 MR. JOHNSON: I'd ask the Court --

17 THE COURT: -- I think in this case, three weeks isn't
18 going to make any humongous difference in this case, and it gives
19 the State Department yet another three weeks to weigh in if
20 they're going to.

21 I will look at the order of June 27 to see if there's
22 anything inconsistent about what I'm doing now with that order and
23 make the necessary corrections to it if necessary, but I'm going
24 to go ahead at this point and just hold your motion in abeyance.

25 I plan to, however, address it if I don't grant the

1 motion to dismiss, whenever you motion it for argument, because
2 I'm usually able to rule from the bench on these things, if I
3 don't grant the motion to dismiss, then, Mr. Drennan, you need to
4 be prepared at that point to respond to the details of the pending
5 motion in terms of the depositions, and so it would not at all be
6 unwise for you-all to talk.

7 Frankly, if you're all going to Ethiopia, the Court
8 isn't going to get involved with this thing at all. The whole
9 point about the Court being involved was to accommodate you-all if
10 you were staying here to conduct the depositions.

11 I'm not going to give up a week of my time especially in
12 the fall to oversee depositions, but I'll just put you on notice
13 that obviously, they might have to be significantly edited if they
14 would not be proper for trial presentation because they're de bene
15 esse depositions essentially.

16 MR. DRENNAN: Your Honor, just to inform the Court's
17 thinking in this regard --

18 THE COURT: Yes.

19 MR. DRENNAN: -- I think it's fair to say that my
20 client, who is a legal permanent resident in the United States and
21 the holder of two expired Somali passports from a failed regime
22 from 13 years ago, he's not going to be going anywhere.

23 THE COURT: He doesn't have to be at the court. I'm not
24 going to tie up a courtroom and my time just for a defendant. He
25 can go to --

1 MR. DRENNAN: Due process, Your Honor.

2 THE COURT: No, no. He can go to a law office or
3 someplace else and participate that way.

4 MR. DRENNAN: Oh, okay.

5 THE COURT: All I'm saying is if you --

6 MR. DRENNAN: But the video link would -- we're talking
7 obviously in a contingent basis here, but the standing requirement
8 that there be a live video link would remain extant to accommodate
9 my client.

10 THE COURT: The defendant certainly -- well, we need to
11 look at that because this is not a criminal case; it's a civil
12 case, and because again those depositions ultimately don't mean a
13 thing until they're played in court, I'm not even going to worry
14 about that right now.

15 All I'm saying is you will need to talk among yourselves
16 about dates. If you-all know that the lawyers of record in this
17 case are planning to go to Ethiopia and take these depositions on
18 the scene, then that, I believe, will cut the Court out of having
19 to be here to preside over those things, and that gives you
20 actually more flexibility in how you want to schedule the time.

21 And then you just need to look into whether or not the
22 defendant has an absolute right to be present. I'm not sure he
23 does. It's a civil case, not a -- in a criminal case, if you're
24 doing substitutions for live trial testimony, but as you know, in
25 a civil case, the parties don't have to be present for the trial.

1 MR. DRENNAN: It's a most unusual civil case, Your
2 Honor. It's tantamount to a criminal case. He's accused of being
3 a war criminal.

4 THE COURT: No, it's still a civil case. And
5 furthermore, it's not as if he wouldn't get access to the
6 testimony. It would come in when it's played at trial.

7 So in any case, we don't have to face that issue right
8 now. What I'll do is let you-all call my chambers when you've
9 worked out a date for the argument, and again, if you can't work
10 it out earlier that week, then you can go ahead and notice it for
11 the 29th or August 5, whatever, a regular Friday docket. All
12 right?

13 Thank you. Anything further?

14 MR. DRENNAN: No, Your Honor.

15 MR. JOHNSON: No, Your Honor. Again, I thank you for
16 your time, and we'll be back in touch with chambers.

17 THE COURT: All right, very good. We'll recess court
18 for the day.

19 MR. JOHNSON: Thank you, Your Honor.

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

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CERTIFICATE OF THE REPORTER

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


Anneliese J. Thomson