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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-0528-CIV-LENARD
MAGISTRATE JUDGE GARBER

ESTATE OF WINSTON CABELLO,
et al.,

Plaintiffs,

vs.

ARMANDO FERNANDEZ LARIOS,

Defendant.
_____/

MOTION TO DISMISS SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

Defendant Armando Fernandez ("Fernandez") moves to dismiss the Second Amended Complaint with prejudice pursuant to Rule 12 of the Federal Rules of Civil Procedure. The Second Amended Complaint was filed after this Court entered an Order dated August 10, 2001 granting in part and denying in part defendant's motions to dismiss the Amended Complaint (the "Order").

Plaintiffs filed the Second Amended Complaint after conducting discovery in this case including deposing the defendant for three days. Plaintiffs have now dropped many of their previous and incorrect allegations. Plaintiffs have changed a number of allegations. For example, plaintiffs no longer allege defendant had been in the witness protection program until just before the Complaint in this case was filed in 1999. Plaintiffs do not allege that they could not serve or sue defendant after he arrived in the United States. Plaintiffs no longer allege that Fernandez personally killed the decedent,

but rather now allege that Fernandez, a Second Lieutenant in the Chilean Army, "participated in the extrajudicial killing of the decedent, Winston Cabello, as a joint tort feasor, co-conspirator, and participant in a common plan, design and scheme." Second Amended Complaint at ¶ 58. Despite the expensive period, during which discovery has occurred (including the three-day deposition of defendant), the allegations are less clear, not more clear. What is clear is that defendant was not allowed to have been present when plaintiffs' decedent was killed and, it would appear, is not alleged to have been present when plaintiffs' decedent was slashed with a corvo. Further, plaintiffs now know and do not contest the fact that defendant has been in the United States since January 1987 and has been living and working in Miami (under his own name) since 1988 – over eleven years before the case was filed. Plaintiffs' claims are factually deficient and the claims made are all time-barred requiring the Court to dismiss them.

I. PLAINTIFFS' ALLEGATIONS

Although after the Order, only three of the claims in the First Amended Complaint survived, plaintiffs now assert eight claims in the Second Amended Complaint:

1. Extrajudicial killing (brought by the decedent's mother and two sisters);
2. Extrajudicial killing (brought by the Personal Representative of the Estate);
3. Extrajudicial killing (brought by the decedent's brother) (these first three claims were originally part of Count I);
4. Torture (brought by the Personal Representative of the Estate) (new Count);

5. Crimes against humanity (brought by the Personal Representative of the Estate) (new Count);

6. Crimes against humanity (brought by the decedent's brother);

7. Cruel, inhuman or degrading treatment or punishment (brought by the Personal Representative of the Estate) (new Count); and

8. Cruel, inhuman or degrading treatment or punishment (brought by the decedent's brother).

Each of the claims emanates from the detention and killing of plaintiffs' decedent in September and October 1973. Significantly, plaintiffs have dropped any allegations that defendant directly killed the decedent or slashed decedent with a corvo. Rather, the Second Amended Complaint attempts to add back claims for conspiracy which were previously dropped by plaintiffs after defendant had briefed why the conspiracy count patently did not lie and plaintiffs announced they would no longer pursue the claim, and which were dismissed by this Court (Order dated April 24, 2000). Fernandez is now accused of human rights violations arising from the torture and death of a person, without any allegation that he personally ordered or personally committed the illegal acts. Rather, he is sued for "conspiracy" to commit these acts. This attempted claim is legally without merit.

II. FERNANDEZ IS NOT LIABLE FOR THE ACTIONS OF CHILEAN MILITARY SUPERIORS

An unusual aspect of the claims asserted in the Second Amended Complaint are that Fernandez is not alleged to have personally committed murder and torture on the plaintiffs' decedent.

Fernandez is not alleged to have ordered the murder or torture. Rather, he is apparently sued for the acts of his military superiors. Plaintiffs allege that the deaths occurred "under the orders of General Pinochet." Second Amended Complaint at ¶ 4. Although plaintiffs allege legal conclusions that Fernandez — who in 1973 was a 24-year old Second Lieutenant – was part of a "conspiracy." Plaintiffs do not provide any factual allegations that Fernandez violated the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350), because they do not allege that Fernandez either:

a. personally killed or tortured the plaintiffs' decedent; or

b. ordered the killing or torture of the decedent.

Courts do not impose liability on subordinates for the orders of their military superiors. In discussing potential liability under 42 U.S.C. § 1985(3) against United States military officers, the Circuit Court observed:

> Allowing **conspiracy** claims to proceed would not only entail second guessing of **military** decisions by civilian courts and require testimony by **military** personnel about command decisions, it would also tend to pit a plaintiff's **superiors** against one another. Each **officer** would doubtless feel pressure to lay the blame for any alleged wrongdoing at the feet of his confreres, lest he be implicated by association in any **conspiracy**. *See Krulewitch v. United States*, 336 U.S. 440, 454, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring). A risk likewise exists that a **subordinate officer** may be found to have participated in the **conspiracy** merely by carrying out orders. Both possibilities would obviously tend to undermine **military** discipline. In the face of congressional silence, faithful adherence to the Supreme Court's teachings clearly prohibits us from implying an intramilitary damage action under Section 1985(3).

Boies v. Marsh, 801 F.2d 462, 469 (D.C. Cir. 1986).

Plaintiffs keep changing their allegations. The allegations of the Second Amended Complaint plead the case as plaintiffs have learned through discovery

and then factual investigation. Plaintiffs no longer allege Fernandez personally committed torture or murder of plaintiffs' decedent. Fernandez was the lowest ranking officer of the "Caravan of Death" and plaintiffs do not allege (and they cannot allege because they know it is not true) that Fernandez ordered the killing or torturing of plaintiffs' decedent which, taking the allegations of their latest complaint as true, was done by military personnel not part of General Arrellano's "squad" under orders of General Arrellano given under the general orders of General Pinochet. Fernandez gave no orders and the Second Amended complaint does not claim that he did.

Nowhere does the law under the TVPA impose liability on a subordinate military officer just because he was physically near where illegal events took place. Plaintiffs seek to impose a virtual absolute liability on anyone who was in the Chilean military in 1973. That is not the intent of the TVPA and this Court should dismiss plaintiffs' claims with prejudice.

III. PLAINTIFFS' CLAIMS ARE TIME BARRED

Plaintiffs now abandon the false allegation that Defendant was placed into the witness protection program. Rather, all plaintiffs allege is that when Fernandez entered the United States in 1987, that he lived in "an undisclosed location under the protection of the United States government." Second Amended Complaint at ¶ 15. Thus, a key factual premise of the court's Order[2] is deleted from the Second Amended Complaint. Significantly, plaintiffs now make no allegations about defendant's susceptibility to

2. "In addition, the Court finds that Defendant's status in the Witness Protection Program since February 4, 1987 until a time shortly before the Complaint was filed, created a period in which defendant was ostensibly absent from this jurisdiction, in that he could not be served." Order at page 40. Plaintiffs have now dropped their previous allegation on this subject.

service of process after 1987. Plaintiffs know, and by deletion of allegations to the contrary, concede that defendant was present in the United States and subject to jurisdiction of the courts of this country for any civil claim against him since that time.

Plaintiffs' allegations establish defendant was physically present in the United States since 1987. All of the plaintiffs are United States citizens and residents (for unexplained reasons, decedent's widow and children—presumably those most injured—are not plaintiffs). There is no allegation that plaintiffs—United States citizens and residents—could not have sued defendant–since 1987 a United States resident—here at any time after 1987. In the Order, this Court ruled that, based solely on plaintiffs' allegations, the statute of limitations was equitably tolled until 1990,[3] when General Pinochet's military regime was replaced by President Patricio Aylvin. This Court ruled that in 1990, the "tolling ceased."[4] Plaintiffs do not allege any action of defendant, as opposed to unnamed and unidentified, other than General Pinochet's persons, took any action to justify the tolling of the statute of limitations. Moreover, as alleged in the Second Amended Complaint all plaintiffs reside in the United States, with all plaintiffs, except for Aldo Cabello, being naturalized United States citizens. Second Amended Complaint, ¶¶ 17-21. The question left, therefore, is when did the statute of limitations expire?

Under the TVPA, the statute of limitations provides "No action shall be maintained under this section unless it is commenced within ten years after the cause of action arose." (28 U.S.C. § 1350 note, emphasis supplied). Here, it is not disputed that the acts for which defendant is sued occurred in October 1973. The statute of limitations

3. Order at page 40.
4. Order at page 40.

therefore, but for equitable tolling, would have expired on October 18, 1983. The federal doctrine of equitable tolling does not extend the statute of limitations indefinitely. Judge Posner described equitable tolling: "[A] person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so." *Heck v. Humphrey*, 997 F.2d 355, at 357 (7th Cir. 1993). The doctrine was further explained:

> Rather, than giving the plaintiff an automatic extension of indefinite duration . . ., the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, despite all due diligence on his part, to file his claim. . . . There must be diligence, and the diligence must continue up to the time of suit – you cannot be diligent for a year, and then wait another year to sue.

Id. at 357. (Emphasis supplied). (Citation omitted). *See also Booker v. Ward*, 94 F.3d 1052, 1057 (7th Cir. 1996).

The Eleventh Circuit has a similar view of equitable tolling. That court has observed that equitable principles of tolling are the "exception, not the rule." *Pacific Harbor Capital, Inc. v. Barnett Bank*, 252 F.3d 1246, 1252 (11th Cir. 2001) (quoting *Rotella v. Wood*, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000)). The Eleventh Circuit described the doctrine as:

> 'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances. *See Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347, 22 L.Ed. 636 (1874) (where a party injured by another's fraudulent conduct "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered ...").

Ellis v. GMAC, 160 F.3d 703, 706 (11th Cir. 1998). The Eleventh Circuit in *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999) rejected a claim of equitable tolling. "Equitable tolling is appropriate when a movant untimely files because of extraordinary

circumstances that are both beyond his control and unavoidable even with diligence." 177 F.3d at 1271 (emphasis supplied).

These cases demonstrate that using equitable tolling to extend a statute of limitations only extends the statute of limitations for that time which is reasonably needed to file a claim. Given this Court's determination that tolling "ceased" in 1990, that reasonable time is not another nine years.[5] Rather, it is just so long as would have been needed by the plaintiffs, exercising due diligence, to file this claim. Plaintiffs were all residents of the United States[6] and defendant has been in the United States since 1987. Plaintiffs have presented no factual basis to justify a nine-year delay in filing this case. The federal courts of this country have been available to them.

Plaintiffs have not plead any facts asserting equitable tolling describing why and how long the statute of limitations should have been tolled. Given this Court's ruling equitable tolling ceased in 1990, the Second Amended Complaint must be dismissed.

IV. THE PERSONAL REPRESENTATIVE LACKS STANDING TO ASSERT CLAIMS FOR TORTURE, CRIMES AGAINST HUMANITY OR FOR CRUEL, INHUMAN OR DEGRADING TREATMENT

This Court found standing for plaintiff Zita Cabello-Barrueto in her capacity as plaintiffs' decedent's personal representative to sue Chilean defendants for alleged extrajudicial killing. Order at Pages 15-16. That claim is now the second claim for relief in the Second Amended Complaint. This Court did not rule the plaintiff Zita Cabello-Barrueto as personal representative had standing to assert other claims. According to Chilean law, the wife and children of the decedent—not plaintiffs here—are the only possible "legal representatives" of decedent. Declaration of Keith S. Rosenn, ¶ 10, filed

5. Defendant does not agree that equitable tolling should be applied, because plaintiffs' total failure to plead this fact. But, accepting the Court's ruling, it is clear this case is time barred.
6. Second Amended Complaint at ¶¶ 17-21.

in connection with defendant's Motion to Dismiss. These true "legal representatives" are now not even mentioned in the Second Amended Complaint. *Cf.* Amended Complaint at ¶ 19.

This Court concluded in the Order that the "Estate" did not have standing to sue for Torture, Crimes against Humanity and for Cruel, Inhuman or Degrading Treatment or Punishment. Order at Pages 11-12, 23-24. Zita Cabello-Barrueto, therefore is "personal representative" of a non-existent Chilean "estate" of decedent as this Court concluded:

> the Court finds that Chilean law does not recognize "the Anglo-American construct of an 'estate' created upon the death of a person." (Rosenn Decl. ¶ 10.) The Court thus finds that Plaintiff the Estate of Winston Cabello lacks the legal capacity to sue Defendant under the ATCA. Thus, Plaintiff the Estate of Winston Cabello's claims under Counts I through IV are dismissed.

Order at Page 12. Yet, as personal representative, she now seeks damages for the alleged torture of decedent prior to his death. Section 2(a)(1) of the TVPA expressly and plainly creates a cause of action strictly in favor of the actual victim of torture. This subsection of the TVPA stands in direct contrast to the next statutory provision (Section 2(a)(2)), which specifically and expressly vests a right of action in the "legal representative" of a victim of an extrajudicial killing, or in "any person who may be a claimant in an action for wrongful death."

The TVPA plainly limits standing to bring an action for torture to the individual actually victimized by the torture. Section 2(a)(1) says that an individual committing an act of torture against another individual under actual or apparent authority, or color of law of a foreign state "shall be liable for damages to that individual." (emphasis supplied).

This Court recognized there is no "estate" for a decedent recognized under Chilean law. The decedent's heirs alone under Chilean law "own" all non-pecuniary assets, including claims against third parties. Where a spouse and children survive the decedent, they (to the exclusion of parents and siblings of the decedent) are the heirs under Chilean law and "own" claims against third parties. Yet the heirs are not parties to this action. Despite the legal limitations, Zita Cabello-Barrueto took action to have herself appointed by the probate court as a "personal representative" of the "estate" of the decedent. While this Court recognized standing on a claim for extrajudicial killing, this Court should not extend that ruling to the other claims now added. The fourth, fifth and seventh claims should be dismissed. The personal representative should be restricted to that which the Court has already decided.

CONCLUSION

The allegations of the Second Amended Complaint fail to establish any legal liability of the defendant. Discovery has limited these allegations and it requires this Court to dismiss the Second Amended Complaint.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Dismiss Second Amended Complaint with Prejudice and Memorandum of Law in Support was served by U.S. mail this 2nd day of November, 2001, upon the following:

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