UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-21951-Civ-TORRES

JESUS CABRERA JARAMILLO, in his individual capacity, and in his capacity as the personal representative of the estate of Alma Rosa Jaramillo, Jane Doe, in her individual capacity, and in her capacity as the personal representative of the estate of Eduardo Estrada, and John Doe, in his individual capacity,

Plaintiffs,

v.

CARLOS MARIO JIMENEZ NARANJO, also known as "Macaco," "El Agricultor," "Lorenzo Gonzalez Quinch a," and "Javier Montanez,"

Defendant.
_____/

ORDER ON PENDING MOTIONS

This matter is before the Court in part upon its review of the docket and the pending motions filed by Defendant that are now ripe for disposition. The Court's rulings follow.

A.

Defendant's Motion to Dismiss for Lack of Prosecution [D.E. 83] is **DENIED**. Defendant makes the case that the case should now be dismissed given that no activity has occurred on the docket following the Court's Order reopening the case after having stayed it pending the Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.*

Plaintiffs oppose the motion on the grounds that after the Court lifted its *sua sponte* stay on claims arising under the Torture Victim Prevention Act ("TVPA"), 28 U.S.C. § 1350, note § 2(a), Plaintiffs began working diligently toward propounding discovery related to those claims, including researching and preparing foreign discovery and identifying relevant witnesses. Plaintiffs also claim to have prepared their initial disclosures, and, when the Court issues a scheduling order, Plaintiffs will proceed with their disclosures and their own discovery.

The Court's review of the docket shows that, indeed, Defendant's position is not unfounded. Having reopened the case, Plaintiffs did not take any measures on the docket to move the case forward. Yet, the burden on Defendant to justify outright dismissal of the action is a heavy one. *See, e.g., Navarro v. Cohan,* 109 F.R.D. 86, 88 (S.D. Fla. 1985); *State Exch. Bank v. Hartline,* 693 F.2d 1350, 1352 (11th Cir. 1982); *Hildebrand v. Honeywell, Inc.,* 622 F.2d 179, 181 (5th Cir. 1980); *Cherry v. Brown-Frazier-Whitney,* 548 F.2d 965, 969 (D.C. Cir. 1976).

The record supporting the pending motion does not allow for the Court to find that Defendant's delay in moving their case forward, on the docket at least, was willful or contumacious. Plaintiffs represent in fact that investigation into their allegations has been ongoing in the interim period and that they are prepared to proceed accordingly. There is not a sufficient record of willful or reckless delay that would warrant an extreme sanction. And given the lack of showing of prejudice in the motion, we are loathe to adjudicate the case in this fashion. Instead, we will grant

Defendant alternative relief to allow the matter to proceed more expeditiously, as set forth below.

B.

Defendant's Motion to Reurge and Supplement Previous Filed Motion to Dismiss [D.E. 82] is **DENIED** as moot. This motion seeks to summarily renew arguments previously included in Defendant's motions to dismiss on jurisdictional grounds and motion for dismissal for failure to state a claim. Plaintiffs complain that the motion is procedurally defective.

Ultimately, the better course of action, if Plaintiffs are intent on proceeding with this action, is for a new amended complaint to be filed. That is necessary in light of the *Kiobel* decision, the Court's vacated stay, and the need to determine what exactly Plaintiffs believe they can pursue in this case. If, for example, the Alien Tort Statute claims are now moot after *Kiobel,* then the case should be adjudicated on a slim-downed complaint that strictly addresses what remaining claims are viable. This then allows Defendant to reconsider its previous motion and file appropriate defenses or responses in light of that narrowed complaint. Similarly, Plaintiffs can better plead around any argument that Defendant may want to present that subject matter jurisdiction also is lacking for the TVPA claims given the post-*Kiobel* landscape.

And, of course, if Plaintiffs believe that Alien Tort Statute claims remain viable in this case notwithstanding *Kiobel,* only a better pleaded amended complaint that addresses such issues would survive Rule 12 review in the first place. The original complaint may not be helpful in this regard.

Accordingly, Defendant's motion to summarily renew its earlier motions to dismiss should be Denied, as Plaintiffs suggest, but for the separate reason that the current complaint should be revisited and amended in any event. Upon the filing of an amended complaint that addresses the Court's concerns and the interest of speedy and efficient resolution of this case, as per Fed. R. Civ. P. 1, Defendant will have to respond accordingly as per the Federal Rules.

Plaintiffs shall, therefore, review their claims and file an amended complaint in light of this Order within thirty days.

C.

Defendant's Motion for Pretrial Conference [D.E. 86] is **GRANTED**. The Court will schedule a Rule 16 conference at the same time as it schedules a hearing on any amended pleadings/motions to dismiss when filed. In light of the entry of this Order and the necessity for an amended complaint, the Court will forego scheduling that conference/hearing at this time until all such filings are complete.

DONE AND ORDERED in Miami, Florida, this 29th day of August, 2013.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge