UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 03-20161 CIV-KING

MARIE JEANNE JEAN, in her individual capacity, and as parent and legal guardian for minors VLADIMY PIERRE and MICHELDA PIERRE, and LEXIUSTE CAJUSTE,

Plaintiffs,

v.

CARL DORÉLIEN, and LUMP SUM CAPITAL, LLC a Maryland limited liability company,

Defendants.

_____/

PLAINTIFF LEXIUSTE CAJUSTE'S MOTION TO ALTER OR AMEND JUDGMENT, OR, ALTERNATIVELY, FOR A RULE 54(B) CERTIFICATION

Plaintiff Lexiuste Cajuste ("Cajuste") moves this Court for an order amending the judgment entered on April 6, 2004, or, alternatively, for a Federal Rule of Civil Procedure 54(b) certification.

Under Federal Rule of Civil Procedure 59(e), within ten (10) days of entry of judgment, a party may seek an order altering or amending a judgment. "Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits." See Lucas v. Florida Power & Light Co., 729 F.2d 1300, 1301 (11th Cir. 1984); Osterneck v. E.T. Barwick Industries, 825 F.2d 1521, 1526 (11th Cir. 1987),

aff'd, 489 U.S. 169 (1989). The Court has broad discretion to reconsider an order it has entered. See Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1995). The grounds justifying the court granting a motion to alter or amend a judgment are: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. See CSX Transp., Inc., v. City of Pensacola, 936 F. Supp. 885, 889 n.2 (N.D. Fla. 1995); Sussman, 153 F.R.D. at 694. Cajuste moves under the third prong; specifically, to correct clear error or prevent a manifest injustice .

I. PLAINTIFF CAJUSTE MOVES FOR RELIEF FROM JUDGMENT AND REQUESTS THE COURT CORRECT THE JUDGMENT OR GRANT LEAVE TO AMEND THE COMPLAINT.

On April 6, 2004, a Final Judgment dismissing Cajuste's claims with prejudice was entered after this Court found that his claims pursuant to the Torture Victim Protection Act ("TVPA") and the Alien Tort Claims Act ("ATCA") were barred by a ten (10) year statute of limitations. Cajuste respectfully requests that the Court correct the judgment to provide for the application of equitable tolling. In the alternative, Cajuste respectfully requests that the Court amend its Final Judgment by dismissing Cajuste's claims without prejudice, and provide Cajuste leave to amend the allegations to support an application of the equitable tolling doctrine.

"A complaint may not be dismissed on a motion for judgment on the pleadings 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Florida Evergreen Foliage v. E.I. Du Pont De Nemours & Co., 165 F. Supp. 2d 1345, 1349 (S.D. Fla. 2001) (quoting Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998)), aff'd, 341 F.3d 1292 (11th Cir. 2003). In his response in opposition to Defendant's motion for judgment on the pleadings, Cajuste asserts facts to support application of the equitable tolling doctrine.

Federal law governs equitable tolling issues arising under a federal statute. Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). "'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." Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998) (citation omitted). Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." Young v. United States, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted); see also Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (noting "presumption" that a statute of limitations may be equitably tolled). Plaintiff submits that equitable tolling ought properly to apply in this case and requests that the Court correct the judgment to apply the doctrine and deny Defendant's Motion.

An alternative, should the Court maintain the dismissal of the Amended Complaint, is for the Court to allow the dismissal to be without prejudice. Because it is unclear whether the Court may have rejected the equitable tolling argument made by Plaintiff due to an absence of facts supporting that tolling in the Amended Complaint, Cajuste seeks leave to amend his allegations to show that the earliest he could have brought suit under both the ATCA and TVPA was when Defendant Carl Dorélien ("Dorélien") entered the United States in January 1995. If Cajuste had filed suit against Dorélien prior to January 1995, federal courts would not have had personal jurisdiction over Dorélien. See S. Rep. No. 102-249, at 10-11 (1991) (stating as to the TVPA that "[t]he statute of limitations should be tolled during the time the defendant was absent from the United States...."); see also Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996)(citing the Senate Report on the TVPA for authority that the limitations period pertinent to ATCA claims

against former Philippine dictator Ferdinand Marcos were tolled, in part, due to "periods in which the defendant was absent from the jurisdiction").

Cajuste also seeks to amend his allegations to show that, without endangering the lives of his close relatives, he could not have filed suit before October 15, 1994, the date the Haitian military regime left power and a democratic regime was reinstalled in Haiti. See Estate of Cabello v. Ferdinand-Larios, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001)(equitable tolling applies during rule of Chilean military authorities); see also Hilao, 103 F.3d at 773 (same as to period during which Philippines' Ferdinand Marcos ruled).

By amending the Final Judgment as to Cajuste to allow Plaintiff leave to amend the Complaint, the Court will ensure that a full and fair view of the facts is available to the Court and the issues properly framed for consideration of the applicability of the equitable tolling doctrine.

II. IN THE ALTERNATIVE, CAJUSTE SEEKS A RULE 54(B) CERTIFICATION.

"A judgment that eliminates fewer than all the . . . parties is not a final, appealable judgment; thus an order dismissing one plaintiff, but not others, is not immediately appealable by the dismissed plaintiff." Citizens Concerned About Our Children v. Sch. Bd. Of Broward County, Fla., 193 F.3d 1285, 1289 (11th Cir. 1999) (interpreting Rule 54(b)). There is, however, a vehicle under which a dismissed party may obtain a judgment that is immediately appealable. That vehicle is through a Federal Rule of Civil Procedure 54(b) Certification.

Under Rule 54(b), "[w]hen . . . multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the . . . parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). "A judgment properly may be certified under the terms of Rule 54(b) only if it possesses the requisite degree of finality." In re Southeast Banking

Corp., 69 F.3d 1539, 1547 (11th Cir. 1995). A judgment may be certified for immediate appeal under Rule 54(b), if it dismisses a party entirely. Id. (citation omitted).

The April 6 Judgment is a Final Judgment on all of Cajuste's claims; therefore, the Judgment satisfies the "finality" requirement for Rule 54(b) certification. Accordingly, Cajuste respectfully requests that, pursuant to Rule 54(b), the Court certify its Final Judgment for immediate appeal by finding: that Cajuste's suit could be treated as a separate action from Marie Jeanne Jean's ("Jean") case because a final determination of Jean's suit would not affect Cajuste's claims and there is no just reason to delay a final determination of these claims. See Cygnar v. City of Chicago, 659 F. Supp. 320, 324 (N.D. Ill. 1987), aff'd in part and rev. in part, on other grounds, 865 F.2d 827 (7th Cir. 1989).

WHEREFORE Cajuste respectfully requests that the Court amend it Final Judgment as set forth above, or, alternatively, certify the Final Judgment for immediate appeal.

Respectfully submitted.

HOLLAND & KNIGHT, LLP
Dwayne E. Williams, Esq.
Fla. Bar. No. 0125199
701 Brickell Avenue, Suite 3000
Miami, Florida 33131
Tel.: (305) 374-8500
Fax.: (305) 789-7799
Email: dwwillia@hklaw.com

Thomas E. Bishop, Esq.
(Admitted *Pro Hac Vice*)
Fla. Bar. No. 956236
50 N. Laura Street, Suite 3900
Jacksonville, Florida 32202
Tel: (904) 353-2000
Fax: (904) 358-1872
Email: tbishop@hklaw

MATTHEW EISENBRANDT
(Admitted *Pro Hac Vice*)
The Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456
Email: meisenbrandt@cja.org

JOHN ANDRES THORNTON
(Florida Bar No. 0004820)
9 Island Avenue #2005
Miami Beach, FL 33139
Tel.: (305) 532-6851
Fax: (305) 532-6851
Email: johnandresthornton@hotmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiff Lexiuste Cajuste's Motion To Alter Or Amend Judgment, Or, Alternatively, For A Rule 54(B) Certification was served by U.S. Mail this ____ day of April, 2004 to: Kurt Klaus, Esq., Law Offices of Kurt R. Klaus, Jr., 3191 Coral Way, Suite 402-A, Miami, FL 33145, attorney for Defendant Carl Dorélien; Scott M. Behren, Esq., attorney for Defendant Lump Sum Capital, LLC.

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Dwayne E. Williams

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