UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KEMAL MEHINOVIC, SAFET HADZIALIJAGIC, MUHAMED BICIC, and HASAN SUBASIC

Plaintiffs,

v.

NIKOLA NIKOLAC, a/ka/ NIKOLA VUCKOVIC,

Defendant.

CIVIL ACTION FILE

NO. 1:98-CV-2470-WBH

ORDER

Before the Court are defendant's motion to dismiss [4], plaintiffs' motion to amend the complaint [13], and plaintiffs' motion to amend the pretrial order and to re-open discovery [17]. Plaintiffs seek compensatory and punitive damages against defendant Nikola Vuckovic alleging genocide; war crimes and crimes against humanity; torture; cruel, inhuman or degrading treatment; arbitrary detention; assault and battery; false arrest and false imprisonment; and intentional infliction of emotional distress. Plaintiffs bring these claims under a host of laws, agreements, resolutions, and treaties, including customary international law; United Nations charters and documents; the Geneva Conventions; the Alien Tort Claim Act; the Torture Victim Protection Act (the "TVPA"); United States common law; Bosnia and Herzegovina laws; and the laws of the State of Georgia. The Court

has jurisdiction under 38 U.S.C. §§ 1331 and 1350, and under supplemental jurisdiction of the state law claims.

I. BACKGROUND

Plaintiffs are Bosnian Croat or Muslim citizens now living in Atlanta. They allege that from May 1992 until November 1992 defendant and others operating with Serbian governmental authority, detained and repeatedly tortured them in the town of Bosanki Samac. Defendant Nikola Nikolac, a/k/a Nikola Vuckovic, was a solider in the Bosnian Serb army under the command of Simo Zaric, who has been indicted in the Hague for war crimes. With the exception of plaintiff Kemal Mehinovic, none of the plaintiffs apparently saw Nikolac after November 1992. Mehinovic was released on October 6, 1994, in a United Nations-sponsored prisoner exchange. He immigrated to the United States in 1995, and, in early 1998, Mehinovic first learned that Nickolac was also living in the Atlanta area. Mehinovic filed this suit on August 20, 1998. After filing suit, Mehinovic contacted the other putative plaintiffs allegedly detained and tortured by defendant and requested that they join in the suit.

II. DISCUSSION

A. Motion to Amend

Plaintiff Mehinovic seeks leave to amend his complaint to join putative plaintiffs Safet Hadzialijagic, Muhamed Bicic, and Hasan Subasic and to add the claim of conspiracy

to violate plaintiffs' human rights. Defendant does not oppose the amendment; accordingly, the motion to amend is hereby granted.

B. Motion to Dismiss

Defendant moves for dismissal of all claims on the grounds that they are time barred by Georgia's two year statute of limitations. The international laws and treaties which plaintiffs claim defendant violated do not themselves provide a private cause of action. Instead, the cause of action is conferred by either or both the TVPA and the Alien Tort Claims Act. The Alien Tort Claim Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," and confers both jurisdiction and a private right of action. 28 U.S.C. § 1350; see also Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir.), cert. denied, 519 U.S. 830, 117 S. Ct. 96, 136 L. Ed.2d 51 (1996); Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995), cert. denied, 518 U.S. 1005, 116 S. Ct. 2524, 135 L. Ed.2d 1048 (1996); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1474-75 (9th Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed.2d 879 (1995). The TVPA is codified as a note to the Alien Tort Claims Act. See 28 U.S.C. § 1350, note. And, unlike the Alien Tort Claims Act, it provides an explicit statute of limitations period, defined as "10 years after the cause of action arose." Id. at 1350, note § 2(c).

Both parties urge the Court to determine the applicable statute of limitations for the Alien Tort Claims Act. Defendant argues that the Court should apply the general rule and [illegible] statute of limitations governing state tort claims. See Wilson v. Garcia,

471 U.S. 261, 266, 105 S. Ct. 1938, 1942, 85 L. Ed.2d 254 (1985). Plaintiffs, on the other hand, contend that the TVPA provides a cause of action for all alleged claims and, alternatively, this is the special case where a federal statute, the TVPA and not state law, offers the best analogy to the Alien Tort Claim Act. See DelCostello v. Teamsters, 462 U.S. 151, 158, 103 S. Ct. 2281, 2287, 76 L. Ed.2d 476 (1983) (noting that in some circumstances, a borrowing of a federal statute of limitation may be best). The Court, however, need not decide whether the TVPA is broad enough to encompass all plaintiffs' claims and, if not, which statute of limitations applies to which claims because regardless of which statute of limitations applies, this suit is timely. Of course, since this action commenced within ten-years of plaintiffs' alleged torture and imprisonment, the suit would clearly be timely should the TVPA limitations period apply. And, even assuming that Georgia's two-year statute of limitations applies, equitable tolling would step in and save this suit. Georgia law tolls a statute of limitations where a defendant is out of the state and beyond the reach of process. O.C.G.A. § 9-3-94; see Towns v. Brown, 399 S.E.2d 926 (Ga. Ct. App. 1986). While the defendant did not remove himself from jurisdiction in this case, that difference is one without distinction. Under § 9-3-94, the plaintiffs must be completely unable to perfect service, either because the defendant's whereabouts were unknown or because service was procedurally impossible. For example, in Gould v. Latorre, 488 S.E.2d 116 (Ga. Ct. App. 1997), the limitations period was not tolled because the plaintiff knew the defendant's Cayman Islands address and could have perfected service under the state's Long Arm Statute. Id. at 118; see also Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) (refusing to find tolling where the plaintiff knew defendant's address). In this case,

defendant was a solider serving during active war and, after the conflict, plaintiffs were forced to relocate. It is beyond reason to expect that plaintiffs knew of defendant's whereabouts. Further, even if defendant's address were known, service of process ... still be impossible because Georgia's Long Arm Statute does not provide jurisdiction under the facts of the instant case. Instead, defendant is subject to the Court's authority only because he is physically within its boundaries.

Although tolling cannot apply contrary to congressional intent, see Hill v. Texaco, Inc., 825 F.2d 333, 334 (11th Cir.1987), no such concern is present here. In enacting the TVPA, the statute most similar to the Alien Tort Claim Act, Congress noted that tolling is appropriate "during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by plaintiff." (S. Rep. No. 249, 102d Cong., 1st Sess. (1991)). Accordingly, the Court finds that the statute of limitations was tolled until early 1998, when plaintiffs first discovered defendant's whereabouts, and thus finds that no claim is time-barred. Defendant's motion is hereby denied.

C. Motion to Amend the Pre-Trial Order and Reopen Discovery

Plaintiffs seek to amend the pre-trial order to add a new expert witness, to submit more detailed expert reports, and to compel defendant to submit a more detailed expert report. They also seek to reopen discovery for the purpose of taking expert witness depositions. Local Rule 26.3 requires that expert witnesses be designated "early in the discovery period to permit the opposing party the opportunity to depose the expert and, if

desired, to name its own expert sufficiently *in advance of the close of discovery.*" L.R. 26.3 (N.D. Ga. 1997) (emphasis added). In this case, discovery closed before plaintiffs identified Peggy Hicks, the expert whom they wish to now add. Plaintiffs do not offer any reason why they did not comply with the Local Rules; accordingly, their request to add Hicks is denied. Plaintiffs also seek to submit more detailed expert reports. A party must supplement an expert report where it "learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1). Defendant argues however that plaintiffs have never provided him the basic information required under Federal Rule of Civil Procedure 26. Because neither party submitted the experts' reports exchanged to date, the Court has little to go by. Plaintiffs, however, have not replied to defendant's contention that they have fallen short of the disclosure requirements dictated under Rule 26.

Plaintiffs do indicate that parties exchanged only "cursory reports" on their experts. They also state that no detailed contact information was provided defendant because of fear of retaliation. They argue that they informed defendant that they would provide that information upon his request but that he never inquired. This however shifts the burden of disclosure from the plaintiff to defendant without justification. If plaintiffs would disclose the required information merely upon request, they cannot now be heard to offer fear of retaliation as an excuse for non-compliance with the Rules. If such fear existed, a protective order shielding the information could have been entered. Instead, plaintiffs only now wish to supply initial discovery material. Accordingly, the Court denies plaintiffs' request to

supplement and to reopen discovery. Finally, plaintiffs seek to compel defendant to supplement his expert's report. Defendant however indicates that he will forego presenting expert testimony and, thus, plaintiffs' request to compel is moot.

III. CONCLUSION

For the above reasons, the Court GRANTS plaintiffs' motion to amend the complaint [13], DENIES plaintiffs' motion to amend the pre-trial order and to reopen discovery [17], and DENIES defendant's motion to dismiss [4].

It is so ORDERED this 9 day of September, 1999.

Willis B. Hunt, Jr.
Judge, United States District Court