UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-8364 Civ-Hurley/Lynch

JUAN ROMAGOZA ARCE, NERIS GONZALEZ, and CARLOS MAURICIO

Plaintiffs,

v.

JOSE GUILLERMO GARCIA, an individual, CARLOS EUGENIO VIDES CASANOVA, an individual, and DOES 1 through 50, inclusive,

Defendants.

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' UNTIMELY PRETRIAL MOTIONS

I. INTRODUCTION

More than two years after this case was filed, and five months after it was scheduled to go to trial, defendants have flooded this Court with thirty-two (32) boilerplate motions, virtually all of which were previously filed — and denied — in another case, or even in *this case*.[1] Defendants' filings were made in three separate waves, with little or no modification from versions already filed save for altering the captions and labeling the motions as "Motions to Dismiss" under Federal Rule of Civil Procedure ("FRCP" or "Rule") 12(b), or "Motions for Judgment on the Pleadings" (or "Motion

[1] The other case was *Ford v. Garcia*, No. 99-8359 CIV-Hurley (U.S.D.C. S.D. Fla.), in which defendants Garcia and Vides Casanova were sued by the survivors of three American nuns and a lay missionary, who were murdered by members of the Salvadoran National Guard in 1980 (the "Churchwomen's case").

for Failure to State a Claim") under Rule 12(c). Incredibly, for each motion to dismiss that defendants have filed in this action, they have also filed at least one *identical* motion for judgment on the pleadings. The end result of this blizzard of paper is to needlessly burden (not to mention confuse) plaintiffs and the Court.

The simple fact is that all of these duplicative motions are untimely and barred on their face, both because defendants have already answered plaintiffs' Second Amended Complaint (on April 10, 2000), and because the deadline for filing substantive pretrial motions expired well over eight months ago. Moreover, only two of defendants' motions were not previously filed and rejected in the *Ford* case, in one form or another, clearly justifying this Court in rejecting them out of hand.[2] For the Court's convenience, attached to this motion as Attachment A is a table setting out the numerous duplicative motions defendants have recently filed in this action.

The purported motions for judgment on the pleadings, further, do not really seek judgment on the pleadings — indeed, they do not even *mention* the pleadings.[3] They are merely duped versions of motions to dismiss under Rule 12(b), renamed in a transparent attempt to avoid summary dismissal. Not surprisingly, these motions fall far short of meeting the standard under Rule 12(c) for obtaining judgment on the pleadings.

In fact, as Attachment A clearly shows, the sole reason for defendants to bring these motions on the eve of trial is to harass plaintiffs and to disrupt their preparations by forcing them to respond to thirty-two (32) frivolous and duplicative motions. For this reason, as well as the others set out in

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[2] Only two of defendants' motions were not previously filed and rejected in the *Ford* case: defendants' Motion for Lack of Subject Matter Jurisdiction under Customary International Law (filed as a Motion to Dismiss, Motion for Failure to State a Claim, and Motion for Judgment on the pleadings), and defendants' Motion to Dismiss and for Judgment on the Pleadings for Failure to Allege Command Responsibility. Plaintiffs object to these motions as being untimely and procedurally barred as well, but nevertheless will prepare substantive responses to these belated motions.

[3] The only two motions that even mention plaintiffs' Complaint and the pleadings in this case are the motions for lack of subject matter jurisdiction under customary international law and the motions for failure to allege command responsibility. Plaintiffs are preparing a substantive response to each of these motions.

detail below, all of defendants' motions should be stricken summarily or denied. In the alternative, if the Court does not strike summarily or deny these motions, plaintiffs request an extension of twenty days from the date of the upcoming November 14, 2001 Status Conference to prepare substantive responses to any motions not stricken or denied.

II. BACKGROUND

This is a civil action for compensatory and punitive damages for torts committed in violation of international and domestic law. Plaintiffs, refugees from El Salvador now living in the United States, instituted this action under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, against defendants Jose Guillermo Garcia, Minister of Defense and Public Security of El Salvador from approximately October 1979 to April 1983, and Carlos Eugenio Vides Casanova, Director-General of the National Guard of El Salvador from approximately October 1979 to April 1983, and subsequently Minister of Defense and Public Security of El Salvador from 1983 to 1989. Plaintiffs allege that under the doctrine of command responsibility, defendants are responsible for the harms inflicted on them by members of the Salvadoran Military and/or Security Forces.

Plaintiffs originally filed this suit on May 11, 1999. Plaintiffs subsequently filed a Second Amended Complaint ("Complaint") on February 17, 2000, which remains as the operative Complaint. Defendants answered the Second Amended Complaint on April 10, 2000. Defendants filed an Amended Answer to the Complaint on October 18, 2001, without leave of court or consent from plaintiffs. Concurrent with this motion, plaintiffs have filed a motion to strike defendants' Amended Answer for violating FRCP 15(a).

On February 23, 2000, this Court issued a Scheduling Order setting trial for May 7, 2001, and requiring that all substantive pretrial motions be filed 90 days before the May 7 trial date. That deadline passed on February 6, 2001. On June 27, 2001, the Court reset the trial date in this case *sua sponte* for January 2, 2002. The Court did not extend the deadline for filing substantive pretrial motions, and defendants have not sought any such extension. Defendants filed the instant pretrial

motions between October 19, and October 26, 2001, well over eight months after the deadline to file substantive pretrial motions expired and after they answered the Complaint.

III. ARGUMENT

A. The Court May Strike or Summarily Deny All of Defendants' Repetitive and Frivolous Motions

Courts routinely grant motions to strike a variety of later-filed papers, including declarations and patently barred motions, as well as evidence that is facially insufficient, redundant, immaterial, impertinent or scandalous. *See, e.g., Harrison v. City of Tampa,* 247 F. 569, 573 (S.D. Fla. 1918) (granting motion to strike declaration); *United States v. Parker,* 182 F.R.D. 661, 664 (S.D. Ga. 1998) (summarily denying duplicative motions and enjoining plaintiff from filing further duplicative and frivolous motions); *Cobb v. Hulsey,* 216 B.R. 676, 679 n.3 (Bankr. M.D. Fla. 1998) (striking debtor's duplicative motion to dismiss, and dismissing debtor's action for litigating in bad faith.) Courts may also summarily deny vexatious motions pursuant to the global mandate under Rule 1 that the Federal Rules shall be construed, and applied, "to secure a just, speedy, and inexpensive determination of every action." FRCP 1; *see also, Carss v. Outboard Marine Corp.,* 252 F. 2d 690, 691 (5th Cir. 1958) (under the Federal Rules, civil cases are to be tried on proof rather than on the pleadings).

Here, defendants' frivolous and duplicative motions challenging the pleadings are intended solely to delay trial and harass the plaintiffs. Therefore, the Court may properly strike these motions. In addition, because the motions are barred on their face, the Court may summarily deny plaintiffs' motions.

B. The Court Should Strike Summarily or Deny All Thirty Two Substantive Pretrial Motions As Untimely

Defendants' motions are untimely. The deadline for filing substantive pretrial motions came and went on February 6, 2001. *See* Order dated February 23, 2000.[4] Defendants filed their motions

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[4] For the Court's convenience, a copy of this Order is attached as Exhibit J to Plaintiffs' Notice of Exhibits in Support of Motion to Strike Defendants' Untimely Pretrial Motions ("Notice of Exhibits").

over eight months after the cut-off date, and in direct contravention of this Court's Scheduling Order. Defendants offer no good cause for the delay, nor did they file for leave to amend the trial schedule.[5] Accordingly, all of the instant motions should be summarily denied. *Sea-Land Servs., Inc. v. D.I.C., Inc.*, 102 F.R.D. 252, 253-4 (S.D. Tex. 1984) (dismissing as untimely Rule 12(c) motion filed nearly seven months after cut-off for filing motions had passed).

C. Defendants' Motions to Dismiss Are Barred by Rule 12(b)[6]

The Federal Rules of Civil Procedure are clear. A defendant may not bring a Rule 12(b) motion after the defendant answers the Complaint. As this Court itself noted in rejecting the identical motions filed by defendants in the *Ford* case:

> After filing their amended answer, defendants filed twelve (12) separate motions to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, despite the fact that Rule 12 requires that 12(b) motions to dismiss be filed prior to answering the Complaint. *See* Fed. R.Civ.P. 12(b) ("A motion making any of these defenses shall be made before pleading if a further pleading is permitted.") Because defendants' motions to dismiss, except their motions to dismiss for lack of subject matter jurisdiction and failure to state a claim are untimely, they will be denied.

See Notice of Exhibits, Ex. B (August 29, 2000 Order Denying Defendants' Motion to Dismiss as Untimely). Here, defendants answered the Complaint on April 10, 2000, and filed an Amended Answer on October 18, 2001. Even if the Court were to consider the October 18, 2001 Amended Answer as the operative pleading, defendants have filed their motions after answering the Second Amended Complaint. Therefore, defendants' 12(b) motions are barred as a matter of law. *See Brisk v. City of Miami Beach*, 709 F. Supp. 1146, 1147 (S.D. Fla. 1989) (once defendants file their answer it becomes procedurally impossible for the Court to rule on motions to dismiss); *Paul v.*

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[5] Assuming *arguendo* that the filing of these motions may be construed as a motion to amend the pre-trial schedule, defendants fail to show cause why the schedule could not "reasonably be met despite the diligence of the party seeking the extension." FRCP 16(b) (commentary to the 1983 amendment).

[6] The following are the docket numbers for defendants' belated motions to dismiss: 132-4, 136-7, 139-40, 143, 145, 147, 149, 158-60 and 165.

McGhee, 577 F. Supp. 460, 462 (E.D. Tenn 1983) (motions to dismiss filed after the answer is filed are moot).

D. The Court Should Strike Defendants' Purported Motions for Judgment on the Pleadings[7]

1. The Standard Under FRCP 12(c)

Defendants have the burden of demonstrating that they are entitled to judgment on the pleadings under FRCP 12(c). To prevail, Defendants must "clearly establish that no material issue of fact remains unresolved and that [they are] entitled to judgment as a matter of law." *Thunderwave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1564 (S.D. Fla. 1997). For purposes of these motions, all of the allegations in plaintiffs' Complaint must be accepted as true. *Bryan Ashley Int'l, Inc. v. Shelby Williams Indus., Inc.*, 932 F. Supp. 290, 291 (S.D. Fla. 1996) (under Rule 12(c), "the district court must view the facts presented in the pleadings, and all inferences drawn thereof; in the light most favorable to the non-moving party"). Federal district courts have applied a "fairly restrictive standard in ruling on motions for judgment on the pleadings." *Id.* (*citing* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (1990)). Accordingly, defendants' motions must be denied unless it appears "*beyond doubt*" that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957) (emphasis added).

2. Defendants' Purported Motions for Judgment on the Pleadings Do Not Come Close To Meeting The Strict Rule 12(c) Standard For Obtaining Judgment On The Pleadings.

In a blatant attempt to avoid summary dismissal under Rule 12(b), defendants have taken their untimely and rehashed motions to dismiss under Rule 12(b) and merely relabeled those same motions as motions for judgment on the pleadings under Rule 12(c). Not surprisingly, with the exception of the two motions not filed in the *Ford* case (and for which plaintiffs will file a substantive response),

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[7] The following are the docket numbers for defendants' purported motions for judgment on the pleadings: 135, 138 (also labeled as a motion for failure to state a claim), 142, 144, 146, 148, 150-57 and 161-64.

defendants in their purported "Motions for Judgment on the Pleadings" fail to analyze — or even cite — the pleadings on which they ostensibly seek judgment. Thus, the defendants have failed to take even the elementary step of attacking plaintiffs' pleadings. *See Jones v. NordicTrack, Inc.*, 236 F.3d 658, 659 (11th Cir. 2000) (per curiam) ("Judgment on the pleadings is appropriate when no issues of material fact *are raised in the pleadings* . . . .") (emphasis added). Plaintiffs have adequately pled sufficient allegations in the Complaint. Defendants do not dispute this in their purported "Motions for Judgment on the Pleadings." Plaintiffs' unrebutted and unchallenged allegations, thus, must be accepted as true for purposes of these motions and defendants' motions for judgment on the pleadings must therefore be summarily denied. *See Thunderwave, Inc.*, 954 F. Supp. at 1564.

E. Defendants' Frivolous and Duplicative Filings are Sanctionable Under Federal Law

Although plaintiffs are not seeking sanctions at this point, it is well-settled that defendants' flurry of patently barred motions on the eve of trial is subject to sanctions at the Court's discretion for delaying the trial proceedings and wasting plaintiffs' and the Court's limited resources. 28 U.S.C. § 1927 provides that "any attorney … who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *See Thomas America Corp. v. Fitzgerald*, 175 F.R.D. 462, 465-466 (S.D.N.Y. 1997) (finding that counsel's filing of a motion to dismiss on the eve of trial was sanctionable under Section 1927 because the motion was patently barred on its face and because "this motion was brought to the court's attention long after the pleadings and dispositive motions had been filed [was] further evidence that it was meant solely for the purposes of delay"); *In re Prudential Ins. Co.,* 63 F.Supp.2d 516, 518, 520 (D.N.J. 1999) (upholding sanctions against a law firm under Section 1927, *inter alia,* for "bombarding the court with paper" by filing twenty-four motions at once).

In fact, other than to delay the proceedings and harass the plaintiffs to prevent them from adequately preparing for the upcoming trial, there is no apparent reason to justify the filing of over thirty pretrial motions on the eve of trial, particularly given that all of the motions are duplicative of

other motions filed, all are barred on their face, all but two were summarily denied in a previous case (but were nevertheless filed unaltered in this action), and at least three of these motions already have been considered and explicitly rejected by the Court in this case. Under these circumstances, sanctions would clearly be warranted if sought and may be imposed at the Court's discretion *sua sponte*. *Prop. Mgmt. & Invs., Inc. v. Johnson*, 69 B.R. 310, 312 (Bankr. M.D. Fla. 1987) (monetary sanctions imposed for filing multiple duplicative motions); *United States v. Parker,* 182 F.R..D. at 664, n. 4 (imposing sanctions and enjoining plaintiff from filing further duplicative and frivolous motions after plaintiff filed multiple identical copies of different motions); *Chauvet v. Local 1199, Drug, Hosp. & Health Care Employees Union*, No. 96 Civ. 2934, 1996 U.S. Dist. LEXIS 17080, at *58-59 (S.D.N.Y. November 18, 1996) (sanctioning party for refiling papers previously rejected by a court where no effort was made to change even the caption and case number, or to address judicial criticisms).

F. In the Event the Court Does Not Summarily Strike or Deny Defendants' Pretrial Motions, Plaintiffs Request Additional Time To Respond Substantively to Defendants' Voluminous Motions.

Defendants have sought to figuratively bury plaintiffs with paper on the eve of trial, seeking apparently either to derail plaintiffs' trial preparation to further delay resolution of these proceedings. In light of the sheer volume of motions defendants have filed, and in the event the Court is not inclined to strike summarily or deny defendants' motions as procedurally barred on their face, plaintiffs request 20 days from the date of the November 14th Status Conference to prepare substantive responses to the motions not stricken or denied.

IV. CONCLUSION

For the reasons stated herein, plaintiffs respectfully request that this Court strike or summarily deny defendants' motions to dismiss and motions for judgment on the pleadings, or, in the alternative, grant plaintiffs' request to extend the time to respond to defendants' voluminous and belated motions.

Dated: November __, 2001

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to KURT R. KLAUS, Jr., Esq., Law Offices of Kurt R. Klaus, Jr., 3191 Coral Way Suite 502, Miami, FL 33145, by U.S. Mail this ___ day of November, 2001.

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