

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, ET AL.

Plaintiffs,

v.

MOHAMED ALI SAMANTAR

Defendant.

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Civil Action No. 1:04 CV 1360

**DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION FOR LEAVE TO
FILE ADDITIONAL AUTHORITY**

INTRODUCTION

Defendant Mohamed Ali Samantar ("Defendant"), by and through undersigned counsel, Spierer & Goldbrg, P.C. and Shaughnessy, Volzer & Gagner, P.C., respectfully submits this Reply to Plaintiffs' Response to Motion for Leave to File Additional Authority ("Plaintiffs' Response").

ARGUMENT

Plaintiffs criticize the decision of the 11th Circuit in Arce v. Garcia, No. 02-144427, 2005 U.S. App. Lexis 3505 (11th Cir. 2005) on the grounds that the appellate panel wrongly construed the circumstances under which the statute of limitations may be tolled on equitable grounds. As here relevant, the court in Arce determined that neither continuing domestic turmoil in El Salvador, the country where the alleged wrongdoing in that matter occurred, nor the defendants' absence from the United States alone constituted the kinds of extraordinary circumstances that excused the plaintiffs from bringing their suit within the limitations period. Arce at *16-*18, *23-*26.

In their critique, Plaintiffs do not take direct issue with the Arce court's reasoning that domestic unrest will support a claim for equitable tolling only where the defendants or their agents can be shown to have had a role in fomenting or prolonging that unrest. See generally, Plaintiffs' Response; Arce at *16-*17. Plaintiffs instead merely assert as a general proposition that equitable tolling should be available in instances other than those in which the defendants can be shown to have engaged in "affirmative misconduct." Plaintiffs' Response at 7. Plaintiffs also repeat from their complaint the circumstances in Somalia that allegedly discouraged Plaintiffs from filing their complaint within the limitations period. Plaintiffs' Response at 10.

Defendant left Somalia no later than February 1991, and there is no allegation that he contributed to any unrest thereafter. Affidavit of Defendant, Mohammad Ali Samantar at ¶ 9 ("Samantar Affidavit") (Exhibit 1 attached to Memorandum of Law In Support of Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, Failure to State a Claim Upon Which Relief Can Be Granted). The Arce court's reasoning, not directly challenged by Plaintiffs, would accordingly have any tolling on account of civil disturbance end in 1991.

Plaintiffs reserve their main reproof for the Arce court's holding that the statute of limitations does not automatically toll during a defendant's absence from the United States. Plaintiffs' Response at 6-9, Arce at *23-*26. The Arce court's reasoning sufficiently refutes Plaintiffs' contentions and requires little amplification. Arce at *23-*26. Defendant would only add that Plaintiffs' heavy reliance on the discussion of equitable tolling in the Senate Report accompanying the Senate Judiciary Committee version of the TVPA is misplaced. Plaintiffs' Response at 3-4. The Senate committee bill, the subject of the Senate Report, provided the following as to relief from the statute of limitations: "All principles of equitable tolling, however, shall apply in calculating this limitations period." S. 313, § 2(c) (Senate Judiciary

Committee amendment in the nature of a substitute), printed in S. Rep. No. 249, 102d Cong., 1st Sess. at 1 (1991). This statutory language was however stricken from the bill as finally passed.

The House Report which accompanied the version of the bill that was ultimately enacted and that contained no reference to equitable tolling also recognized the possible availability of equitable tolling to extend the statute of limitations. The House Report, though, described these circumstances in language much closer to the language used by the Arce court. Citing only instances of defendant actions that may have impeded a plaintiff from bringing suit within the limitations period, the House Report noted: "In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, equitable tolling remedies may apply to preserve a claimants rights." H.R. Rep. No. 367, pt. 1, 102d Cong., 1st Sess. at 5 (1991). The narrow compass of the circumstances referenced by the House Report reflects the absence of any special recognition ultimately given to equitable tolling in the TVPA as enacted and the more usual practice as to equitable tolling recognized by the Arce court and by other circuits.¹ See e.g. Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) ("[A]ny

¹ Plaintiffs misconstrue the general standard applied by the Arce and the Eleventh Circuit generally in determining the availability of equitable tolling. The Arce court most assuredly did not limit such availability, as Plaintiffs assert, to circumstances where "the defendant had engaged in affirmative misconduct as to that particular lawsuit." Plaintiffs' Response at 1. Indeed the Court expressly noted equitable tolling would be appropriate under circumstances, whether or not resulting from the defendant's misconduct, that were "beyond [the plaintiff's] control and unavoidable even with diligence." Arce at *13. Moreover, the panel of the Eleventh Circuit that decided another ATCA and TVPA case two weeks after the Arce decision specifically approved of the Arce ruling but distinguished the Arce holding on the facts of the two cases. Cabello v. Fernandez-Larios, No. 04-10030, 2005 U.S. App. LEXIS, 4216, *5 (11th Cir. 2005). In Cabello, the court found equitable tolling to be appropriate because of misconduct that concealed the existence of torture. This misconduct, as Plaintiffs take pains to note, was not committed by defendant. It was however committed by defendant's employer, the Government of Chile, which the court found to be a co-conspirator. Id. Under the reasoning of Arce and Cabello, it is likely, though, that the Cabello plaintiffs would have been found to be entitled to equitable tolling even if the wrongful concealment had been committed by an unrelated party.

invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.").

A rejoinder is also needed to Plaintiffs' suggestion, not relevant to the facts in Arce but very relevant in the instant action, that the statute of limitations is tolled any time defendants reside outside the United States even if, during such times, they may be amenable to suit in a third country under a law similar to the TVPA. Plaintiffs, in support of their assertion that mere non-residence in the United States tolls the statute, cite the following fragment of a sentence from the Senate Report: "The statute of limitation should be tolled during the time the defendant was absent from the United States." Plaintiffs' Response at 6, quoting S. Rep. No. 249, 102d Cong., 1st Sess. at 10-11 (1991). The Plaintiffs omit to quote the full sentence which has significance here because Defendant resided in Italy from February 20, 1991 to June 25, 1997. Samantar Affidavit at ¶ 9. In its entirety the sentence from the Senate Report reads:

The statute of limitation should be tolled 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 the plaintiff, provided that the remedy in that jurisdiction is adequate and available.

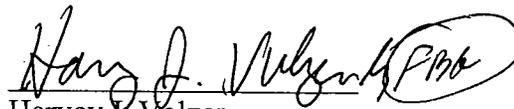
S. Rep. No. 249, 102d Cong., 1st Sess. at 10-11 (1991) (emphasis supplied).

Defendant has established that an action similar to the instant one could have been brought by Plaintiffs against Defendant in Italy during the full time of Defendant's residency in that country and that such action would have afforded Plaintiffs remedies that were adequate and available. Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss for

Lack of Personal Jurisdiction, Failure to State a Claim Upon Which Relief Can Be Granted, and Lack of Subject Matter Jurisdiction at 9-10. Accordingly, if Plaintiffs are entitled to any equitable tolling of the statute of limitations due to Defendant's effective immunity from suit, that tolling had to cease no later than February 20, 1991. The ten-year statute of limitations had thus run by the time the instant action was commenced in 2004.

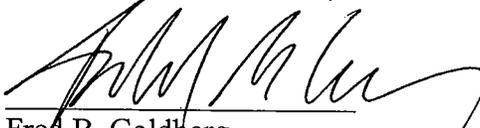
WHEREFORE, Defendant respectfully requests that this Court enter an ORDER permitting Defendant to file the additional authority and that the Court consider the reasoning of Arce in its ruling on Defendant's Motion to Dismiss.

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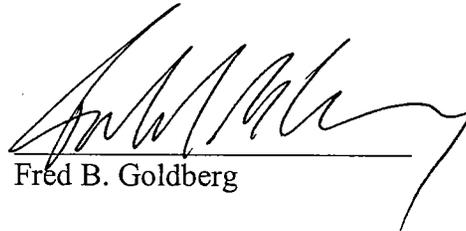
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CERTIFICATE OF SERVICE

I, Fred B. Goldberg, hereby certify that on this 4th day of April, 2005, I caused to be served a true and correct copy of the foregoing reply to Defendant's Reply to Plaintiffs' Response to Motion for Leave to File Additional Authority, by first-class U.S. Mail, postage pre-paid, on the following:

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