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RE: Our File No. 25514
Jose Oscar Chavez, Ana Patricia Chavez, et al v. Nicolas Carranza
U.S. D.C. No. 03-2932 MIP

Counselors:

I am forwarding to you at this time the following pleadings:

1. Motion Of Defendant To Dismiss The Complaint and
2. Defendant's Memorandum In Support Of Motion To Dismiss.

Sincerely yours,

NEELY, GREEN, FARGARSON,
BROOKE & SUMMERS



Robert M. Fargarson

RMF/fba
Enclosure

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOSE OSCAR CHAVEZ, ANA
PATRICIA CHAVEZ, HAYDEE
DURAN, CECILIA SANTOS, JOSE
FRANCISCO CALDERON, JANE DOE
I, and JANE DOE II,

Plaintiffs,

VS.

NO. 03-2932 MIP

NICOLAS CARRANZA,

Defendant.

MOTION OF DEFENDANT TO DISMISS THE COMPLAINT

NOW COMES the Defendant, Nicolas Carranza, and files his motion to dismiss the complaint and as ground for such dismissal states:

1. The complaint fails to state a claim upon which relief can be granted to the Plaintiff against the Defendant in this cause.
2. The Defendant states that the claims of the Plaintiffs, if any, are barred by the appropriate Statute of Limitations concerning such allegations and alleged claims, pursuant to "Torture Victims Protection Act of 1991" (Pub. L. 102-256 March 12, 1992, 106 Statute 73)

which limits claim to ten (10) years after the cause of action arose which complaint shows on its face that the acts complained of accrued in 1979-1980 and are barred.

A Tennessee State claim for tortious bodily injury or death is barred one (1) year after the cause of action arose. (See T.C.A. 28-3-104).

3. The claims of the Plaintiffs, Jose Oscar Chavez, Haydee Duran, Cecilia Santos and Jose Francisco Calderon, are not "aliens" entitled to maintain such actions in the Courts of the United States of America.

The Defendant alleges that the Court lacks jurisdiction over the subject matter because the above named Plaintiffs are not "aliens" and therefore not entitled to maintain an action, pursuant to 28 U.S.C. §1350, Alien Tort Claim Act.

4. The Plaintiffs have failed to exhaust their remedies under the laws of El Salvador where the alleged causes of action occurred. The Amnesty Law alleged by the Plaintiffs was not enacted until more than ten (10) years after the occurrences or causes of action alleged by the Plaintiffs occurred and they have not pled any facts about actions taken against the Defendant in El Salvador but simply make the conclusionary statement that the Amnesty Law foreclosed their alleged claims or causes of action.

WHEREFORE, AND FOR ALL OF WHICH, the Defendant prays for an order and judgment of the Court that the complaint be dismissed against him.

Respectfully Submitted,



ROBERT M. FARGARSON (#8420)

Neely, Green, Fargarson, Brooke & Summers
Attorneys for Defendant
65 Union Avenue, 9th Floor
Memphis, Tennessee 38173-0543
(901) 523-2500

CERTIFICATE OF SERVICE

I, Robert M. Fargarson, do hereby certify that a copy of the foregoing Motion was forwarded, via U.S. Mail, postage prepaid, on this the 20th day of January, 2004, to:

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ROBERT M. FARGARSON

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOSE OSCAR CHAVEZ, ANA
PATRICIA CHAVEZ, HAYDEE
DURAN, CECILIA SANTOS, JOSE
FRANCISCO CALDERON,
JANE DOE I, and JANE DOE II,

Plaintiffs,

VS.

NO. 03-2932 MIP

NICOLAS CARRANZA,

Defendant.

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

NOW COMES the Defendant, through his attorneys of record herein, and submits his memorandum of fact and law in support of his Motion to dismiss and respectfully states to the Court the following:

FACTS OF PLAINTIFFS' CLAIM

The Plaintiffs seek damages from the Defendant, Nicolas Carranza, pursuant to the Torture Victims Protection Act enacted in 1992 and codified at 28 U.S.C. §1350 also commonly known as the Alien Tort Claims Act which grants jurisdiction to the United

States Federal Court. The Plaintiffs also claim jurisdiction by reason of 28 U.S.C. §1331 because of the diversity of citizenship.

The claims of the Plaintiffs are alleged to be the result of torture, extra judicial killing, disappearances and arbitrary detention as well as other acts of humiliation and grievous conduct committed by the Salvadorian Armed Forces and in particular Security Forces. The Plaintiffs allege that the Defendant, Nicolas Carranza, as Vice-Minister of Defense and Public Security during the times relevant in 1979 to 1980 or as Director of the Treasury Police, had responsibility over the Security Forces or over the Treasury Police and that he conspired with or aided and abetted subordinates in the Security Forces or Treasury Police in their conduct, or he did nothing about the extra judicial killings and abuses committed by such Police and Armed Forces allegedly under his authority.

The complaint does not allege that the Defendant was directly involved in the killings or other acts of torture or humiliation but that he did not take appropriate action to prevent them or otherwise abetted and aided them.

While other allegations are made those allegations are the central allegations or the gravamen of the Plaintiffs' respective complaints against him.

LAW IN SUPPORT OF MOTION TO DISMISS

The Defendant alleges that the complaint fails to state a claim upon which relief can be granted against him. The reason for this allegation is based upon at least three (3)

specific legal grounds. These three (3) grounds will be taken in the order stated in the motion to dismiss.

1. The Claim Is Barred By The Statute Of Limitations.

The relevant statute of limitations is contained in what is commonly known as the "Torture Victim Protection Act" of 1991 also codified in 28 U.S.C. §1350. Section 2 (c) clearly states the Statute of Limitations which is as follows:

"No action shall be maintained under this section unless it is commenced within ten (10) years after the cause of action arose."

The claims of the Plaintiffs recited in the complaint clearly occurred well over twenty (20) years prior to the commencement of this action in Federal Court. Consequently, no cause of action exists on the part of the Plaintiffs against the Defendant, Nicolas Carranza, because they were not timely made.

2. The Plaintiffs Herein, Namely, Jose Oscar Chavez, Haydee Duran, Cecilia Santos and Jose Francisco Calderon, Are Not Aliens Entitled To Sue.

While the "Alien Tort Claim Act" does not seem to specifically define who constitutes an alien within the meaning of the Act, Chapter 12, Immigration and Nationality in 8 U.S.C. §1101 does define an "alien". The definition of alien is as follows in §1101. Definitions (a)(3):

"The term 'alien' means any person not a citizen or national of the United States."

Since that definition is used in the United States laws concerning immigration and nationality, it would be inconsistent for Congress to use the term "alien" in any other manner in another law unless the law specifically contained a different definition. Consequently, since the immigration and nationality laws are clear expressions and definitions of national identity, they are or should be expressions of the same term used in the act at issue.

Consequently, the complaint show on its fact that Jose Oscar Chavez, Haydee Duran, Cecilia Santos and Jose Francisco Calderon are all citizens of the United States or nationals of the United States as opposed to "aliens". Therefore, they are not in the class of individuals permitted and authorized by statute to bring the claims now before the Honorable Court.

Assuming arguendo that based upon diversity of citizenship, the Plaintiffs claim some state rights for alleged tortious conduct on the part of the Defendant, Plaintiffs' claims are barred under the law of the State of Tennessee, pursuant to Tennessee Code Annotated 28-3-104. Personal tort actions which states as follows:

"(a) the following action shall be commenced within one (1) year after the cause of action accrued:

(1) Actions for liable, injuries to the person, false imprisonment, malicious prosecution, breach of marriage promise:"

(Emphasis Added)

...

“(3) Civil actions for compensatory or punitive damages, or both, brought under the Federal Civil Rights Statute: ”

...

“(1) The cause of action for injury to the person shall accrue on the date of the personal injury, not the date of the negligence or sale of a product.”

The Plaintiffs are, therefore, precluded from bringing any cause of action under the tort laws of the State of Tennessee for personal injury.

3. The Complaint Should Be Dismissed For The Failure Of Plaintiffs To Clearly Identify They Exhausted Their Remedies.

The “Torture Victim Protection Act” of 1991 requires that a Plaintiff exhaust available remedies in the place where the conduct given rise to the claim occurred.

The exact and specific provision is found in §2(b) titled Exhaustion Of Remedies and is expressed as follows:

“A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”

The Plaintiffs have made the broad statements and broad allegations that they did not have any adequate remedies available to them in El Salvador at the time their causes of action arose. However, they do not state any activity or any efforts at all to pursue a remedy. El Salvador had a judicial system and judicial courts but the Plaintiffs have made

no statements of filing any claims or availing themselves of the judicial system. Their claim for relief is basically based upon the fact that they had no remedies or were fearful to avail themselves of any remedy.

The Statute under which they bring their cause of action, however, clearly states that a court "shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies" and the Plaintiffs do not plead facts sufficient to demonstrate that they have done so. (Emphasis added).

CONCLUSION

Because the complaint shows on its face that all of the claims of the Plaintiffs accrued more than ten (10) years prior to the commencement of this action in the United States District Court for the Western District of Tennessee, Western Division, their claim should be dismissed as time barred under the Federal Statute relied upon or under the laws of the State of Tennessee.

Additionally, the claims of the Plaintiffs, Jose Oscar Chavez, Haydee Duran, Cecilia Santos and Jose Francisco Calderon, cannot be maintained because they are not aliens but resident citizens of the United States as clearly stated in the complaint which should be dismissed for that reason also.

And, the complaint should be dismissed by the Honorable Court for failure of the

Plaintiffs to demonstrate in their complaint that they have exhausted remedies available to them during the twenty-two (22) years preceding the filing of this complaint or that during that period of time they had no available remedies in San Salvador.

WHEREFORE, AND FOR ALL OF WHICH the Defendant, Nicolas Carranza, prays judgment of the Court that the complaint be dismissed against him.

Respectfully Submitted,



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