

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Walker D. Miller

Civil Action No. 08-cv-02528-WDM-BNB

JACK J. GRYNBERG, *et al.*,

Plaintiffs,

v.

IVANHOE ENERGY, INC., *et al.*,

Defendants.

**ORDER ON MOTIONS TO DISMISS AND
APPEAL OF MAGISTRATE JUDGE DECISION**

Miller, J.

This matter is before me on Defendant Jose Fabricio Correa Delgado's ("Correa") Motion to Dismiss (Docket No. 26); Plaintiffs' Motion to Dismiss Correa Without Prejudice (Docket No. 35); Plaintiffs' Motion to Dismiss Correa With Prejudice (Docket No. 62); and Plaintiffs' Appeal of Magistrate Judge's Ruling (Docket No. 68). I have considered the motions, related briefs, and Complaint and conclude that oral argument would not materially assist in deciding these motions. For the reasons that follow, Correa's Motion to Dismiss shall be granted, Plaintiffs motions to dismiss shall be denied, and the appeal shall be denied as moot.

Background

This case surrounds the Pungarayacu Tar Sands Heavy Oil Deposit (the "Pungarayacu Field") in the Nation of Ecuador ("Ecuador"). According to Plaintiffs'

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Original Complaint (Docket No. 1),¹ in March, April, and May 2006 Plaintiffs Grynberg and Cotundo Minerales, S.A. (“Cotundo”) obtained a mining concession from Ecuador granting them exclusive rights for thirty years for exploration and production of approximately 195,757.8 acres in the Pungarayacu Field. In researching methods to extract the reserves in the Pungarayacu Field, Grynberg contacted Ivanhoe Energy (“Ivanhoe”), a company that had a process utilizing the recovery and upgrading of hydrocarbons from tar sands which potentially could have been useful in the Pungarayacu Field. Allegedly, Grynberg and Ivanhoe representatives discussed, over emails and phone calls, the possibility of a joint venture to exploit the heavy oil deposits in the Pungarayacu Field, and exchanged written information including a report containing Grynberg’s technical analysis of the Pungarayacu Field and a report detailing Ivanhoe’s process and its advantages.

Subsequently, in March 2008 Grynberg learned that Ivanhoe representatives were in Quito, Ecuador negotiating for a concession to exploit the Pungarayacu Field. In April 2008, Ecuador nationalized the Pungarayacu Field and indicated that it would declare certain undeveloped mining concessions expired. It is not clear if Plaintiffs’ mining concessions to the Pungarayacu Field were declared expired, but in October 2008, Ivanhoe, through a subsidiary, was awarded a different concession to the

¹ Plaintiffs have filed an Amended Complaint (Docket No. 40). The Amended Complaint, however, was filed after Correa filed an answer (Docket No. 25) to the Original Complaint but without leave of court or written agreement from opposing parties as required by Fed. R. Civ. P. 15(a)(2). Furthermore, the Amended Complaint removes all allegations concerning Correa as its purpose was to remove Correa as a defendant from the case. Therefore, I look to the Original Complaint for purposes of this Order.

Pungarayacu Field covering the entire area for which Plaintiffs' had previously held the concession.

With respect to the allegations against Correa, Plaintiffs allege that they learned from "their Ecuador sources" that Correa, as the older brother to President Raphael Correa Delgado of Ecuador, had demanded and received cash and valuable gifts from the other Defendants in exchange for expediting the award of the concession to the Pungarayacu Field to Ivanhoe and its subsidiaries. (Compl., Docket No. 1 ¶ 38.) The complaint also alleges that Defendant Robert M. Friedland bribed Ecuadorian Government officials, including Correa, and engaged in "monetary transactions in proceeds from specified unlawful activities." *Id.* ¶ 39. There are no other allegations in the complaint relating to Correa.

On January 20, 2009, Correa both answered the complaint (Docket No. 25) and filed a motion to dismiss for lack of personal jurisdiction, insufficient service of process, and *forum non conveniens* (Docket No. 26). Plaintiffs did not respond to Correa's motion to dismiss, instead filing a motion to voluntarily dismiss Correa without prejudice (Docket No. 35) on February 4, 2009.² I ordered Correa to respond to Plaintiffs' motion for voluntary dismissal (Docket No. 36). Before Correa responded, however, Plaintiffs filed an Amended Complaint (Docket No. 40), which removed Correa as a defendant

² Plaintiffs initially filed their motion for voluntary dismissal on February 3, 2009 (Docket No. 28), but this document was stricken for failure to follow the local rules (see Docket No. 34). Plaintiffs refiled their motion for voluntary dismissal without prejudice on February 4, 2009 (Docket No. 35).

from the case and deleted all allegations regarding Correa from the complaint.³ Notably, however, the Amended Complaint still alleges that the key to Ivanhoe's procurement of the concession to the Pungarayacu Field was based on "access" to the Ecuadorean President (although without specifying what type of access) and that the remaining defendants bribed Ecuadorean government officials (although without specifying which government officials). (Docket No. 40 ¶¶ 37–38.) Correa responded to Plaintiffs' motion for voluntary dismissal without prejudice on February 17, 2009 (Docket No. 45), arguing that although dismissal was warranted, I should impose three conditions on the dismissal: (1) Plaintiffs be held liable for all of Correa's attorneys' fees and costs; (2) the false allegations against Correa be stricken from the Complaint; and (3) Plaintiffs be required to comply with their outstanding discovery obligations. Correa also answered the Amended Complaint (Docket No. 46).

On February 10, 2009, based on the jurisdictional issues raised in the case, Magistrate Judge Boland ordered disclosure requirements and discovery stayed pending further order of the court, but ordered Plaintiffs to respond to Correa's written discovery requests. (Docket Nos. 43, 44). Plaintiffs filed a motion for a protective order (Docket No. 47) requesting that they not be compelled to answer two of Correa's discovery requests (specifically, Interrogatory No. 7 and Request No. 6) because it would subject the witnesses to needless invasion of their privacy, retaliation, and harassment in Ecuador. Plaintiffs further argued that Correa's dismissal from the case

³ As discussed *supra*, the Amended Complaint was not filed in compliance with Rule 15(a)(2) as it was filed after Correa answered the Complaint and without leave of court or the opposing parties' written consent.

would render the evidence irrelevant. After a hearing on the issue, Magistrate Judge Boland denied Plaintiffs' motion for a protective order and again ordered Plaintiffs to respond to Correa's discovery requests. (See Docket Nos. 60, 61.)

Five days after Magistrate Judge Boland's order, Plaintiffs filed a motion for voluntary dismissal of Correa with prejudice (Docket No. 62). Plaintiffs moved for reconsideration or, alternatively, a stay of the discovery order (Docket No. 65) and appealed Magistrate Judge Boland's order (Docket No. 68). Magistrate Judge Boland granted a stay with respect to his discovery order "pending a ruling by the district judge about whether he will impose conditions on the dismissal of Mr. Correa from the case and, if so, whether facts relating to the allegations of ¶138 of the Original Complaint are relevant to the conditions he intends to impose." (Docket No. 69 at 2.) In support of the stay Magistrate Judge Boland cited the fact that Plaintiffs had since moved for dismissal *with prejudice* and noted that it was appropriate to defer to me the determination of whether disclosure was necessary to my resolution of the issues. On March 17, 2009, Correa responded to Plaintiffs' motion for voluntary dismissal with prejudice (Docket No. 72), arguing again that although dismissal was warranted, exceptional circumstances, such as Plaintiffs' alleged bad faith in bringing the lawsuit against Correa based on false accusations, existed such that Correa was entitled to an award of attorneys' fees.

Discussion

In this case, both parties seek essentially the same thing—dismissal of Correa from the lawsuit. The sole remaining issue appears to be whether Correa should be awarded attorneys' fees. Under these circumstances, although there are multiple

motions for dismissal, I conclude that the prudent way to proceed is to grant Correa's motion to dismiss and deny both of Plaintiffs' motions for voluntary dismissal. Such a procedure will achieve the ultimate goal of dismissing Correa from the lawsuit without my having to determine the issue of attorneys' fees in the context of a Rule 41(a)(2) motion as opposed to a motion for attorneys' fees, properly filed pursuant to Fed. R. Civ. P. 54(d)(2), D.C.COLO.LCivR 54.3, and Section 7 of my PreTrial and Trial Procedures.

Correa's initial motion to dismiss, filed on January 20, 2009, sought dismissal of the claims against him based on, *inter alia*, insufficient service of process. (See Docket No. 26). Although Plaintiffs never responded to this motion, they admitted in both of their motions for voluntary dismissal that Correa was never properly served. (See Docket No. 35 ¶ 4–5; Docket No. 62 ¶ 4–5). Plaintiffs have further admitted that service was defective in other pleadings to this Court. (See Pls.' Mtn. for Protective Order, Docket No. 47 ¶ 6 (stating that Correa's objections to "service of process by DHL" were "patently sufficient to result in dismissal as soon as they were made").⁴ Therefore, as all pleadings submitted to the Court are bound by the requirements of Fed. R. Civ. P. 11 and a court lacks personal jurisdiction over a defendant absent proper service of process, see *Hukill v. Okla. Native Am. Domestic Violence Coal.*, 542 F.3d 794, 797 (10th Cir. 2008); *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1229 (10th Cir. 2006), I

⁴ I note that there is no dispute that Correa has not waived service pursuant to Fed. R. Civ. P. 4(d). Indeed, Plaintiffs admit in their motions for voluntary dismissal that Correa has not waived service, as it is his right to do. (See Docket No. 35 ¶ 5; Docket No. 62 ¶ 5).

conclude that this Court does not have personal jurisdiction over Correa. Thus, Correa's motion to dismiss shall be granted and Correa shall be dismissed from the lawsuit without prejudice. Although the issue of attorneys' fees was raised in the context of Correa's dismissal from this case, because I am dismissing Correa for insufficient service of process based on his own motion, which did not ask for attorneys' fees, this Order does not constitute any determination of the merits of Correa's request for attorneys' fees. Correa remains free to move for attorney's fees by separate motion.

Furthermore, given that Correa is now dismissed from the action, there is no reason for the Plaintiffs to be compelled to answer his discovery requests. As such, Magistrate Judge Boland's stay order shall remain in effect until further order of this court. Additionally, Plaintiffs' appeal of Magistrate Judge Boland's discovery order ordering Plaintiffs to respond to Correa's discovery requests is moot and shall be denied without prejudice. I do note, however, that the discovery requests may become relevant should Correa move for attorneys' fees.

Accordingly, it is ordered:

1. Defendant Jose Fabricio Correa Delgado's Motion to Dismiss (Docket No. 26) is granted.
2. Plaintiffs' Motion to Dismiss Correa Without Prejudice (Docket No. 35) is denied as moot.
3. Plaintiffs' Motion to Dismiss Correa With Prejudice (Docket No. 62) is denied as moot.
4. Plaintiffs' Appeal of Magistrate Judge's Ruling (Docket No. 68) is denied without

prejudice.

5. Magistrate Judge Boland's discovery order (Docket Nos. 60, 61) shall remain stayed pending further order of this Court.
6. Correa may file, pursuant to Fed. R. Civ. P. 54(d)(2), D.C.COLO.LCivR 54.3, and Section 7 of my PreTrial and Trial Procedures, a motion for attorneys' fees on or before Tuesday, August 25, 2009. Plaintiffs shall have fourteen days thereafter to respond.

DATED at Denver, Colorado, on August 11, 2009.

BY THE COURT:

s/ Walker D. Miller
United States Senior District Judge