

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 1:13-cv-22589-KMW

MIGUEL ANGEL CORBACHO
DAUDINOT

Plaintiff,

v.

YASIEL PUIG VALDES a/k/a
YASIEL PUIG and MARITZA
VALDES GONZALEZ,

Defendants.

DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants, Yasiel Puig Valdes a/k/a Yasiel Puig ("Puig") and Maritza Valdes Gonzalez ("Valdes"), pursuant to Fed R. Civ. P. 12(b)(6), hereby move to dismiss plaintiff's first amended complaint ("amended complaint") [DE #10] for failure to state a claim upon which relief may be granted. The grounds for this motion are set forth in the following memorandum of law.

MEMORANDUM OF LAW

Introduction

This is plaintiff's second effort at stating a claim against defendants. It is no better than plaintiff's initial effort. Indeed, window dressing aside, the first amended complaint is nearly identical to the initial complaint that defendants moved to dismiss [DE #7]. Plaintiff's complete failure to address the fundamental problems in his initial

complaint speaks volumes about the futility of his continued effort to hold defendants liable for conduct that is simply not actionable here.

Taking plaintiff at his amended complaint, this is an action brought by a Cuban citizen who was arrested in Cuba, was tried and convicted in Cuba, and is currently serving a prison sentence in Cuba, all as a result of allegedly false testimony given by defendants in Cuba. Plaintiff alleges that he would not have been arrested and convicted but for defendants' allegedly false testimony during the Cuban government's investigation and trial of plaintiff, and that, therefore, defendants (who are also Cuban citizens) are liable under the Torture Victim Protection Act ("TVPA"), for aiding and abetting and conspiring with the Cuban government in its harsh treatment of plaintiff while he was in the Cuban government's custody.¹

The amended complaint must be dismissed for at least three reasons. First, the TVPA does not apply to a claim that is wholly unconnected to the United States, as is plaintiff's claim here. Second, the amended complaint's allegations regarding plaintiff's treatment in the Cuban prison system do not satisfy the TVPA's definition of torture. Third, the amended complaint fails to allege, as it must in order to state a claim for secondary liability under the TVPA, that defendants' actions were intended to result in plaintiff's torture.

¹ The TVPA provides, in part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual." Torture Victim Protection Act § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)).

I. Legal Standard.

A complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this “plausibility standard,” plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

The amended complaint here falls woefully short of this standard. Indeed, when stripped of its conclusory allegations of conspiracy and aiding and abetting, the amended complaint says nothing about defendants other than that they allegedly falsely testified during a criminal investigation and trial in Cuba. These allegations, even if true (and, to be clear, they are not true), do not state a claim for relief under the TVPA.

II. The Amended Complaint’s Allegations Do Not Warrant the Extraterritorial Application of the TVPA.

The amended complaint’s allegations involve conduct that occurred exclusively in Cuba and has no connection with the United States. Specifically, the amended complaint alleges that a Cuban citizen was wrongfully arrested, tried and convicted in Cuba based on purportedly false testimony given by two Cuban citizens during a criminal investigation and trial in Cuba. (Am. Compl. ¶¶ 34, 37, 70-73, 75-76, 92-93, 95-96, 98-102, 222-237.) In light of this, the court’s first task is to determine whether the TVPA even applies here.

The Supreme Court recently addressed the issue of the extraterritorial application of a federal statute – that is, “whether a claim may reach conduct occurring in the territory of a foreign sovereign” – in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (April 17, 2013). In *Kiobel*, a group of Nigerian nationals filed suit against several multinational oil companies under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, alleging that the corporations aided and abetted the Nigerian government in committing violations of “the law of nations” in Nigeria. *Id.* at 1662.

The Supreme Court affirmed the Second Circuit’s dismissal of plaintiffs’ claims, holding that, “when a statute gives no clear indication of an extraterritorial application, it has none ... and reflects the presumption that United States law governs domestically but does not rule the world.” *Id.* at 1664 (internal citations and quotes omitted). The TVPA does not provide any indication – much less a “clear indication” – that it is to be applied extraterritorially. See TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)). Accordingly, the TVPA does not apply to conduct “occurring in the territory of a foreign sovereign,” such as the conduct alleged here, and plaintiff’s claim must be dismissed. See *Kiobel*, 133 S. Ct. at 1664.

Although *Kiobel* was only recently decided, it has already been expressly relied on to dismiss TVPA claims on the ground that the statute does not apply extraterritorially. *Murillo v. Bain*, 2013 WL 1718915 (S.D. Tex. April 19, 2013); see also *Chen Gang v. Zhao Zhizhen*, 2013 WL 5313411 (D. Conn. Sept. 20, 2013).

In *Murillo*, a Honduran couple sued the president of Honduras under the TVPA for the killing of their son at a political rally in Honduras. The district court, citing *Kiobel*, dismissed plaintiff's case on extraterritoriality grounds, noting that:

This case has nothing to do with the United States. The parents of a deceased Honduran are suing a Honduran politician, complaining about the Honduran army's behavior at a Honduran airport. **American laws like the Alien Tort Statute and the Torture Victim Protection Act are presumed not to apply beyond the borders of the United States.**

Id. at *3 (emphasis added).

Because this case, too, has nothing to do with the United States, the TVPA does not apply and the amended complaint must be dismissed.

III. The Amended Complaint's Allegations Do Not Satisfy the TVPA's Statutory Definition of Torture.

Even if the court were inclined to apply the TVPA extraterritorially to plaintiff's claim, the amended complaint must still be dismissed because its factual allegations fail to satisfy the TVPA's statutory definition of torture.

The TVPA defines "torture," in part, as:

[A]ny act, directed against an individual in the offender's custody or physical control, **by which severe pain or suffering** (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, **is intentionally inflicted on that individual[.]**

TVPA § 3(b), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)) (emphasis added).

Courts interpreting this language have consistently noted that the TVPA's "definition of torture includes a severity requirement that is crucial to ensuring that the conduct proscribed by. . . the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (internal citations and quotes omitted) (dismissing claim for torture as that term is used in the TVPA); *Weisskopf v. United Jewish Appeal-Federation of Jewish Philanthropies of New York, Inc.*, 889 F. Supp. 2d 912, 925 (S.D. Tex. 2012) (dismissing TVPA claim on the ground that the conduct described in the complaint did not meet the statute's definition of torture).

As the court in *Simpson* explained, not even acts that "reflect a bent toward cruelty on the part of the perpetrators" necessarily satisfy the TVPA's definition of torture:

[T]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Rather, **torture is a label that is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.**

Simpson, 326 F.3d at 234 (emphasis added), citing, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92–93 (D.C. Cir. 2002).

The court in *Price* noted that:

The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture." See S. Exec. Rep. No. 101-

30, at 15 (“[I]n order to constitute torture, an act must be a ... of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”)... **[T]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault.** Not *all* police brutality, not *every* instance of excessive force used against prisoners is torture[.]

Price, 294 F.3d at 93 (bold added, italics in original) (holding that “plaintiffs must allege more than that they were abused” in order to survive a motion to dismiss). Absent from the amended complaint are any allegations describing acts of an “extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain and suffering,” as required by the TVPA. See *Price*, *supra*.

Instead, plaintiff alleges that he was: regularly “threatened” by prison guards; placed in “solitary confinement” in a windowless cell; provided with spoiled food and “murky” water; deprived of “sun and open air”; subjected to “unsanitary conditions” in a hot, cramped cell; denied medical care; placed in solitary confinement on the days his wife came to visit him or on one occasion when he refused “to accuse of wrong-doing a man [he] did not know”; denied “any chance to exercise”; barely able to sleep because the jail was not climate controlled and the guards were noisy; only allowed to have visitors for one hour a month; subjected to the confiscation of food and treats brought to him by his family; and transferred to a prison away from his family. (Am. Compl. ¶ 83 and ¶ 85 a – v.)

Prison conditions in Cuba are no doubt harsh. Claiming to have endured harsh prison conditions, however, does not suffice to state a claim under the TVPA. Rather, plaintiff must allege facts demonstrating that a state official’s conduct “rose to such a

level of depravity and caused ... such intense pain and suffering as to be properly classified as torture.” *Price*, 294 F.3d at 94. Plaintiff has not done so. Because the acts described in the amended complaint do not meet the TVPA’s stringent definition of torture, the amended complaint fails to state a claim and must be dismissed.

IV. The Amended Complaint’s Allegations Fail to State a Claim for Secondary Liability under the TVPA.

Hardly a model of clarity (or brevity), the amended complaint’s sole count attempts to state a claim against defendants for “aiding and abetting” and “conspiring with” the Cuban government to torture plaintiff in violation of the TVPA. (See Am. Compl. at ¶¶ 213-249 and 250-257.) Even if the court were inclined to apply the TVPA extraterritorially and overlook plaintiff’s failure to allege conduct that satisfies the TVPA’s definition of torture, the amended complaint still must be dismissed because plaintiff has failed to state a claim for secondary liability under the TVPA.

In order to state a claim against defendants for secondary liability for violation of the TVPA, plaintiff must allege that defendants assisted or conspired with the Cuban government with the purpose or intent to facilitate the commission of the specific offenses alleged – i.e., the torturing of plaintiff. *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1343 and 1352 (S.D. Fla. 2011) Importantly, vague and conclusory allegations of secondary liability do not suffice, rather the complaint must provide factual allegations that raise the right to relief above the speculative level. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1270 (11th Cir. 2009) (directing the district court to dismiss TVPA claims for failure to state a claim

upon which relief may be granted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

The amended complaint here fails to provide the requisite factual allegations regarding defendants' alleged "purpose or intent to facilitate the commission of the specific offenses alleged." *In re Chiquita Brands*, 792 F. Supp. 2d at 1343. Instead, the amended complaint alleges in conclusory fashion that defendants "acted with the intent to assist the government," (Am. Compl. ¶ 253), but offers nothing by way of factual allegations. Plaintiff attempts to fill this void with speculation by claiming that defendants must have known that plaintiff would be tortured because, well, everybody knows that Cuba's legal system does not afford due process and its prison conditions are abysmal. (See Am. Compl. ¶¶ 241 - 245.) Such speculation is insufficient. *Sinaltrainal*, 578 F.3d at 1270 (directing dismissal of secondary liability claim under the TVPA where "plaintiffs' vague and conclusory allegations ... fail to detail any factual allegations to raise a right to relief above the speculative level.")

The crux of plaintiff's secondary liability claim is that defendants "entered into a conspiracy and a joint plan with the Cuban government to effectuate a variety of purposes[.]" (Am. Compl. ¶ 213.) Significantly, nowhere does plaintiff actually allege that defendants entered into any agreement with the Cuban government.² Instead, the amended complaint alleges an agreement between defendant Puig and his mother,

² The amended complaint contains conclusory allegations that defendants conspired with, and aided and abetted, "unnamed agents of the INDER, the repressive DCSE and the Cuban government." (See, e.g., Am. Compl. ¶¶ 11 – 14.) As noted above, however, such allegations do not suffice. The amended complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

defendant Valdes, “to become informants for the Cuban government[.]” (Am. Compl. ¶ 216.) That does not suffice. Plaintiff must allege facts showing an agreement between defendants and the party that perpetrated the alleged torture (i.e., the Cuban government). Absent that, plaintiff cannot state a claim for secondary liability under the TVPA. See *In re Chiquita Brands*, 792 F. Supp. 2d at 1351 and 1354 (complaint must provide “facts regarding dates, attendees, and discussions of meetings between Chiquita and the AUC, as well as facts regarding the terms of the agreements reached”).³

In sum, because the amended complaint does not properly allege that defendants acted with the purpose or intent to facilitate the Cuban government’s alleged torture of plaintiff, nor does it provide any of the particulars of defendants’ alleged agreement with the Cuban government, the amended complaint’s effort to state a claim for secondary liability under the TVPA fails.

³ The amended complaint’s failure to allege such an agreement distinguishes this case from the other case filed by plaintiff’s counsel against a Major League Baseball player, *Curbelo Garcia, et al. v. Chapman*, 13-cv-22210-CMA. (See Am. Compl. ¶¶ 18 and 201.) In that case, Judge Altonaga denied defendants’ motion to dismiss plaintiffs’ secondary liability claim under the TVPA on the ground that the complaint clearly alleged that defendant, after being caught attempting to flee Cuba, met with Cuban president Raul Castro and entered into an agreement to become a snitch for the government. *Case no. 13-cv-22210-CMA* (DE # 84 at 17 and 22.) Plaintiff here does not, and cannot, make such an allegation. Not only is Judge Altonaga’s decision in *Chapman* factually distinguishable, it is now of questionable validity given the Supreme Court’s subsequent decision in *Kiobel* prohibiting the application of federal statutes that do not clearly evince a Congressional intent to be applied extraterritorially to cases that, like this case, have nothing to do with the United States.

Conclusion

Plaintiff's claim against defendants must be dismissed because: (1) the TVPA is not to be applied extraterritorially to cases, such as this one, that have nothing to do with the United States; (2) the acts allegedly inflicted on plaintiff while in the custody of the Cuban government fail to satisfy the TVPA's stringent definition of torture; and (3) the amended complaint fails to properly allege that defendants had any purpose or intent to facilitate the Cuban government's torture of plaintiff or any agreement with the Cuban government to that end.

Respectfully submitted,

SANTINI LAW

1200 Brickell Avenue, Suite 950

Miami, Florida 33131

Tel: (305) 372-7307

Fax: (305) 372-7308

ssantini@santinilawfirm.com

By: /s/ Sean R. Santini

Sean R. Santini

Florida Bar No. 832898

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Sean R. Santini
Sean R. Santini

SERVICE LIST

Kenia Bravo
avelinogonzalez2@bellsouth.net
Avelino J. Gonzalez, P.A.
6780 Coral Way
Miami, FL 33155

Avelino Jose Gonzalez
avelinogonzalez@bellsouth.net
Avelino J. Gonzalez, P.A.
6780 Coral Way
Miami, FL 33155