UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARNIEM KIOBEL, et al.,	:	
Plaintiffs,	:	02 Civ. 7618 (KMW)(HBP)
-against-	:	REPORT AND RECOMMENDATION
ROYAL DUTCH PETROLEUM COMPANY, and SHELL TRANSPORT AND TRADING COMPANY,	:	
Defendants.	:	

PITMAN, United States Magistrate Judge:

TO THE HONORABLE KIMBA M. WOOD, United States District Judge,

I. Introduction

This putative class action seeks damages and other relief for crimes against humanity, allegedly committed with defendants' assistance and complicity between October 1, 1990 and May 28, 1999 against the residents of Ogoniland, Rivers State, Nigeria. Plaintiffs allege that defendants committed these acts in order to facilitate their discovery and exploitation of oil deposits in Nigeria.

Defendants, Royal Dutch Petroleum Company and Shell Transport and Trading Company ("Shell"), move for an Order pursuant to Rule 21 of the Federal Rules of Civil Procedure to

strike plaintiffs' amended complaint because it (1) changes their class definition, (2) removes two plaintiffs and (3) adds a new defendant, without prior Order of the Court (Docket Item 93).

In the alternative, defendants move for an Order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the amended complaint on the grounds that plaintiffs' claims (1) are barred by the "act of state" doctrine, (2) are barred by the doctrine of international comity and (3) fail to state claims on which relief can be granted. Defendants previously asserted these same arguments in a motion to dismiss the original complaint (Docket Item 7). I issued a Report and Recommendation on March 11, 2004 (Docket Item 51) concluding that these arguments did not warrant dismissal of the original complaint.

Finally, defendants also argue in their reply brief that the amended complaint should be dismissed pursuant to Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004), because the claims set forth therein are based on "'international law norm[s] with less definite content and acceptance among civilized nations than the historical paradigms familiar' in 1789" (Defendants' Reply Memorandum in Support of Defendants' Motion to Strike or Dismiss, dated August 6, 2004 ("Defendants' Reply Memo."), at 7, quoting Sosa v. Alvarez-Machain, supra, 124 S.Ct. at 2765).

For the reasons set forth below, I respectfully recommend that defendants' motions be denied in all respects.

II. Facts

On September 20, 2002, plaintiffs filed their original class action complaint. On May 17, 2004, before defendants had filed their answer, plaintiffs filed an amended complaint. In the amended complaint, plaintiffs altered their class definition, deleted two named plaintiffs (Dornubari Anslem John-Miller and Simeon Deebom) and added a new defendant, Shell Development Petroleum Company of Nigeria, Ltd. Defendants now seek to strike the amended complaint under Rule 21, or in the alternative, to dismiss the amended complaint under Rule 12(b)(6).

III. Analysis

A. Motion to Strike

Defendants argue that the amended complaint should be stricken because Fed.R.Civ.P. 21 requires that amendments to the complaint that add or drop parties require a court Order and no court Order was obtained in this case. As noted above, the amended complaint changed the class definition, removed two plaintiffs and added a new defendant.

Defendants' motion arises out of the fact that two different provisions of the Federal Rules of Civil Procedure --

Rules 15 and 21 -- are potentially applicable to the amended complaint, and the two rules have slightly different requirements.

Rule 15(a) is a broad rule governing amendments of the pleadings. Rule 15(a) states, in pertinent part, that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." Fed.R.Civ.P. 15(a). The record here establishes that defendants had not filed a responsive pleading at the time plaintiffs filed the amended complaint.[1] Thus, if Rule 15 is controlling, plaintiffs had the right to file the amended complaint without leave of the court and no motion was necessary.

Rule 21, on the other hand, provides in pertinent part, that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Fed.R.Civ.P. 21. Thus, if Rule 21 is controlling, to the extent that the amended complaint adds and drops parties, plaintiffs were required to seek leave of the court before filing the amended complaint.

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[1]Although defendants had filed their Rule 12(b)(6) motion prior to the filing of plaintiffs' amended complaint, it is well-settled that a Rule 12 dismissal motion is not a "responsive pleading" as that term is used in Rule 15. Thompson v. Carter, 284 F.3d 411, 416 n.2 (2d Cir. 2002); Barbara v. New York Stock Exchange Inc., 99 F.3d 49, 56 (2d Cir. 1996); Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 448 n.1 (2d Cir. 1978); Hollenbeck v. Boivert, 330 F. Supp.2d 324, 327 n.3 (S.D.N.Y. 2004).

Two decisions from the Court of Appeals for the Second Circuit strongly suggest that Rule 15 is controlling here. In Washington v. New York City Bd. of Estimate, 709 F.2d 792 (2d Cir. 1983), the Court of Appeals reviewed the District Court's denial of a plaintiff's motion to add two individual defendants. After recognizing a plaintiff's right to amend his complaint under Rule 15(a) prior to the filing of an answer, the Court held that the district judge erred in denying plaintiff's motion:

> So far as we are able to determine from the record before us and from the district court docket entries, Washington's May 14, 1981 request to amend the caption to add Meekins and Wilkinson as defendants was his first attempt to amend his complaint. Since the Board did not answer the complaint until August 26, 1981, Washington was entitled on May 14, 1981 to amend his complaint as a matter of right, and his request at that time should have been granted. See Le Grand v. Evan, 702 F.2d 415, 417 (2d Cir. 1983).

709 F.2d at 795.

The Court reached a similar result in Le Grand v. Evan, 702 F.2d 415 (2d Cir. 1983). In that case, the District Court denied a pro se plaintiff's motion to amend his complaint to add a "John Doe" defendant until the true name of the correct party could be ascertained. Again, the Court of Appeals reversed the District Court, stating:

> Le Grand's motion to amend by naming a "John Doe" clerk as defendant until the true name could be determined should have been granted. The district court may have believed that Le Grand's motion was submitted after dismissal of the complaint since the motion to amend was not filed until May 29 and not docketed until June 5. However, the motion was actually received by the

> clerk's office on May 27, prior to service of a responsive pleading and to dismissal of the complaint. It should, therefore, have been granted as a matter of right. Fed.R.Civ.P. 15(a).

702 F.2d at 417.[2]

A substantial number of judges have followed Washington and Le Grand and concluded that Rule 15 may be utilized to either add or drop parties, notwithstanding the availability of similar relief under Rule 21. See, e.g., Singh v. Prudential Ins. Co. of Am., Inc., 200 F. Supp.2d 193, 196-97 & n.7 (E.D.N.Y. 2002); Clarke v. Fonix Corp., 98 Civ. 6116 (RPP), 1999 WL 105031 at *6 (S.D.N.Y. Mar. 1, 1999), aff'd without opinion, 199 F.3d 1321 (2d Cir. 1999); CBS Broad., Inc. v. Bridgestone Multimedia Group, Inc., 97 Civ. 6408 (JSM), 1998 WL 740853 at *1 (S.D.N.Y. Oct. 23, 1998); Askir v. Boutros-Ghali, 933 F. Supp. 368, 370 n.1 (S.D.N.Y. 1996) ("[I]n this circuit the proper approach is to amend the pleadings [to remove a defendant] pursuant to Fed.R.Civ.P. 15(a)."); First City Nat'l Bank and Trust Co. v. FDIC, 730 F. Supp. 501, 515 (E.D.N.Y. 1990), superceded by statute as stated in United States Fire Ins. Co. v. United Limousine Serv., Inc., 328 F. Supp.2d 450, 454 (S.D.N.Y. 2004);

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[2]Harvey Aluminum, Inc. v. Am. Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1953), is not to the contrary. In Harvey, the Court held that although defendants had not yet filed a responsive pleading, a motion under Rule 21 was the appropriate method for removing one of the defendants from the action. The Court did not address Rule 15(a) at all, and, did not, therefore, hold that Rule 21 precludes reliance on Rule 15(a) to add or drop parties.

Pepsico, Inc. v. Wendy's Int'l, Inc., 118 F.R.D. 38, 44 (S.D.N.Y. 1987) ("The policy of the Federal Rules promoting 'the just, speedy, and inexpensive determination of every action,' Fed.R.Civ.P. 1; see also CPLR 104, would be frustrated by favoring Rule 21 over Rule 15(a) without substantial reason.").[3] See also Christensen v. Bristol-Myers Co., 86 Civ. 0183 (SWK), 1988 WL 96065 at *1-*2 (S.D.N.Y. Sept. 8, 1988);

The leading practice treatises have reached the same conclusion. 3 James Wm. Moore et al., Moore's Federal Practice ¶ 15.16[1] (3rd ed. 1999) ("The better view . . . rejects the notion that a motion to amend is required to add or drop parties before the filing of a responsive pleading. The more persuasive cases hold that before the time a responsive pleading is filed, all amendments are allowed as a matter of course, including amendments to drop or add parties."); 1 Michael C. Silberberg & Edward M. Spiro, Civil Practice in the Southern District of New York § 6:26 at 6-59 (2d ed. 2004) ("A party may amend without leave of court to add a party prior to service of [an] answer. The provisions of Rule 21 which require a court order to add a

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[3]Indeed, in addition to the general language of Rule 15(a) allowing amendment of a party's pleading, subsection (c)(3) of the rule expressly refers to an amendment of a pleading that "changes the party . . . against whom a claim is asserted . . . ." Fed.R.Civ.P. 15(c)(3); see Scally v. Daniluk, 96 Civ. 7548 (KMW), 1997 WL 639036 at *3-*4 (S.D.N.Y. Oct. 15, 1997) (analyzing the timeliness of plaintiff's amended complaint that replaces two defendants with one new defendant).

party are inapplicable during the time the amendment may be served as of right."); 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure § 1479 (2d ed. 1990) ("[A]ny attempt to change parties by amendment before the time to amend as of course has expired should be governed by the first sentence of Rule 15(a) and may be made without leave of court.").

Although defendants correctly note that some District Judges in this Circuit have reached a contrary conclusion, I believe those decisions are either distinguishable or fail to support defendants for other reasons. First, the principal case defendants rely upon, Momentum Luggage & Leisure Bags v. Jansport, Inc., 00 Civ. 7909 (DLC), 2001 WL 58000 at *1-*3 (S.D.N.Y. Jan. 23, 2001), is factually distinguishable from the instant case because one of the two defendants had already filed a responsive pleading at the time plaintiff filed its amended complaint. In any event, the opinion in Momentum Luggage noted that it made no difference whether Rule 15 or Rule 21 was controlling because the standard of review under both would be the same. 2001 WL 58000 at *2. See also Highland Capital Mgmt., L.P. v. Schneider, 02 Civ. 8098 (PKL), 2004 WL 2029406 at *3-*4 (S.D.N.Y. Sept. 9, 2004). United States v. Hansel, 999 F. Supp. 694, 697 (N.D.N.Y. 1998), another case cited by defendants, relies upon non-binding authorities from other Circuits in support of its conclusion that Rule 21 prevails over Rule 15(a),

and therefore, does not detract from the continuing vitality of the Court of Appeals' decisions in Washington v. New York City Bd. of Estimate, supra, 709 F.2d at 795-96, and Le Grand v. Evan, supra, 702 F.2d at 417. See CBS Broad., Inc. v. Bridgestone Multimedia Group, Inc., supra, 1998 WL 740853 at *1. Finally in Sheldon v. PHH Corp., 96 Civ. 1666 (LAK), 1997 WL 91280 at *2-*3 (S.D.N.Y. Mar. 4, 1997), the Honorable Lewis A. Kaplan, United States District Judge, noted that although Rule 21 is the preferred rule for amending a pleading to add or eliminate parties, "there [is no] doubt that a broad reading of Rule 15 would permit amendments for any purpose, including changes of parties." 1997 WL 91280 at *3. Again, Judge Kaplan noted that reliance on Rule 21 or Rule 15 made no difference because the standard of review under each is the same.

Finally, even if plaintiffs had made a motion under Rule 21, it is a near certainty that the motion would have been granted given the fact that defendants' own authorities conclude that Rule 21 motions should be assessed under the liberal standard applicable to Rule 15. Defendants have not shown that such a motion would have been futile nor can they show prejudice. I appreciate that defendants hotly contest the truth of plaintiffs' allegations, but the elimination of two named plaintiffs and the addition of another of defendants' subsidiaries causes no cogni-

zable prejudice to defendants. At most, defendants' objection here is no more than a procedural quibble.

Thus, I conclude that Washington v. New York City Bd. of Estimate and Le Grand v. Evan teach that Rule 15 is applicable here, that the amended complaint was properly filed as a matter of right and that defendants' motion to strike the amended complaint should be denied.

B. Motion to Dismiss

Defendants also move to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(6) by incorporating by reference the arguments they made in a previous motion to dismiss addressed to the original complaint in this case. Specifically, defendants reassert their arguments that plaintiffs' claims (1) are barred by the "act of state" doctrine, (2) are barred by the doctrine of international comity and (3) fail to state claims on which relief can be granted. In their reply brief, defendants also argue that plaintiffs' claims in the amended complaint should be dismissed because they are based on principles of international law that do not meet the standards set forth by the Supreme Court in Sosa v. Alvarez-Machain, supra, 542 U.S. 692.

Defendants have not submitted additional briefing on the three arguments that they previously asserted and that I rejected in my Report and Recommendation dated March 11, 2004

(Docket Item 51). There is, therefore, no reason to revisit the conclusions I reached in my March 11, 2004 Report and Recommendation which addressed each of the three arguments defendants' reassert here and denied them all on the merits. Since defendants have failed to raise any additional questions of fact or law with respect to these arguments and plaintiffs' amended complaint contains no new legal claims that must be addressed, I deny each of defendants' reasserted arguments for the same reasons discussed in my March 11, 2004 Report and Recommendation (see Report and Recommendation, Docket Item 51).

Defendants' remaining argument, that plaintiffs' amended complaint is based on principals of international law that do not comport with the standard set forth in Sosa v. Alvarez-Machain, supra, 124 S. Ct. 2739 (2004) was raised for the first time in defendants' reply brief. This argument is, therefore, procedurally defective. See Ernst Haas Studio, Inc. v. Palm Press, Inc., 164 F.3d 110, 112 (2d Cir. 1999) (per curiam); Meadowbrook-Richman, Inc. v. Associated Fin. Corp., 253 F. Supp.2d 666, 680 (S.D.N.Y. 2003); Carbonell v. Acrish, 154 F. Supp.2d 552, 561 & n.10 (S.D.N.Y. 2001); Playboy Enter., Inc. v. Dumas, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997).

Moreover, defendants have raised the argument in a perfunctory manner that is of little assistance to the Court. Sosa is clearly a decision that may have a significant impact on

the claims asserted in this and the related actions, and unquestionably counsels courts to be extremely cautious in determining what standards of international law will support a claim under the Alien Tort Statute, 28 U.S.C. § 1350. However, the precise holding of Sosa is narrow, namely "that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." 124 S.Ct. at 2769.

Despite the narrowness of this holding, defendants make brief but broad arguments that simply ignore patent factual distinctions between the allegations in Sosa and the amended complaint in this case. For example, defendants claim that plaintiff Charles Wiwa's claim for illegal detention doesn't pass muster under Sosa and summarizes Wiwa's claim as follows: "Charles Wiwa -- just like the plaintiff in Sosa -- alleges a relatively brief detention, after which he was turned over to the authorities and charged. (Am. Compl. ¶ 8)" (Defendants' Reply Memo. at 8). In fact, the amended complaint contains the following allegations concerning Wiwa:

> [Charles Wiwa] was arrested on January 3, 1996, for organizing a protest against Shell and the Nigerian government. Upon his detention, he was taken to the Bori Market where his captors clubbed, horsewhipped, kicked and beat him for nearly two hours in front of a huge crowd including his mother, sisters and other relatives. Government soldiers took him to the Kpor Military Detention Camp in Gokana where he was tortured

> through daily whippings and threats were made against members of his family. After 5 days in the detention camp he was transferred to the State Investigation and Intelligence Bureau in Port Harcourt. He was formally charged before the Magistrate Court 2 in Port-Harcourt with unlawful assembly. The purported unlawful assembly was alleged to have occurred the day after his arrest.

(Amended Complaint ¶ 8). As summarized by the Supreme Court, the complaint in Sosa contained no allegations of a five-day long detention accompanied by repeated beatings and horsewhippings. 124 S.Ct. at 2746-47. In light of these differences, defendants' contention that plaintiff Wiwa's allegations in this case are "just like" the allegations in Sosa is flatly wrong.

Similarly, defendants argue that plaintiff Nwikpo's detention claim should be dismissed, claiming that "Kendricks Nwikpo alleges that he was detained for only nine hours (Am. Compl. ¶ 10) -- even less than was at issue in Sosa" (Defendants' Reply Memo. at 8). In making this argument, defendants, however, simply ignore the following allegations: "The ITSF arrested and detained [Nwikpo] for approximately 9 hours. While in detention he was tortured by being beaten with a large club while handcuffed and sprayed in the face with a chemical irritant that burned his skin, eyes, nose and throat" (Amended Complaint ¶ 10).

Sosa is clearly material to the claims asserted in this case and what impact, if any, it has on the claims asserted here requires careful analysis. That analysis is not assisted by the facile two-and-one-third page discussion in Defendants' Reply

Memo. which, as noted above, simply ignores allegations that do not support defendants' conclusions. Thus, apart from the procedural defect in the manner in which defendants have asserted their arguments based on Sosa, I also find that the matter has been insufficiently addressed by defendants to warrant discussion.

IV. Conclusion

Accordingly, for the reasons stated above, I respectfully recommend that defendants' motion to strike and, in the alternative, motion to dismiss the amended complaint be denied in all respects.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of this Report and Recommendation to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, United States District Judge, Room 1610, 500 Pearl Street, New York, New York 10007 and to the chambers of the undersigned, Room 750, 500 Pearl Street, New York, New York 10007. Any requests for an extension of time for

filing objections must be directed to Judge Wood. **FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.** Thomas v. Arn, 474 U.S. 140 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237 & n.2 (2d Cir. 1983).

Dated: New York, New York
August 15, 2005

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

Copies mailed to:

Rory O. Millson, Esq.
Thomas G. Rafferty, Esq.
Michael T. Reynolds, Esq.
Cravath, Swaine & Moore, LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019-7475

Carey R. D'Avino, Esq.
Stephen A. Whinston, Esq.
Keino R. Robinson, Esq.
Berger & Montague, PC
1622 Locust Street
Philadelphia, Pennsylvania 19103-6365