92874-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:19-CV-23988-RNS

DANIEL A. GONZALEZ,

Plaintiff,

v.

AMAZON.COM, INC. a Delaware Corporation, and SUSSHI INTERNATIONAL, INC., a Florida Corporation d/b/a FOGO CHARCOAL,

Defendants.
_____/

DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT WITH PREJUDICE

Defendant SUSSHI INTERNATIONAL, INC., d/b/a/ FOGO CHARCOAL (hereinafter referred to as "FOGO"), by and through its undersigned counsel, pursuant to Florida Rules of Civil Procedure 8(a) and 12(b)(6), respectfully requests this Honorable Court enter an order dismissing Plaintiff's Amended Complaint [DE 29] with prejudice, and in support thereof, states as follows:

INTRODUCTION

The Plaintiff was ordered to cure two deficiencies in his complaint. *Gonzalez v. Amazon.com, Inc.*, 19-23988-CIV, 2020 WL 1169125, at *3 (S.D. Fla. Mar. 11, 2020). First, the Plaintiff was required to plausibly allege how he came to own the interest in the subject confiscated property before March 12, 1996. *Id*. Second, this Court mandated that he plausibly allege that FOGO knowingly trafficked in confiscated property of the Plaintiff. *Id*. A plain reading of the Amended Complaint reveals that the Plaintiff did not acquire an ownership interest in the subject confiscated property before March 12, 1996. And no allegation in the Amended Complaint changed concerning how FOGO knowingly trafficked in Plaintiff's confiscated property. The allegations against FOGO are the same from the first complaint to the second. Finally, the new complaint explains that the Subject Property was used as a residence for the Gonzalez family, meaning it falls outside Title III of the Helms Burton Act and no damages for trafficking can be sought against FOGO.

ARGUMENT & MEMORANDUM OF LAW

I. Material Allegations in the Amended Complaint.

In the second version of the complaint, the Plaintiff explains that his grandparents had seven children. (Am. Compl. ¶ 11 [DE 29]) The Plaintiff's parents then had four children and he is the second born. (*Id*. at ¶ 12) The Plaintiff's mother and father became U.S. citizens before March 12, 1996. (*Id*. at ¶ 14) Plaintiff's grandfather passed away before March 12, 1996, and the subject property passed to Plaintiff's father. (*Id*. at ¶ 15) There is no allegation

about when (or if) Plaintiff's grandmother passed away. Next, the Plaintiff alleges his father died in November of 2016. (*Id*. at ¶ 16). Plaintiff's mother, who is still alive, inherited his father's interest in the subject property. (*Id*.) She has since given the interest to the Plaintiff, yet there is no allegation of when this occurred. (*Id*.) Finally, Plaintiff describes the "Subject Property" as "agricultural" and states it was used for residential purposes. (*Id*. at ¶¶ 10, 12)

II. The Plaintiff Failed to Plead Ownership of the Claim in Compliance with the Helms Burton Act, Again.

The primary problem with the Amended Complaint is that the Plaintiff did not acquire his interest in the subject Confiscated Property before March 12, 1996. Without this, the Plaintiff again "has not sufficiently alleged that he has an actionable ownership interest in the confiscated property." *Gonzalez v. Amazon.com, Inc.*, 19-23988-CIV, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020) (Scola, J). "In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." *See* 22 U.S.C.A. § 6082(a)(4)(B). The use of the word "such" is significant, meaning that the U.S. National bringing the claim must have "acquire[d] ownership of the claim before March 12, 1996." *Id*.; *see also Gonzalez*, 2020 WL 1169125, at *2 ("In other words, a United States citizen must already own the claim to the confiscated property on March 12, 1996 when the Act was passed."). "Any other interpretation of the Act would require the Court to ignore the definition of ["United States national"], and the

qualifying words "such" [...] out of the liability imposing language [. . .]—which would run afoul of basic canons of statutory interpretation." *Havana Docks Corp. v. MSC Cruises SA CO*, 19-cv-23588, 2020 WL 59637, at *3 (S.D. Fla. Jan. 6, 2020) (Bloom, J.)[1].

A plain reading of the Amended Complaint reveals the Plaintiff did not own the interest to the Subject Property on or before March 12, 1996. The interest in the Confiscated Property, if any, as of March 12, 1996 belonged to Plaintiff's father who died in November of 2016. (*Id*. at ¶ 16) There is no allegation the Plaintiff's father either gifted or conveyed the interest in the Confiscated Property to him on or before March 12, 1996. To the contrary, the earliest the Plaintiff would have received the interest, if at all, was sometime after November of 2016. The Plaintiff alleges his father "maintained his claim to the Subject Property" until his death in 2016, when the interest passed to the Plaintiff's mother. (*Id*. at ¶ 16) Plaintiff's sole basis for asserting any interest in the Subject Property is his allegation that his mother gave her interest to him at some unknown point after his father's death (after March 12, 1996). (*Id*.)

Beyond this, based upon the allegations in the Amended Complaint, Plaintiff's sole interest in the Subject Property is merely a prospective potential interest in one-quarter of one-seventh of an interest[2] that he would inherit after

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[1] Rehearing granted on other grounds in a different Havana Docks case on April 15, 2020. *See Havana Docks v. NCL, Ltd.*, Case No. 19-cv-23591 [Ecf. No. 53]. In that Havana Docks case, the plaintiff attached a copy of the certified claim. There is no certified claim in this case.

[2] Plaintiff's father is one of seven children, and the Plaintiff is one of four children.

his mother passes away[3]. *See e.g*. §§ 732.102, 732.104, Fla. Stat. Hence, the Plaintiff has failed to satisfy the requirements of this Court's prior order to plead in compliance with the Helms-Burton Act. "[T]he Helms-Burton Act only applies to claim owners who are already United States citizens at the time the Act was passed on March 12, 1996." *Gonzalez*, 2020 WL 1169125, at *2 (Scola, J.). Here, the allegations fail to demonstrate Plaintiff owned the Subject Property on March 12, 1996. To the contrary, the allegations demonstrate he did not own the claim to the interest in the Subject Property until sometime after November of 2016. Like the first Complaint, the Amended Complaint "does not contain allegations demonstrating Gonzalez's ownership in compliance with § 6082(a)(4)(B)." *Id*. Dismissal is proper, again. *Id*.

III. The Plaintiff Has Not Alleged Sufficient Knowledge of Trafficking in the Confiscated Property by FOGO, Again.

Separately, the allegations concerning FOGO's knowledge are conclusory and legally inadequate. Importantly, they are exactly the same as before. (*Compare* Am. Compl., ¶ 27 *with* Compl. ¶ 19). Under the Helms Burton Act, "a person 'traffics in confiscated property if that person knowingly and intentionally . . . engages in commercial activity using or otherwise benefiting from confiscated property." 22 U.S.C. § 6023(13). Mere conclusory allegations of knowledge are insufficient to state a claim under Helms Burton. *See Gonzalez*, 2020 WL 1169125, at *2. In both the original and Amended Complaint, the Plaintiff alleges:

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[3] There is no reference to Plaintiff's father or mother having a testamentary document and thus this interest would pass intestate. § 732.101, Fla. Stat.

> On information and belief, beginning on or about January 5, 2017 and continuing thereafter, the Defendants, Amazon.com and FOGO Charcoal, *knowingly and intentionally commenced, conducted, and promoted the sale of marabu charcoal produced on the Subject Property* without the authorization of Plaintiff. On information and belief, beginning on or about January 5, 2017 and continuing thereafter, the Defendants also *knowingly and intentionally participated in and profited from the communist Cuban Government's possession of the Subject Property* without the authorization of Plaintiff who holds a claim to the Subject Property. *** In similar, Defendant FOGO Charcoal's website boasts that the product is the '[First] Cuban Export to US' and 'Made from 100% Cuban Marabu.' (See Fig. 2, FOGO Charcoal).

(*Compare* Am. Compl., ¶ 27 *with* Compl. ¶ 19) (emphasis added) Again, these allegations are "conclusory" and "legally insufficient." *See Gonzalez*, 2020 WL 1169125, at *2 (citing *Ruiz v. Experian Information Solutions, Inc.*, 2017 WL 1378242, at *2 (S.D. Fla. Apr. 14, 2017)(Scola, J.)(conclusory allegation of knowledge is not sufficient to satisfy the scienter requirement)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (conclusory allegations cannot survive a motion to dismiss). The only addition to the *scienter* allegations discusses Amazon.

> For example, on or about July 22, 2019, Plaintiff sent Defendant Amazon written notice by certified mail to cease and desist from trafficking in the Subject Property. While Defendant Amazon stopped selling the marabu charcoal on the U.S. version of its website, Defendant Amazon continued to (and continues to) traffick [sic] in the Subject Property by selling the marabu charcoal on various versions of its websites throughout the word. (See *e.g.*, Fig. 1, Amazon.com's website in Italy extolling the virtues of Cuban marabu charcoal). Thus, even with express written notice that it was trafficking in Plaintiff's property, Defendant Amazon.com knowingly and intentionally continued to (and continues to) traffick [sic] in the Subject Property on different versions of its website throughout the world.

(Am. Compl., ¶ 27) There is no similar allegation about FOGO. Figure 2 in the Amended Complaint is an image from FOGO's website dated July 16, 2019. Further, a current review of FOGO's website (referenced in the amended complaint: FogoCharcoal.com) reveals FOGO is not currently selling Marabu Charcoal. The only logical inference[4] from these points is that after receiving a letter from the Plaintiff concerning the confiscated property in July of 2019 (Am. Compl. ¶ 30), FOGO ceased selling the product on its website. (It did.)

Further, a comparison of the Figures 1 and 2 shows that the item FOGO was selling on its website as of July 16, 2019 is not the same as the one Amazon is allegedly selling on its Italian website[5].

[4] By seeking treble damages against FOGO (Am. Compl. ¶ 34.b) Plaintiff had to send notice to FOGO in July of 2019, like he alleges sent to Amazon. *See* 22 U.S.C.A. § 6082(a)(3)(B). *See also* Am. Compl. ¶ 30 [DE 29].

[5] Likewise, the Plaintiff does not allege that FOGO was the seller of the Marabu on Amazon.com. It was not. Figure 1 in the initial complaint (DE 1, pg. 7) shows that "Carbon Vegetal" was the seller of the Marabu charcoal on Amazon's US website at the time.

Simply, there is no plausible factual allegation that FOGO knowingly trafficked in Plaintiff's confiscated property. As before, "[t]hese allegations are conclusory and, without any other allegations demonstrating the Defendant [FOGO's] knowledge, are legally insufficient to state a claim." *Gonzalez*, 2020 WL 1169125, at *2.

IV. There is No Liability Under the Helms Burton Act for Trafficking in Residential Property.

Finally, for the first time, the Plaintiff explains that the subject Confiscated Property was residential. Specifically, the Plaintiff explains: "Guido Gonzalez [his father] married Adis Gonzalez [his mother] in 1952. The couple had four children, Neymis Gonzalez, Daniel Gonzalez, Guido Gonzalez and Adis Gonzalez, born in 1954, 1955, 1959, and 1965, respectively. All children were born in Cuba and lived on the subject property." (Am. Compl., ¶ 12) However, even if FOGO's actions amounted to trafficking, there is no remedy under Title III of the Helms Burton Act for trafficking in residential property under these circumstances.

Title III excludes "real property used for residential purposes" from the definition of property subjected to trafficking unless two conditions are present: either the claim to the residential property must be certified or a Cuban official must occupy the property. *See* 22 U.S.C.A. § 6023(B). Both of these conditions must have occurred on or before March 12, 1996. (*Id.*) Specially, 22 U.S.C. § 6023(B) provides:

> For purposes of subchapter III of this chapter, the term 'property' does not include real property used for residential purposes

> unless, as of March 12, 1996-- (i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949; or (ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba."

Id. Neither condition to bringing residential property under the confines of Title III are alleged to be present here. First, as Plaintiff alleged, no claim to the property has been certified under Title V of the International Claims Settlement Act of 1948. (Am. Compl. ¶ 23) Second, there is no allegation that a Cuban Official occupies the property. Dismissal for this reason is also proper.

V. Incorporation of the motion and reply memorandums of law.

In order to avoid duplication, FOGO adopts and reincorporates by reference its prior arguments in the motion to dismiss [DE 13] and reply brief [DE 24], except for those about importation of charcoal being subject to general license since the Court ruled that the existence of a general license is an affirmative defense. In sum, there is no plausible connection between any marabu charcoal – derived from an invasive weed – growing on land once owned by Plaintiff's grandfather and the product being sold by FOGO.

VI. As Plaintiff has Not Cured Prior Court-Ordered Deficiencies, Dismissal with Prejudice is Proper.

Plaintiff's Amended Complaint should be dismissed with prejudice. This Court afforded the Plaintiff an opportunity to amend, provided the Plaintiff an explanation of the deficiencies during the hearing on the motion to dismiss [DE 27], and again via written opinion [DE 28]. Despite those instructions, the Plaintiff's amended complaint contained the same, if not worse, deficiencies as the first complaint. In particular, the originally deficient—yet material—

allegations that FOGO knowingly and intentionally trafficked in Plaintiff's confiscated property are same as they were before. Dismissal with prejudice is now proper in favor of FOGO. *See e.g. Loos v. Immersion Corp.*, 762 F.3d 880, 890–91 (9th Cir. 2014), as amended (Sept. 11, 2014) ("The district court dismissed Plaintiff's amended complaint without leave to amend because Plaintiff failed to correct the deficiencies identified in his original complaint. We find no abuse of discretion in that decision. The district court gave Plaintiff a detailed explanation of why his original theory of loss causation was deficient. Despite having this explanation, Plaintiff persisted in attempting to establish loss causation through Immersion's disappointing earnings results and the July 1, 2009 announcement of an internal investigation. Because Plaintiff 'essentially re-pled the same facts and legal theories' in his amended complaint, the district court did not abuse its discretion in dismissing Plaintiff's claims with prejudice."). *See also Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 16-13596, 2020 WL 1074420, at *14 (11th Cir. Mar. 6, 2020) ("a district court is required to give a counseled plaintiff only one chance to replead before dismissing a complaint with prejudice on shotgun-pleading grounds [under Rule 8(a)], *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296 (11th Cir. 2018).").

WHEREFORE Defendant SUSSHI INTERNATIONAL, INC., d/b/a/ FOGO CHARCOAL respectfully request that this Honorable Court dismiss this action against it with prejudice and award it prevailing party attorney's fees and costs

together with any other and further relief that this Court deems necessary and just.

Respectfully submitted on this 17th day of April, 2020, by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on April 17, 2020, and the foregoing document is being served this day on all counsel or parties of record on the Service List below, 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 Notices of Electronic Filing.

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