

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA

THE REPUBLIC OF ECUADOR,

Plaintiff,

vs.

Case No.: 2009-34950-CA-01 (40)
Complex Business Litigation Section

ROBERTO ISAIAS DASSUM and
WILLIAM ISAIAS DASSUM,

Defendants.

JUDGMENT

THIS CAUSE came before the Court for a non-jury trial on liability on August 18 - 20, 2015. Upon consideration of the evidence and arguments of counsel, the Court finds that Article 29 of Ecuador's Law of Reorganizing Economic Matters in the Tax and Financial Systems ("Article 29"), Resolution JB-2008-1084 of the Banking Board of the Republic of Ecuador, Resolution SBS-2008-185 of the Superintendent of Banks and Insurance of Ecuador, and Resolution AGD-UID-GG-2008-12 of the Agencia De Garantia De Depositos of Ecuador are Acts of State of the Republic of Ecuador.

While there was substantial evidence presented at trial by the Isaiases that they committed no wrongdoing, did not cause any losses to Filanbanco, and were not provided Due Process in Ecuador, this Court believes those issues may more appropriately be addressed at a subsequent proceeding, which the Court decides need not now be reached based upon the below findings of fact and conclusions of law. However, because Ecuador lacks standing and/or failed to establish at trial any authority to bring suit, and because the statute of limitations has run, the

Court renders judgment in favor of the Defendants, Roberto Isaias and William Isaias, and against the Republic of Ecuador, based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Standing and Authority to Sue.

Prior to trial, this Court granted Plaintiff's procedural motion to substitute the "Republic of Ecuador" for the Agencia de Garantia de Depositos (the "AGD") as the named plaintiff in this matter. *See* Order Granting Mot. to Sub. Party Pl., Mar. 22, 2010. At trial, however, no witness testified that he or she was an actual representative of the Republic of Ecuador. Ecuador's sole witness at trial, Mr. Eguiguren (an Ecuadoran attorney), testified that he was neither a government official nor an official representative of the Republic of Ecuador:

- Q. Are you testifying as the government of Ecuador's official representative?
- A. I am not an official representative of the Government of Ecuador.
- Q. And you're not an official of the Government of Ecuador?
- A. No, I am not.

Trial Tr. Vol. 1, 105:14-22.

Ecuador's only witness, Genaro Eguiguren, had no personal knowledge of the Resolutions of the Republic of Ecuador:

- Q. You agree with me that you were not a member of any of those executive agencies that you named during your direct examination, correct?
- A. I, no.
- Q. Were you an eyewitness to any of these resolutions?
- A. I was not an eyewitness.
- Q. Were you there when they were signed?
- A. No.

Trial Tr. Vol. 1, 106:3-12; *see also* Trial Tr. Vol. 1, 108:25-109:3 (admitting that the first time he read the resolutions was after he was hired to testify in this case). The witness was not competent to corroborate the resolutions in any way.

Beyond the fact that no witness testified as a representative of the Republic of Ecuador, Plaintiff introduced no evidence that the “Republic of Ecuador” has any grant of authority, executive, judicial, statutory, or otherwise, to bring this action against the Defendants.

II. Statute of Limitations.

A. No proof of any relevant act committed by the Defendants after December 2, 1998.

After December 2, 1998, the Defendants were not employed by Filanbanco and had no involvement in any of its activities. Testimony of Mr. Franco (defense witness who is an attorney and was the General Counsel for Filanbanco from 1983 to 1996, when he became the General Manager until December 2, 1998), Trial Tr. Vol. 2, 354:23-355:2 (“Q. After December 2, 1998, do you know of anything that the defendants, William and Roberto Isaias, had to do with the administration of Filanbanco? A. No, I don’t.”). Filanbanco’s official shareholder records establish that on December 2, 1998, Filanbanco’s ownership was transferred from Intral Panama, S.A. to the AGD. *See* Defs.’ Ex. IV(2); Trial Tr. Vol. 2, 349-51 (testimony of Mr. Franco confirming the transfer). Ecuador offered no evidence or testimony of any act committed by the Defendants, much less any act committed after December 2, 1998.

This lawsuit was filed on April 29, 2009. Am. Final Joint Statement, ¶ 1(l).

Accordingly, this Court finds that more than 10 years elapsed between December 2, 1998 (the last possible date that the Defendants could have had anything to do with the administration of Filanbanco), and the AGD’s filing of this lawsuit.

B. The Deloitte Report was not concealed.

Although the Complaint appears to allege a possible basis for tolling, namely that the so-called “Deloitte Report” was concealed, there was no evidence of any such concealment in any way by anyone, much less by the Defendants. Defense witness Heidi Laniado, an attorney for

the Defendants in Ecuador, established that the Deloitte Report was filed in the public docket of Ecuador's Supreme Court in a document dated December 4, 2002. Trial Tr. Vol. 2, 213-21. Further, counsel for Ecuador stipulated to Ms. Laniado's representation that she found the Deloitte Report in that document. *Id.* Further, Mr. Franco testified that the Deloitte Report was publicly available upon its issuance in 2001 and had been filed in 2001 in the public docket of a lawsuit between the AGD and the Defendants. Trial Tr. Vol. 2, 371:2-25.

This Court finds the testimony of Ms. Laniado and Mr. Franco on this point to be credible. Ecuador offered no contrary evidence or impeachment establishing that the Deloitte Report was concealed in any way. Consequently, this Court finds that the Deloitte Report was not concealed.

CONCLUSIONS OF LAW

I. No Standing or Authority to Sue.

The "Republic of Ecuador" has no standing or authority to sue. Under Florida law, standing requires that "the claim be brought by or on behalf of one who is recognized in the law as a real party in interest, that is, the person in whom rests, by substantive law, the claim sought to be enforced." *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985).

The Plaintiff relies on Article 29 and its executive resolutions, as the basis for its standing to sue. None of the resolutions contain any language granting any authority to any agency other than the AGD. *See* Pl.'s Exs. 5, 6, & 7. Under the express terms of Article 29, only the AGD has standing to sue. The text of Article 29 states: "the Deposit Guarantee Agency [AGD] may seize property." Am. Final Joint Statement, ¶ 1(m); *see also* Pl.'s Ex. 3, AGD Law, Art. 22 ("The decision on the assets of financial institutions under the control of the [AGD], during the applicable insolvency period, rests with the [AGD]."); Art. 27 ("Coercive jurisdiction shall be

given to the AGD for the recovery and collection of debts in its favor, or in the favor of the financial institutions subject to its control and administration.”); *Dassum*, 146 So. 3d at 61 (construing the complaint as alleging that “the AGD has been authorized to pursue the balance of the liability through litigation against the Isaiases in Miami-Dade County”). Article 29 does not grant any authority to bring suit to any other agency or to “the Republic of Ecuador” itself. Nor was there any testimony to this effect at trial.

The AGD is not the plaintiff in this action, having been replaced, upon its motion, by the “Republic of Ecuador.” *See* Order Granting Mot. to Sub. Party Pl., Mar. 23, 2010. In that motion, the AGD indicated that “the Republic of Ecuador, through its General Procurator and pursuant to the relevant Laws of Ecuador, has assumed the right and power formerly held by the AGD to pursue this lawsuit against Defendants.” *See* Pl.’s Unopposed Mot. to Sub. Party Pl., Mar. 18, 2010. Ecuador did not introduce any evidence at trial that either its General Procurator, or the “Republic” itself, “assumed the right and power to pursue this lawsuit.”¹ FF, Part III. Neither Ecuador’s General Procurator, nor any representative from the Republic of Ecuador, testified at trial in this matter. At trial, no witness testified that he or she was an actual representative of the Republic of Ecuador. Ecuador’s sole witness at trial, Mr. Eguiguren, testified that he was neither a government official nor an official representative of the Republic of Ecuador. For lack of standing and authority to sue alone, judgment must be rendered for the Defendants.

¹ Indeed, Ecuador’s constitution specifically provides that the institutions of the government, including state agencies, “shall exercise only such competence and powers as are assigned to them under the Constitution and the law.” 2008 Const. art. 226, attached as Ex. C to Defs.’ Memo. on Ecuadorian Law Supporting Affirmative Defenses & Defenses, June 12, 2015; *see also* Decl. of Jorge Zavala Egas, at 15-16, attached as Ex. A to Defs.’ Resp. to Ecuador’s Mot. for Pretrial Determination of Judicial Notice, July 13, 2015 (“First Zavala Decl.”).

II. This Lawsuit is Barred By Any Applicable Statute of Limitations.

The Complaint was filed on April 9, 2009. There is no evidence that the Defendants are alleged to have committed any relevant act after December 2, 1998 - the date that Filanbanco was transferred to the AGD. Accordingly, more than 10 years elapsed between the last possible occurrence of a wrongful act and the filing of this lawsuit. FF, Part V.A.

The Third District Court of Appeal held that “[s]imply stated, the Republic claims to be a creditor with a claim for money damages.” *Republic of Ecuador v. Dassum*, 146 So. 3d 58, 62 (Fla. 3d DCA 2014). Florida’s statute of limitations for claims based on “statutory liability” or any other non-specified actions is four years. Fla. Stat. § 95.11(3)(f), (p) (four year limitations period for “[a]n action founded on a statutory liability” or “[a]ny action not specifically provided for in these statutes”).

Ecuador has not demonstrated at trial that any longer limitations period applies, including any Ecuadorian limitations period. Ecuador bears the burden of establishing that a foreign limitations period should apply. *See In re Avantel, S.A.*, 343 F.3d 311, 321-22 (5th Cir. 2003) (holding that the party seeking to apply foreign law has the burden of proving its substance to a reasonable certainty); *Aetna Cas. & Sur. Co. v. Ciarrochi*, 573 So. 2d 990, 990 (Fla. 3d DCA 1991) (“[W]here a party seeking to rely upon foreign law fails to demonstrate that the foreign law is different from Florida law, the law is the same as Florida.”). Ecuador has not met this burden. Ecuador offered no Ecuadorian law, before or at trial, about Ecuadorian limitations periods, much less any argument that this Court should apply an Ecuadorian limitations period instead of a Florida period.²

² On the other hand, Defendants offered Ecuadorian law indicating that any Ecuadorian limitations period would have long expired. According to the Defendants’ expert, Dr. Jorge Zavala, under Ecuadorian law, for claims based on infractions that are not crimes, the limitations period is three months. First Zavala Decl. at 13-15, attached as Ex. A to Defs.’ Resp. to Ecuador’s Mot. for Pretrial Determination of Judicial

The Plaintiff alleged in the Complaint that the Deloitte Report had been hidden and therefore tolled the limitations period. *See* Compl. ¶ 22 (alleging that Filanbanco’s General Manager sent the Deloitte Report “to the Banks Superintendent, Miguel Davila Castillo, who secreted the Deloitte Report and tried to discredit it through one of his subordinates”). There was no trial evidence of this. To the contrary, the Defendants introduced evidence and testimony that the Deloitte Report was publicly available upon issuance in 2001, and had been filed in the docket of Ecuador’s Supreme Court since 2002. FF, Part V.B.³

For the independent reason that this lawsuit is barred by the statute of limitations, judgment must be rendered for the Defendants.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that final judgment is rendered against the Plaintiff and for the Defendants. Plaintiff shall take nothing by this action. This Court retains jurisdiction to entertain Defendants’ motions for fees and costs.

Notice, July 13, 2015; Criminal Code Art. 417(6) (“In the case of contraventions, the statute of limitations shall be of three months, reckoned as of the commission of the infraction.”). Even construing Ecuadorian law most favorably to the Plaintiff, the longest possible limitations period is five years. *See* Criminal Code, Art. 363(3) (prescribing jail for falsification of financial statements); Art. 101 (prescribing a five-year limitations period for conduct that could be punished by jail), attached as Ex. F to Defs.’ Memo. on Ecuadorian Law Supporting Affirmative Defenses & Defenses. The limitations period begins to run from the date of the conduct. Criminal Code Art. 417(6) (three month limitations period); Criminal Code Art. 101 (five year limitations period) (“time shall be reckoned as of the date on which the infraction was perpetrated”). Ecuador has made no showing that any longer limitations period, much less, one longer than 10 years, applies.

³ The Plaintiff also alleged at trial for the first time, without any support, that, under Ecuadorian law, the limitations period was tolled while Filanbanco was in liquidation. There is no support for this position in Ecuadorian law. To the contrary, in such circumstances, Ecuadorian law provides for tolling only for claims brought by the bank-in-liquidation. Second Zavala Decl. at 1-3. Here the plaintiff is not Filanbanco (or Filanbanco-in-liquidation, or any receiver or liquidator of Filanbanco); rather, the plaintiff is the Republic of Ecuador. As such, there was no tolling.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 10/15/15.



JOHN W. THORNTON
CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

Copy to Counsel of Record