

Caballero v Fuerzas Armadas Revolucionarias De Colombia

2020 NY Slip Op 34026(U)

December 4, 2020

Supreme Court, New York County

Docket Number: 154864/2020

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANTONIO CABALLERO,

Index No. 154864/2020

Plaintiff

- against -

DECISION AND ORDER

FUERZAS ARMADAS REVOLUCIONARIAS DE
COLOMBIA, a/k/a/ FARC-EP a/k/a
REVOLUTIONARY ARMED FORCES OF
COLOMBIA, and NORTE DE VALLE CARTEL,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff's action seeks to enforce a federal judgment from the Southern District of Florida, now domesticated in New York by the Erie County Clerk. C.P.L.R. § 5018(b). Plaintiff moves for a declaratory judgment, C.P.L.R. § 3001, that Julio Cesar Alvarez Montelongo and Rafael Marquez are agents or instrumentalities of defendant Fuerzas Armada Revolucionarias de Colombia (FARC) under 28 U.S.C. § 1610 n., so that plaintiff may enforce his judgment against them. Kirschenbaum v. 650 Fifth Ave., 830 F.3d 107, 132-33 (2d Cir. 2016).

The federal district court for the Southern District of Florida determined that defendants FARC and Norte de Valle Cartel

are narcoterrorist organizations engaged in international terrorism and entered a final judgment against them in plaintiff's favor. A terrorist organization includes any organization designated as a Foreign Terrorist Organization under 8 U.S.C. § 1189, any organization designated in the Federal Register as a terrorist organization, or a group of two or more individuals who engage in terrorist activities. 8 U.S.C. § 1182(a)(3)(B)(iv); Kirschenbaum v. 650 Fifth Ave., 830 F.3d at 131-33. An agent or instrumentality of a terrorist organization such as FARC includes a person who materially assisted in, provided financial or technical support to, or provided merchandise or services in support of the international narcotics trafficking activities of a narcotics trafficker such as FARC or was controlled by or acted for a narcotics trafficker. Kirschenbaum v. 650 Fifth Ave., 830 F.3d at 135; Stansell v. Revolutionary Armed Forces of Colombia, 771 F.3d 713, 724 n.6, 731-32 (11th Cir. 2014).

To establish that Montelongo and Marquez both are agents or instrumentalities of FARC, plaintiff presents an affidavit by John Robert McBrien, the former Associate Director for Global Targeting in the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury. Aff. of Nicholas

Rostow Ex. A. McBrien attests that Montelongo and Marquez are FARC's agents or instrumentalities based on two OFAC publications and a United States Department of the Treasury press release in August 2017, which identified individuals and entities linked to the Flores Drug Trafficking Organization (DTO), including Montelongo and Marquez and entities linked to them, which do not include FARC. Aff. of John Robert McBrien (Rostow Aff. Ex. A) Exs. D-F. While the court may take judicial notice of these documents published on the United States Department of the Treasury's website, People v. Schreier, 22 N.Y.3d 494, 498 n. (2014); Travelers Prop. Cas. Co. of Am. v. Archibald, 124 A.D.3d 480, 481 (1st Dep't 2015); LaSonde v. Seabrook, 89 A.D.3d 132, 137 n.8 (1st Dep't 2011); L & Q Realty Corp. v. Assessor, 71 A.D.3d 1025, 1026 (1st Dep't 2012), this evidence does not establish that Montelongo or Marquez is FARC's agent or instrumentality. The evidence shows only that Montelongo and Marquez are linked to the Flores DTO.

The evidence does not show that the Flores DTO is an agent or instrumentality of FARC, as neither the OFAC documents nor the United States Department of the Treasury press release mentions FARC. At most, plaintiff establishes a strategic alliance between Raul Flores Hernandez, the leader of the Flores DTO, and

the leaders of the Sinaloa Cartel; McBrien Aff. Ex. F, at 1, which Caballero v. Fuerzas Armadas Revolucionarias de Colombia, No. 12-48803, slip op. at 1 (11th Judicial Fla. Cir. Ct. Nov. 18, 2014), found was an agency or instrumentality of FARC in 2014. Montelongo's and Marquez's link to the Flores DTO and an alliance between the Flores DTO and the Sinaloa Cartel, which was an agent or instrumentality of FARC in 2014, does not necessarily establish that Montelongo and Marquez are agents or instrumentalities of FARC in 2020.

McBrien also attests that OFAC blocked assets linked to Montelongo and Marquez, McBrien Aff. ¶¶ 34, 35, based on the "Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked," published by the United States Department of the Treasury August 13, 2014. Id. Ex. O. "Blocked" persons are persons who own "blocked" assets, which the United States has seized or frozen under 50 U.S.C. §§ 1701-1702 or 50 U.S.C. App. § 5(b). 28 U.S.C. § 1610 n.; Kirschenbaum v. 650 Fifth Ave., 830 F.3d at 137; Stansell v. Revolutionary Armed Forces of Colombia, 771 F.3d at 723. The court similarly may take judicial notice of the Revised Guidance on the Department of the Treasury's website. People v. Schreier, 22 N.Y.3d at 498 n.; Travelers Prop. Cas. Co. of Am. v. Archibald, 124 A.D.3d at 481;

LaSonde v. Seabrook, 89 A.D.3d at 137 n.8; L & Q Realty Corp. v. Assessor, 71 A.D.3d at 1026.

This evidence, however, shows only that OFAC may "block" individuals, entities, and assets pursuant to an Executive Order or OFAC regulations and not that Montelongo and Marquez are blocked individuals, are associated with blocked entities, or own blocked assets. McBrien Aff. Ex. O. Moreover, even if plaintiff established that the United States Department of the Treasury blocked Montelongo and Marquez, their associated entities, or their assets, no evidence indicates that such a designation originated from a connection to FARC, rather than for an entirely separate reason.

In total, plaintiff's combined evidence does not establish that Montelongo or Marquez assisted in, provided support to, were controlled by, or acted for FARC or its international narcotics trafficking activities, to qualify as its agent or instrumentality under 28 U.S.C. § 1610 n. Plaintiff fails to present evidence, from OFAC's website or otherwise, identifying Montelongo or Marquez as FARC's agent or instrumentality, or showing a direct connection between FARC and Montelongo or Marquez. Because plaintiff has failed to establish that Julio Cesar Alvarez Montelongo or Rafael Marquez is an agent or

instrumentality of defendant Fuerzas Armada Revolucionarias de Colombia (FARC) under 28 U.S.C. § 1610 n., the court denies plaintiff's motion for a declaratory judgment declaring that Montelongo and Marquez are agents or instrumentalities of FARC, without prejudice to a future motion presenting such evidence. C.P.L.R. § 3001.

DATED: December 4, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C