

**Andes Petroleum Ecuador Ltd. v Occidental
Petroleum Corp.**

2023 NY Slip Op 30972(U)

March 28, 2023

Supreme Court, New York County

Docket Number: Index No. 655072/2021

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ANDES PETROLEUM ECUADOR LTD.,

Plaintiff,

- v -

OCCIDENTAL PETROLEUM CORPORATION,
OCCIDENTAL EXPLORATION AND PRODUCTION
COMPANY

Defendants.

INDEX NO. 655072/2021

MOTION DATE 10/27/2021,
01/18/2023

MOTION SEQ. NO. 001 005

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 22, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147, 148, 149, 150, 154, 156, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 218, 219, 220, 221, 222, 223, 224, 225, 226

were read on this motion for ISSUANCE OF LETTERS OF REQUEST.

Upon the foregoing documents, and for the reasons stated on the record after oral argument on March 9, 2023 (NYSCEF 267) (as amplified herein), it is

ORDERED that Defendant Occidental Petroleum Corporation’s (“OPC”) motion to dismiss Plaintiff Andes Petroleum Ecuador Ltd.’s (“Andes”) Amended Complaint as untimely (CPLR 3211[a][5]) is **GRANTED** and all claims against OPC are dismissed with prejudice; it is further

ORDERED that OPC's motion for the issuance of letters of request is denied as moot in light of the dismissal of the Amended Complaint as against OPC; and it is further

ORDERED that this action shall remain stayed as against Defendant Occidental Exploration and Production Company pending arbitration.

This Court initially denied OPC's motion to dismiss, finding that OPC failed to meet its burden of showing that Andes's fraudulent conveyance claims were time-barred under Ecuadorian law, which was determinative because the claims accrued in Ecuador (NYSCEF 155 at 3-8; CPLR 202). The Court found that there was no analogous claim under Ecuadorian law, and thus applied Ecuador's default 10-year statute of limitations, under which Andes's claims would have been timely (*id.* at 7-8). The First Department reversed and remanded with instructions that, rather than applying Ecuador's default limitations period, the Court consider "the expert evidence provided by each side concerning what Ecuadorian causes of action are *most closely analogous* to the New York causes of action" for fraudulent conveyance (*Andes Petroleum Ecuador Ltd. v Occidental Petroleum Co.*, 213 AD3d 403, 404 [1st Dept 2023] [emphasis added]).

On remand, the parties submitted supplemental briefs and expert affidavits directed to the specific inquiry outlined by the First Department. After considering those submissions, together with the submissions made in connection with the original motion and oral argument by counsel, the Court concludes that *delito civil* (with a four-year statute of limitations) is the Ecuadorian cause of action most closely analogous to the various fraudulent conveyance claims asserted by Andes in this action. Although certain of Andes's New York law claims do not require proof of fraudulent intent, they all at a minimum involve claims of *constructive* fraud or fraudulent intent presumed by law. Moreover, under Ecuador's statutory scheme both intentional (*delito civil*)

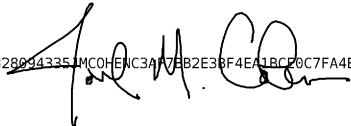
and unintentional torts (*cuasidelito civil*) are governed by the same four-year statute of limitations. “A cause of action for fraudulent conveyance is a species of tort” (*Morgenthau v A.J. Travis Ltd.*, 184 Misc 2d 835, 843 [Sup Ct New York County 2000] *citing Sunrise Indus. Joint Venture v Ditrac Optics*, 873 F Supp 765, 770-771 [ED NY 1995]). To be sure, *delito civil* is not a precise fit, and the Court has considered Andes’s argument that the form of relief under that cause of action (monetary damages) arguably differs from the form of relief for fraudulent conveyance (voiding the transfer, which in this case has the effect of monetary relief but is different in form), but in the end finds *delito civil* is the closest analogy that has been presented by the parties and their respective experts.

Andes’s arguments in favor of the collusion-focused Ecuadorian cause of action for *acción colusoria* (with a 10-year statute of limitations) as the closest analogy to fraudulent conveyance are unavailing. Even assuming *acción colusoria* may apply outside the real property context, the record indicates that rarely, if ever, has been the case. Indeed, the Court finds that *acción colusoria* is not only less analogous than *delito civil* but also less so than *acción pauliana*, an Ecuadorian claim with a one-year statute of limitations on which OPC secondarily relies. Unlike *acción colusoria* (or *delito civil*, for that matter), *acción pauliana* focuses on the rights of creditors, which is the focus of Andes’s claims in this case. A claim for *accion pauliana* requires “(1) a harm to the creditor; and (2) knowledge that the debtor will become insolvent after the transfer or its bad economic situation will be aggravated because of the transfer” (OPC Supp. Brief at 7-8 [NYSCEF 250]).

In sum, based on the record presented by the parties and their respective Ecuadorian legal experts, the Court finds that the closest Ecuadorian analogues to Andes’s claims of fraudulent conveyance under New York’s DCL are, in order, *delito civil* (four-year statute of limitations),

acción pauliana (one-year statute of limitations) and then *acción colusoria* (ten-year statute of limitations). There is no dispute that Andes’s Complaint in this action was filed more than four years after the alleged fraudulent conveyance at issue in this case. Accordingly, consistent with the First Department’s mandate and the plain language of CPLR 202, Andes’s claims against OPC in this action are time-barred and OPC’s motion to dismiss must be granted.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

3/28/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	OTHER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>				