United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7036 **September Term, 2014**

FILED ON: JUNE 9, 2015

TJGEM LLC,

APPELLANT

v.

REPUBLIC OF GHANA, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00382)

Before: ROGERS, GRIFFITH and WILKINS, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and was briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is:

ORDERED and ADJUDGED that the order of the district court be affirmed in its entirety. The district court correctly concluded that it lacked subject-matter jurisdiction and dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

TJGEM, LLC, a domestic corporation, was formed to pursue infrastructure projects in the Republic of Ghana. It entered into discussions presumed to be negotiations for a contract to reconstruct the Accra sewer system, but ultimately was not awarded the contract. It filed suit alleging that a number of torts were committed by the Republic of Ghana, the Accra Metropolitan Assembly, two Ghanaian officials, several U.S. companies, and several U.S. citizens.

The district court dismissed the complaint for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. *TJGEM LLC v. Republic of Ghana*, 26 F. Supp. 3d 1, 7–12 (D.D.C. 2013). TJGEM's primary claim was that the "commercial activity" exception applied. *See* 28 U.S.C. § 1605(a)(2). It sought no jurisdictional discovery in the district

court, relying instead on its lengthy complaint and the numerous attached exhibits. Upon *de novo* review, *see Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994), we conclude that TJGEM fails to show that the district court erred in concluding the conduct alleged in the complaint, as supported by the attached exhibits, did not come within the FSIA commercial activity exception. The legal theories underlying the complaint are difficult to discern, but with respect to the claim that a misappropriation of trade secrets occurred in the United States, there is no proffered evidentiary basis to support such a claim. Where jurisdiction depends on plaintiff asserting a particular type of claim, the claim may not be "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). TJGEM pointed to nothing more than bare assertions and a brief reference in an internet news story to a memorandum of understanding being signed in the United States. Nothing in the record indicates the memorandum involved TJGEM's trade secrets or that any trade secrets were disclosed by any of the defendants to the Export-Import Bank of the United States. All other alleged "commercial activity" took place in Ghana. And regardless of whether Alfred Vanderpuije, the Mayor of Accra with whom TJGEM entered into contract discussions, had negotiating authority on behalf of the central government of Ghana, TJGEM failed to proffer any evidence of a direct effect in the United States. Financial harm to a U.S. business abroad is not a "direct effect" for purposes of the FSIA commercial activity exception. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1184–85 (D.C. Cir. 2013).

TJGEM's theory that Ghana has waived its sovereign immunity, *see* Appellant's Br. 41–43, was not raised in the district court, and is therefore forfeited. *See GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012). In any event, TJGEM points only to Ghana's waiver of sovereign immunity in *its own* courts. It proffers no evidence of a waiver of immunity in the United States's courts, which have "uniformly concluded" that the domestic waiver of sovereign immunity does not imply such waiver in other countries' courts. *See Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 523 (9th Cir. 2001) (collecting cases).

TJGEM also fails to show that the district court abused its discretion by dismissing the non-sovereign defendants pursuant to Federal Rule of Civil Procedure 19(b). *See FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C. Cir. 1997). In the district court, TJGEM argued only that Ghana did not have sovereign immunity. It did not contest the defendants' argument in moving to dismiss that if the claims against Ghana were dismissed, so too should be those against the non-sovereign defendants under *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). *See TJGEM*, 26 F. Supp. 3d at 12. The district court therefore could reasonably conclude the issue had been conceded.

Finally, TJGEM's contention that the district court erred in considering matters outside the complaint in ruling on the Rule 12(b)(1) motion is contrary to our precedent. The district court may look beyond the pleadings to resolve disputed factual issues pertaining to jurisdiction. *See Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003). To the extent TJGEM contends that the district court considered inadmissible evidence, TJGEM has neither identified that evidence nor offered any explanation at all, and consequently the court will not consider the

contention. *See Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk