

5CL5DOEC

conference

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

JANE DOE, 1, et al.,

Plaintiffs,

v.

04 Civ. 10108 (SHS)

EMMANUEL CONSTANT, a/k/a "Toto  
Constant,"

Defendant.

-----x

December 21, 2005

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

SONNENSCHNEIN, NATH & ROSENTHAL, L.L.P.  
Attorneys for Plaintiffs

BY: IVOR SAMSON  
MONICA PA

CENTER FOR CONSTITUTIONAL RIGHTS  
Attorneys for Plaintiffs

BY: JENNIE GREEN

5CL5DOEC

conference

1 (Case called)

2 THE DEPUTY CLERK: Please, make your appearances for  
3 the record.

4 MR. SAMSON: Good morning, your Honor. Ivor Samson,  
5 Sonnenschein, Nath & Rosenthal, representing plaintiffs Doe 1  
6 and 2. And also with me is Monica Pa from Sonnenschein, Nath &  
7 Rosenthal, representing the same parties.

8 THE COURT: Good morning.

9 MS. PA: Good morning.

10 MS. GREEN: Jennifer Green representing Jane Does 1, 2  
11 and 3. And for the record, we will be filing a notice of  
12 withdrawal for Jane Doe 3.

13 THE COURT: A notice of withdrawal?

14 MS. GREEN: Yes.

15 THE COURT: All right. And there has been no answer?

16 MS. GREEN: That's correct.

17 THE COURT: So I think you can do that.

18 Do you have it now?

19 MS. GREEN: We will be filing it probably within the  
20 next few days. We need to get the necessary paperwork back  
21 from her.

22 THE COURT: So then this action, I will sign off on  
23 that because I have to, even though I assume it is done under  
24 41A.

25 MS. GREEN: Correct.

5CL5DOEC

conference

1 THE COURT: So get that within the week, if you can.  
2 So, we will then proceed on the basis of 1 and 2.  
3 Please, be seated. I have a number of questions. I'm sorry, I  
4 should let you tell me whatever you want to tell me first and  
5 then I will ask my questions.

6 Go ahead, sir.

7 MR. SAMSON: Thank you, your Honor.

8 We are here on the motion, request to enter a motion  
9 for default against the defendant Mr. Constant. He was  
10 personally served in January of this year on January 14th,  
11 2005. Proof of service was filed with the Court on January 26,  
12 2005. There has been no answer or any attack on the complaint  
13 filed by Mr. Constant.

14 On November 30, 2005, we filed a motion for judgment  
15 by default. A clerk's certificate of default was entered on  
16 December 1. There was an amended notice of a motion for  
17 judgment by default which included the clerk's certificate  
18 filed on December 7th, and then this hearing was set for today,  
19 December 21st.

20 We are also requesting, your Honor, that the Court,  
21 after default is entered, I hope, will set an evidentiary  
22 hearing on the issue of damages, and we are requesting three  
23 days of the Court's time for the evidentiary hearing, and  
24 further requesting, just based on trial schedule, that the  
25 Court not set that hearing before, probably the last two weeks

5CL5DOEC

conference

1 of May.

2 I have a trial in California that's going to go six to  
3 eight weeks beginning on March 10th, so I would prefer it after  
4 May 15th, if possible.

5 THE COURT: How do you know -- I don't see it in front  
6 of me at the moment, but I remember reading the affidavit of  
7 service. Apparently the defendant was served outside of 26  
8 Federal Plaza here. How do you know that it was the defendant?  
9 Do you have that affidavit of service?

10 MR. SAMSON: We have the affidavit from the process  
11 server. How that individual in fact knew it was Mr. Constant I  
12 can only speculate. Mr. Constant has appeared in the media, he  
13 has a fairly distinctive physical appearance. He is a large  
14 man. And I would be speculating further, your Honor, but I'm  
15 presuming that the process server had seen photographs or  
16 pictures of Mr. Constant and knew him by sight to serve him.

17 THE COURT: Do you happen to have that affidavit of  
18 service? I just can't find it in this pile.

19 MR. SAMSON: I have a copy of the return of service  
20 here with me.

21 THE COURT: Yes, that's fine. Just hand it up. I  
22 will give it back to you.

23 He doesn't have his description or anything like that.  
24 I take it somebody knew that the defendant was going to be  
25 appearing at 26 Federal Plaza on that day?

5CL5DOEC

conference

1 MR. SAMSON: Your Honor, my understanding is that an  
2 investigator was retained -- and I will defer to Ms. Green, she  
3 may have further information on this. The defendant was  
4 reporting on a periodic basis, I think weekly to immigration  
5 authorities at that building. They knew the time that he was  
6 supposed to come and, essentially, they were waiting for him.

7 THE COURT: Is that true?

8 MS. GREEN: Yes, that is my understanding, your Honor.

9 THE COURT: All right.

10 MS. GREEN: It is also my understanding that when  
11 Mr. Constant was served, he was greeted by name and he did  
12 confirm that he was in fact Mr. Constant.

13 THE COURT: By the investigator?

14 MS. GREEN: Yes, the person who served; yes.

15 THE COURT: Submit to me an affidavit of this person  
16 that would be the investigator. Because on this return of  
17 service I want additional information, in other words, how he  
18 knew that the person he served was the defendant, if he had a  
19 picture that he was using he should attach a copy of it; if he  
20 greeted him by name and he responded or acknowledged that he  
21 was Mr. Constant, I want that down. If it has, at this point,  
22 a description of him physically, I would want that.

23 Whatever he can do to give me some degree of comfort  
24 that the defendant is knowingly defaulting before I enter a  
25 default judgment. All right? Do that within the next two

5CL5DOEC

conference

1 weeks. The investigator may be on vacation. I'm going to hand  
2 proof of service back.

3 That's point one.

4 MR. SAMSON: Thank you.

5 THE COURT: And, based on these papers, I take it that  
6 you have served him by mail at his home, is that correct?

7 MR. SAMSON: That is correct, your Honor.

8 THE COURT: How do you know that that is his home?

9 MR. SAMSON: Your Honor, we know that he has received  
10 mail at that address. That address appears on several public  
11 records. For example, his social security is listed at that  
12 address. That is the address of his mother and his aunt. And  
13 apparently it's a matter of general public knowledge that he  
14 lives with his mother.

15 We understand, through an investigator, that the  
16 mailman, the postal clerk delivers mail to Mr. Constant at that  
17 address.

18 THE COURT: Well, get me an affidavit setting forth  
19 whatever you can that tells me that that's his address, all  
20 right? You don't -- you don't have to give me an affidavit of  
21 the postman, my guess is you wouldn't be able to get that, but  
22 of whoever says that he knows that the post office delivers  
23 mail there and all the other things that you have told me  
24 about.

25 MR. SAMSON: Yes.

5CL5DOEC

conference

1 THE COURT: The social security records, or whatever  
2 it is, why you think that's his address because I also want  
3 some degree of comfort that he received notice of this default  
4 motion. So, be beyond the simple fact that it was mailed to an  
5 address.

6 MR. SAMSON: Fair enough.

7 THE COURT: Do that within two weeks.

8 I have some preliminary questions but let me go to the  
9 end questions first. What do you foresee occurring at this  
10 default hearing? And why can't it be done or even shouldn't it  
11 be done on the basis of affidavits?

12 MR. SAMSON: If I may, your Honor, let me address the  
13 last question first, why it shouldn't be done on the basis of  
14 affidavit.

15 First, it could be done on the basis of affidavits but  
16 it should not be. Our plaintiffs have suffered grievously.  
17 This is something that falls in the category of crimes against  
18 humanity. And the purpose of this lawsuit, in addition to  
19 bringing just individual justice on behalf of these two women,  
20 is to shine the public light, if you will, on these political  
21 crimes that have occurred. And that can best happen if the  
22 victims have a chance to tell their story in court.

23 Secondly, your Honor, for these individuals, the  
24 lawsuit itself it is not just about money, it is about them  
25 individually seeking justice. I don't know how else to say it.

5CL5DOEC

conference

1           But, it will have a cathartic effect for them if  
2 someone in a position of authority in the United States is able  
3 to hear what has happened to them and say that it is wrong. It  
4 will be incredibly meaningful to them as well as to the Haitian  
5 refugee community in the United States.

6           And so, for those two reasons alone, we would  
7 respectfully like to have an evidentiary hearing rather than  
8 the Court merely ruling on affidavits.

9           I hope that answers at least the last question.

10          With respect to how I would envision that the hearing  
11 would occur, your Honor you would you like me to address that?

12          THE COURT: Yes; what you intended to do on that  
13 hearing, because you have asked for three days, it is a little  
14 unusual. I am concerned about having a hearing that -- in the  
15 guise of an inquest on damages subsequent to a default, that's  
16 fairly straightforward, but I'm concerned about such a  
17 straightforward proceeding being used for other purposes. And  
18 part of my concern will be alleviated on the basis of those  
19 affidavits if I have a better sense that Mr. Constant indeed  
20 has knowingly defaulted. That's part of the concern.

21          Then there is still some residual concern as to  
22 whether it is an appropriate use of the Court system.

23          Go ahead.

24          MR. SAMSON: Your Honor, the hearing is simply to  
25 focus on the damage. We anticipate that there will be four

5CL5DOEC

conference

1 experts, a social historian, a psychologist, a forensic  
2 physician, and there is a possibility of an economist.

3 THE COURT: Social historian, psychologist?

4 MR. SAMSON: And a physician.

5 THE COURT: Physician, and?

6 MR. SAMSON: And possibly an economist, that's still  
7 being determined; in addition to the two plaintiffs themselves.

8 And I should also mention, your Honor, that neither  
9 plaintiff is fluent in English, we have arranged for a Creole  
10 to English certified interpreter.

11 THE COURT: That's fine.

12 MR. SAMSON: That that in itself is going to make the  
13 proceeding a little bit longer than it might otherwise. But,  
14 as the Court is aware, under the statutes as pled, punitive  
15 damages are possible. In order to be able to assess the amount  
16 of damages, first direct compensatory damages for the two  
17 plaintiffs, the Court has to understand a little bit about  
18 their lives and the impact of the crimes that have been alleged  
19 on their lives.

20 Secondly, in order to make an assessment --

21 THE COURT: And therefore, what? That's why you are  
22 having the plaintiffs testify?

23 MR. SAMSON: That's why we are having the plaintiffs  
24 testify, why we are having the social -- pardon me, the  
25 psychologist testify, as to talk about the impairment of their

5CL5DOEC

conference

1 lives and essentially the impact on their lives.

2 THE COURT: This is somebody who has interviewed the  
3 two plaintiffs and would, as a psychologist, talk about the  
4 continuing damage due to the alleged crimes against them?

5 MR. SAMSON: Yes.

6 THE COURT: All right.

7 MR. SAMSON: The ongoing trauma, if you will.

8 The physician is necessary to talk about the physical  
9 nature of the acts that occurred.

10 THE COURT: This is somebody who has examined the two  
11 plaintiffs then?

12 MR. SAMSON: Particularly number 1, Doe number 1, who  
13 was stabbed under the charge of attempted killing; and then the  
14 economist -- and I say possibly an economist, your Honor,  
15 that's still being worked out -- to attempt a method of  
16 quantifying what the compensatory economic damages should be  
17 for these women.

18 THE COURT: You mean the standard economic analysis of  
19 what their earning power would have been and what it is now?  
20 That sort of thing?

21 MR. SAMSON: To some degree. These are both women of  
22 limited means with somewhat limited economic potential, so  
23 we're trying to figure out how to best address that.

24 THE COURT: All right.

25 MR. SAMSON: And that hasn't been determined right

5CL5DOEC

conference

1 now.

2 THE COURT: What about the social historian?

3 MR. SAMSON: The social historian, he may consider  
4 himself a political scientist. I'm using the term social  
5 historian.

6 THE COURT: One of my questions was going to be what  
7 is a social historian, but go ahead.

8 MR. SAMSON: Basically to talk about the command and  
9 control structure of what is known as FRAPH, F-R-A-P-H, the  
10 paramilitary organization headed by Mr. Constant, and to be  
11 able to describe the role of institutionalized violence as an  
12 integral part of FRAPH's policy in order to understand, I guess  
13 I would say the truly heinous nature of the crimes committed by  
14 Mr. Constant, his responsibility for those crimes as it goes to  
15 potential punitive damages.

16 THE COURT: All right.

17 Another of my concerns is if I don't have subject  
18 matter jurisdiction I, theoretically, should not be entering a  
19 default judgment because I can't do anything without subject  
20 matter jurisdiction. And, unfortunately, when I only have one  
21 side here it is hard for me to get a good handle on subject  
22 matter jurisdiction.

23 I think your subject matter jurisdiction claims are  
24 clearer or cleaner under your Tortured Victims' Protection Act  
25 claims which are 1 and 2. They're a little less clear under

5CL5DOEC

conference

1 claims 3, 4 and 5.

2 I think I would like some briefing from you on why I  
3 have subject matter jurisdiction. Now, you should do all five  
4 counts, as I say, just in analyzing it. I think the Tortured  
5 Victims' Protection Act takes care of 1 and 2 but, nonetheless,  
6 I want a submission from you on that.

7 MR. SAMSON: May we have 30 days?

8 THE COURT: Whatever time you want, yes. That's all  
9 right. 30 days is fine.

10 MR. SAMSON: Thank you.

11 THE COURT: But, in terms of 3, 4 and 5. You just may  
12 be making it more difficult on yourselves, and I'm not urging  
13 this on you but I'm suggesting it, if you withdraw claims 3, 4  
14 and 5, then I'm less concerned about subject matter  
15 jurisdiction. I don't know if there is anything in particular  
16 you gain -- I can't specifically tell you that 28 U.S.C. 1350  
17 permits punitive damages but, if it does, then you have got  
18 your punitive damages and your ability to obtain punitive  
19 damages under 1 and 2, and it just may make it a more  
20 straightforward litigation if I don't have that concern about  
21 the impact of Alvarez-Machain which I think, at least insofar  
22 as your Law of Nations claims are concerned, that is, Counts,  
23 3, 4 and 5 and the impact on alien tort statute or the  
24 relevance of the alien tort statutes.

25 So, do you want to respond to that suggestion?

5CL5DOEC

conference

1 Anyone?

2 MS. GREEN: Yes, your Honor, if I may.

3 The claims 3, 4 and 5 are claims which we believe do  
4 meet the Sosa v. Alvarez-Machain task. They are claims which  
5 are specific, obligatory and universally condemned. The  
6 violence against women claim, that is important because we  
7 believe that specifies the hate crime nature. And the specific  
8 gender-based violence has been recognized internationally and  
9 that it is universally condemned.

10 In terms of the cruel and inhuman degrading treatment  
11 and crimes against humanity, pattern of rape against women in  
12 Haiti has been recognized by the Inter-American Commission on  
13 Human Rights as a crime against humanity, so we do think that  
14 there is a very strong legal basis for recognizing that as  
15 well.

16 So, we are prepared to brief it more fully and lay out  
17 the authority which supports it.

18 THE COURT: All right. Well then do it on all five  
19 counts. And try to be as straightforward as you can be,  
20 especially because I don't have anybody on the other side.

21 MS. GREEN: Okay.

22 THE COURT: So, to the extent that there are issues in  
23 your analysis --

24 MS. GREEN: Lay them out.

25 THE COURT: Right, exactly. Be forthcoming, lay them

5CL5DOEC

conference

1 out. It will make it easier on me and it will make you more  
2 credible.

3 To the extent there are no issues, well then say it as  
4 well. But Alvarez-Machain is not as transparent as one would  
5 hope. All right?

6 MS. GREEN: Okay.

7 THE COURT: Now, there is another issue, and  
8 Mr. Samson averted to it by talking about a political crime. I  
9 think I have to be concerned about whether this is something  
10 that I need to defer to the political branches on.

11 Has the United States been made aware of this action  
12 and have they taken any position on it? Is there any  
13 involvement of the State Department here? Because I think any  
14 default judgment would, from your standpoint, would possibly  
15 stand up better if we know what the view of the United States  
16 is. Or, put another way, if the State Department has been  
17 made -- I think it would be the State Department as opposed to  
18 the Justice Department -- that somebody in the other branch is  
19 made aware of this action and given the opportunity to indicate  
20 whether they think there is an impact on the foreign policy of  
21 the United States. I think that's fairly traditional here.

22 So, I guess the narrow question is, does somebody in  
23 the political branch, specifically the executive branch, know  
24 of the existence of this suit? Have they been given an  
25 opportunity to tell me whether or not there is any impact on

5CL5DOEC

conference

1 the foreign policy of the United States of a judgment here?

2 MR. SAMSON: If I can answer that at two levels, your  
3 Honor? One, there has been no formal transmission of the  
4 lawsuit or the complaint to any U.S. government agency that I  
5 am aware.

6 At another level, I am aware that the Department of  
7 Homeland Security is aware of the litigation and it has been  
8 discussed between our co-counsel at the Center for Justice and  
9 Accountability, and members of the Department of Homeland  
10 Security staff.

11 THE COURT: But is that the first organization? I  
12 thought you were dealing with the Center for Constitutional  
13 Rights. What's the one you just mentioned?

14 MR. SAMSON: I'm sorry, your Honor?

15 THE COURT: The -- you said your co-counsel, I thought  
16 that it was the Center for Constitutional Rights.

17 MR. SAMSON: It is. I'm sorry if I misspoke. The CJA  
18 in San Francisco.

19 There is two public organizations, if we may, here.  
20 There is the Center for Constitutional Rights with which  
21 Ms. Green is affiliated, and then there is an organization in  
22 San Francisco that appears on the pleadings, the Center for  
23 Justice and Accountability.

24 THE COURT: All right.

25 MR. SAMSON: And, they are also listed as co-counsel

