

FSM SUPREME COURT TRIAL DIVISION

ROSA MUTI and KEMES MUTI, on behalf of)
the children of their late father, Muti Kette,)
)
Plaintiffs,)
)
vs.)
)
CHUUK PUBLIC UTILITIES CORPORATION)
and CHUUK STATE,)
)
Defendants.)
_____)

CIVIL ACTION NO. 2021-1004

ORDER DISMISSING CASE

Larry Wentworth
Associate Justice

Decided: November 24, 2021

APPEARANCES:

For the Plaintiffs: Sabino S. Asor, Esq.
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For the Defendant: Erick Divinagracia, Esq.
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HEADNOTES

Civil Procedure – Dismissal

When the court has granted both defendants' motions to dismiss (but on different grounds), the court will not reach the plaintiffs' summary judgment motion. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 456, 458 (Chk. 2021).

Civil Procedure – Dismissal; Civil Procedure – Motions – Unopposed

When no oppositions to the motions to dismiss were filed, the failure to oppose those motions is, by rule, deemed a consent thereto, although the court still needs good grounds to grant the dismissal. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 456, 458 (Chk. 2021).

Civil Procedure – Service of Process

When the plaintiff's attorney serves a summons and complaint, the service of process of those documents is insufficient under Rule 4(c)(1) because the plaintiff's attorney is deemed a party to the action. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 456, 458 (Chk. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Service of Process

A motion to dismiss for insufficiency of service is a Rule 12(b)(5) motion to dismiss, which courts often, instead of granting a dismissal, just quash the service and grant further time to effect service of process. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 456, 458 (Chk. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Service of Process

When a defendant has moved to dismiss for insufficiency of service and other grounds and the defendant's other grounds to dismiss have some merit, the better course is to not reach those other grounds for dismissal and to dismiss on the insufficiency-of-process grounds, which, since it is a dismissal without prejudice, would give the plaintiffs the opportunity to either pursue their remedies in other forums or to fix some of the deficiencies in their case before proceeding again in this forum. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 456, 458 (Chk. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Service of Process

A defendant has waived any right to move to dismiss for insufficiency of the service of process when it did not raise that defense either before or in its answer to the plaintiffs' original complaint. The filing of an answer not asserting the Rule 12(b)(5) defense of insufficient service constitutes a waiver of that defense. Muti v. Chuuk Public Utilities Corp., 23 FSM R. 456, 459 (Chk. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Statutes of Limitation

When the allegations of the plaintiff's own complaint demonstrate that certain of its claims are subject to the statute-of-limitations defense, the court may grant a defendant's motion to dismiss those claims on the statute of limitations, even though it is generally an affirmative defense. Muti v. Chuuk Public Utilities

Corp., 23 FSM R. 456, 459 (Chk. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This is before the court on 1) Plaintiffs' Motion for Summary Judgment, filed August 26, 2021; 2) Defendant Chuuk Public Utilities Corporation's Motion to Dismiss, filed August 31, 2021; 3) Motion to Dismiss Amended Complaint, filed September 2, 2021 by defendant Chuuk State; and 4) Defendant Chuuk Public Utilities Corporation's Opposition to Plaintiffs' Motion for Summary Judgment, filed September 6, 2021. Since the court hereby grants both defendants' motions to dismiss (but on different grounds), the court does not reach the plaintiffs' summary judgment motion.

No oppositions to the motions to dismiss were filed. By rule, the failure to oppose a motion is deemed a consent thereto, although the court still needs good grounds to grant it. Pacific Fin. Corp. v. David, 21 FSM R. 5, 6 (Chk. 2016). The plaintiffs may thus be deemed to have consented to the defendants' position that the court lacks jurisdiction because the matter is not yet ripe for adjudication.

I.

Chuuk Public Utilities Corporation ("CPUC") moves to dismiss the case against it because the court does not have personal jurisdiction over CPUC due to insufficiency of service of process; because the plaintiffs lack standing and failed to join the indispensable parties (the plaintiffs' siblings) since it was unclear who inherited the right to the land. Nepak # 1; because the matter should first be referred to the Chuuk Land Commission to determine Nepak # 1's ownership; and because the statute of limitations bars most, if not all of the plaintiffs' claims.

CPUC contends that the court lacks personal jurisdiction over it because of the insufficiency of the service of process of the original complaint and summons and the amended complaint. The complaint and summons (and later the amended complaint) were served on CPUC by the plaintiffs' attorney and the plaintiffs' attorney is considered a party to the action and thus ineligible to serve process.

With an exception that does not apply to this case, this is a correct statement. When the plaintiff's attorney served the summons and complaint, service of process of those documents was insufficient under Rule 4(c)(1) because the plaintiff's attorney is deemed a party to the action. Heirs of Jonah v. Department of Transp. & Infrastructure, 20 FSM R. 118, 120 (Kos. 2015). A motion to dismiss for insufficiency of service is a Rule 12(b)(5) motion to dismiss, which courts often, instead of granting a dismissal, just quash the service and grant further time to effect service of process. Helgenberger v. Ramp & Mida Law Firm, 21 FSM R. 445, 450 (Pon. 2018).

However, in this case, considering CPUC's other grounds to dismiss have some merit, the better course in this case is to dismiss on the insufficiency of process grounds, which, since it is a dismissal without prejudice, see Fuji Enterprises v. Jacob, 20 FSM R. 121, 127 (Pon. 2015); FSM v. Fu Yuan Yu 096, 16 FSM R. 1, 3 (Pon. 2008), would give the plaintiffs the opportunity to either pursue their remedies in other forums or to fix some of the deficiencies in their case that CPUC asserts exist before proceeding again in this forum. The court therefore does not reach CPUC's other grounds for dismissal.

II.

The State of Chuuk moves to dismiss the case against it because, under Rule 4(d)(6), the service of process was insufficient since the complaint and summons were served only on the Chuuk attorney general

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and not also on the governor as required by that rule. Chuuk also moves to dismiss the case against it because the plaintiffs lack standing to sue; because Chuuk is not a real party in interest; and because the six-year statute of limitations bars the plaintiffs' claims against it.

Chuuk has waived any right to move for insufficiency of the service of process since it did not raise that defense either before or in its answer to the plaintiffs' original complaint. The filing of an answer not asserting the Rule 12(b)(5) defense of insufficient service constitutes a waiver of that defense. FSM Civ. R. 12(h)(1).

Chuuk also moves for dismissal on statute of limitations grounds. Under Chuuk State Law No. 5-01-39, § 11, actions for breach of contract (or breach of a lease) must be commenced within six years of the date the right to sue accrues.

When the allegations of the plaintiff's own complaint demonstrate that certain of its claims are subject to the defense of statute of limitations, the court may dismiss those claims on the statute of limitations, even though it is generally an affirmative defense. Aunu v. Chuuk, 18 FSM R. 48, 50-51 (Chk. 2011); Mobil Oil Micronesia, Inc. v. Pohnpei Port Auth., 13 FSM R. 223, 228 (Pon. 2005).

The amended complaint's claims against the defendant State of Chuuk are for lease payments allegedly due in 1997, 1998, and 1999. The complaint in this case was filed May 5, 2021.

III.

NOW THEREFORE IT IS HEREBY ORDERED that this matter is dismissed without prejudice for claims against defendant Chuuk Public Utilities Corporation and dismissed with prejudice for all claims against the State of Chuuk that accrued before May 5, 2015.

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