FSM SUPREME COURT TRIAL DIVISION

CONSTANTINE DUNGAWIN, Plaintiff, vs. WESLEY SIMINA, in his official capacity as Governor of the government of Chuuk and STATE OF CHUUK, Defendants.	)	CIVIL ACTION NO. 2009-1003

ORDER GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS

Ready E. Johnny
Associate Justice

Decided: January 28, 2010

APPEARANCES:

For the Plaintiffs: Derensio S. Konman
Micronesian Legal Services Corporation
P.O. Box D
Weno, Chuuk FM 96942

For the Defendants: Joses Gallen, Esq.
Attorney General
Office of the Chuuk Attorney General
P.O. Box 1050
Weno, Chuuk FM 96942

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HEADNOTES

Civil Procedure – Summary Judgment – Grounds

A court will deny a summary judgment motion unless, viewing the facts presented and inferences made in the light most favorable to the nonmoving parties, it finds that there is no genuine issue of material fact and the that moving party is entitled to judgment as a matter of law. The movant bears the burden of showing a lack of triable issues of fact. Dungawin v. Simina, 17 FSM Intrm. 51, 53 (Chk. 2010).

Public Officers and Employees – Chuuk

Being forced to resign a Chuuk public service system job on December 2, 2002, because the employee was going to run for a seat in the Chuuk House of Representatives, was, as a matter of law, illegal because the statute and regulations requiring such resignations had already been held unconstitutional. Dungawin v. Simina, 17 FSM Intrm. 51, 53 (Chk. 2010).

Civil Procedure – Summary Judgment – Procedure

A summary judgment movant, since he bears the burden of showing a lack of triable issues of fact, must go forward not only on his allegations but also on the nonmovants' affirmative defenses, since the burden of demonstrating that no triable fact issues exist encompasses affirmative defenses as well as the movant's own factual allegations. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Administrative Law – Judicial Review; Public Officers and Employees – Chuuk

It would have been futile for Chuuk public service system employees, who were forced to resign in December 2002 because they wished to be candidates in the 2003 election, to pursue their administrative remedies before proceeding to court. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Public Officers and Employees – Chuuk; Statutes of Limitation

The applicable limitations period for a wrongful termination suit against the State of Chuuk is six years (subject to statutory tolling provisions). Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Statutes of Limitation – Accrual of Action

Courts have characterized the date from which a limitations period starts running as from when the cause of action accrues and that a cause of action accrues when a suit may first be successfully maintained thereon. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Sovereign Immunity – Chuuk; Statutes of Limitation – Accrual of Action

A cause of action against the State of Chuuk accrues or arises and the limitations period starts running from the date on which the event triggering the cause of action occurred. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Statutes of Limitation – Tolling

Chuuk's inaction in responding to a former state employee's February 17, 2006 request for payment of lost wages does not toll statute of limitation on the former employee's cause of action for wrongful termination in December 2002. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Statutes of Limitation – Accrual of Action

When a state employee was forced to leave state employment in December 2002, the six-year statute of limitations for claims against the state started running then because it was the date on which the event triggering the cause of action occurred and it was also the time when he could have first successfully maintained a suit on his claim he should not have been forced to resign. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Statutes of Limitation

When the six-year statute of limitations started in December 2002, and expired in December 2008, a case filed on March 23, 2009, was filed too late. Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010).

Civil Procedure – Motions

Failure to oppose a motion is deemed a consent to the motion, but, in order for the court to grant it, the motion still must have a sound basis in law and fact. Dungawin v. Simina, 17 FSM Intrm. 51, 55 (Chk. 2010).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

A sound basis in law and fact exists to grant the defendants' summary judgment motion when

the plaintiff's cause of action accrued in December 2002, the applicable statute of limitations is six years, and the plaintiff filed his suit over six years after his cause of action accrued. Dungawin v. Simina, 17 FSM Intrm. 51, 55 (Chk. 2010).

Civil Procedure – Summary Judgment – For Nonmovant

When a party's summary judgment motion has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, a court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that its nonmoving opponent is not entitled to judgment as a matter of law. Dungawin v. Simina, 17 FSM Intrm. 51, 55 (Chk. 2010).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On January 4, 2010, the plaintiff filed his Motion for Summary Judgment with Memorandum of Points and Authorities and a supporting affidavit. On January 6, 2010, the defendants filed their Opposition to Motion for Summary Judgment, containing a cross-motion for summary judgment. The plaintiff's summary judgment is denied and the defendants' cross-motion is granted. The court's reasons follow.

I.

The plaintiff, Constantine Dungawin, seeks summary judgment on his complaint, filed March 23, 2009, that he was wrongfully terminated on December 2, 2002, from his Chuuk Public Service System employment when he was forced to resign because he sought to run for the Chuuk House of Representatives. He seeks reinstatement to his old employment and monetary damages for lost pay, annual leave, sick leave and civil rights violations, plus attorney's fees.

On April 23, 2009, the defendants answered the complaint and raised as affirmative defenses: 1) the court lacked subject-matter jurisdiction because the plaintiff failed to exhaust his administrative remedies, 2) equitable estoppel, 3) unclean hands, 4) sovereign immunity, 5) statute of limitations, and 6) failure to state a claim upon which relief could be granted.

A court will deny a summary judgment motion unless, viewing the facts presented and inferences made in the light most favorable to the nonmoving parties, it finds that there is no genuine issue of material fact and the that moving party is entitled to judgment as a matter of law. Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 48 (App. 1995). The movant bears the burden of showing a lack of triable issues of fact. Nanpei v. Kihara, 7 FSM Intrm. 319, 323 (App. 1995).

II.

It is undisputed that Dungawin was forced to resign his public service system job on December 2, 2002, because he was going to run for a seat in the Chuuk House of Representatives. This, as a matter of law, was illegal because the statute and regulations requiring such resignations had already been held unconstitutional. Lokopwe v. Walter, 10 FSM Intrm. 303, 307 (Chk. S. Ct. Tr. 2001) (executive regulation invalid); Olap v. Chuuk State Election Comm'n, 9 FSM Intrm. 531, 533-34 (Chk. S. Ct. Tr. 2000) (statute invalid).

Dungawin, as the movant, since he bears the burden of showing a lack of triable issues of fact, must go forward not only on his allegations but also on the nonmovants' affirmative defenses, since the burden of demonstrating that no triable fact issues exist encompasses affirmative defenses as well as the movant's own factual allegations. FSM Dev. Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335, 337 (Chk. 2009); FSM Social Sec. Admin. v. Fefan Municipality, 14 FSM Intrm. 544, 546 (Chk. 2007).

The Chuuk State Supreme Court has previously ruled that it would have been futile for Chuuk public service system employees, who were forced to resign in December 2002 because they wished to be candidates in the 2003 election, to pursue their administrative remedies before proceeding to court. Tomy v. Walter, 12 FSM Intrm. 266, 270 (Chk. S. Ct. Tr. 2003) (reminding state government that a state employee could not be terminated for becoming a candidate). Dungawin has overcome the failure-to-exhaust-remedies defense. The defendants' equitable estoppel, unclean hands, and sovereign immunity affirmative defenses do not appear to be supported by any factual basis and need not be considered here.

The applicable limitations period for a wrongful termination suit against the State of Chuuk, which is what this case is, is six years. Chk. S.L. No. 5-01-39, § 11 (actions against Chuuk not covered by twenty-year or two-year limitations). Dungawin does not contend that any of the statutory tolling provisions, found in sections 12-14, apply in his case. *See id.* §§ 12-14.

Generally, courts have characterized the date from which a limitations period starts running is from when the cause of action accrues and that a cause of action accrues when a suit may first be successfully maintained thereon. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 485, 489 n.1 (App. 1996); Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14, 17 (App. 1993). By statute, Dungawin's cause of action accrued or arose and the limitations period started running "from the date on which the event triggering the cause of action occurred." Chk. S.L. No. 5-01-39, § 15. That date would be December 4, 2002, when Dungawin's resignation became effective.

Dungawin contends that the limitation period should be tolled because of Chuuk's inaction in responding to his February 17, 2006 request for payment of lost wages. For this proposition he relies on Kosrae v. Skilling, 11 FSM Intrm. 311, 317 (App. 2003), where the court held that Kosrae's inaction in resolving an employee's grievance could not be used in the running of the six-year statute of limitations. In Skilling, however, the court concluded that the six-year statute of limitations on an employee grievance did not start running until the employee left state employment. The grievance at issue in Skilling, was a pay dispute that remained unresolved during Skilling's employment period. Skilling therefore offers Dungawin no support.

In the present case, Dungawin was forced to leave state employment in December 2002. The state statute provides that the six-year statute of limitations for claims against it started running then – "the date on which the event triggering the cause of action occurred." Chk. S.L. No. 5-01-39, § 15. This was also the time when Dungawin could have first successfully maintained a suit on his claim he should not have been forced to resign. Rockhudson Tomy, another government employee who was forced out of office at the same time for the same reason – candidacy in the 2003 Chuuk House of Representatives election – and who was represented by the same law firm that represents plaintiff Dungawin in this case, did successfully maintain a suit against the state shortly after the 2003 election. *See* Tomy v. Walter, 12 FSM Intrm. 266 (Chk. S. Ct. Tr. 2003).

The six-year statute of limitations started in December 2002, and expired in December 2008. This case was filed March 23, 2009. It was filed too late. Dungawin's motion is thus denied as a matter of law.

III.

The defendants, in their opposition to Dungawin's summary judgment motion, move for summary judgment on the ground that this suit is barred by the statute of limitations. Dungawin did not file a response to this motion. Failure to oppose a motion is deemed a consent to the motion, FSM Civ. R. 6(d), but, in order for the court to grant it, the motion still must have a sound basis in law and fact. Saimon v. Wainit, 16 FSM Intrm. 143, 146 (Chk. 2008); American Trading Int'l, Inc. v. Helgenberger, 15 FSM Intrm. 50, 52 (Pon. 2007); Fredrick v. Smith, 12 FSM Intrm. 150, 152 (Pon. 2003); Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85 n.1 (Chk. 1995). A sound basis in law and fact exists to grant the defendants' summary judgment motion because, as described above, Dungawin's cause of action accrued in December 2002, the applicable statute of limitations is six years, and Dungawin filed his suit over six years after his cause of action accrued.

Furthermore, even if the defendants had not made a cross motion for summary judgment, the court would still have granted summary judgment for the defendants. When a party's motion for summary judgment has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that its nonmoving opponent is not entitled to judgment as a matter of law. FSM Dev. Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335, 338 (Chk. 2009); Alokoa v. FSM Social Sec. Admin., 16 FSM Intrm. 271, 277 (Kos. 2009); Western Sales Trading Co. (Phils) v. B & J Corp., 14 FSM Intrm. 423, 425 (Chk. 2006); Zion v. Nakayama, 13 FSM Intrm. 310, 313 (Chk. 2005); Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004); FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM Intrm. 169, 174-75 (Chk. 2001); Klavasru v. Kosrae, 7 FSM Intrm. 86, 89 (Kos. 1995); Truk Continental Hotel, Inc. v. Chuuk, 6 FSM Intrm. 310, 311 (Chk. 1994), *rev'd on other grounds*, 7 FSM Intrm. 117 (App. 1995). Dungawin, the original movant, had ample opportunity to show that there was a genuine issue of material fact about the running of the statute of limitations.

IV.

Accordingly, the plaintiff Constantine Dungawin's summary judgment motion is denied; the defendants' summary judgment motion is granted; and the case is dismissed as time-barred.

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