

been prosecuted in a diligent manner, prejudice is generally presumed. Even though the Defendant did not claim any prejudice, the Court identifies that the record supports a claim of prejudice and further, A case left to languish in the system, with little to no activity will eventually erode the ability of the Defendant to prepare a defense.

Since the Defendant would suffer a demonstrable prejudice or threat of prejudice from the excessive delay in Plaintiff's bringing this case to trial, this prong of the analysis has been met.

#### IV. CONCLUSION

Taking a look at the Plaintiff's processing of this case prior to the dismissal, the four speedy trial factors, on balance, show that the Defendant has suffered a violation of his right to a speedy trial. The record does not support any legitimate reasons for the delay, and the excessive length of time that has passed coupled with the absolute lack of diligence on the part of the Plaintiff are sufficient to assume prejudice. The record does show that the delays were a direct result of the Plaintiff failing to diligently prosecute the case. Brief periods of inactivity in an otherwise active prosecution are acceptable, however this was not the case in this instance and the Court is unwilling to encourage this behavior by the Plaintiff. The better procedure is for the Plaintiff to insist on its need to have its day in court by filing a motion for reassignment, requesting a status conference, or scheduling of the case prior to a dismissal. Something more than nothing would be a necessary action. Only rarely would a failure to file anything for several years be appropriate.

WHEREFORE, it is hereby ORDERED that this action is DISMISSED without prejudice for lack of prosecution. All scheduled dates in this matter are VACATED, and all pending motions are TERMINATED.

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#### CHUUK STATE SUPREME COURT TRIAL DIVISION

CHUUK STATE,	)	CSSC CR. NO. 097-2012
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JIMMY EMILIO and DAMIAN JOHN,	)	
	)	
Defendants.	)	
	)	

#### ORDER

Midasy O. Aisek  
Associate Justice

Hearing: January 8, 2013  
Decided: May 17, 2013

APPEARANCES:

For the Plaintiff: Charleston L. Bravo  
Assistant Attorney General  
Office of the Chuuk Attorney General  
P.O. Box 1050  
Weno, Chuuk FM 96942

For the Defendants: Bethwell O'Sonis, Esq.  
Office of the Public Defender  
P.O. Box 754  
Weno, Chuuk FM 96942

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HEADNOTES

Criminal Law and Procedure – Motions

A motion styled a motion in limine that requests the court's permission under Rule 15 to depose a witness outside of the jurisdiction is misnamed because a motion in limine is a pretrial request that certain inadmissible evidence not be referred to or offered at trial. Chuuk v. Emilio, 19 FSM R. 33, 35 n.1 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

Rule 15 permits the court to authorize a deposition in a criminal case when exceptional circumstances exist. It only allows depositions to be taken to preserve testimony for use at trial. It does not permit a witness who is available to attend trial to be deposed beforehand. Chuuk v. Emilio, 19 FSM R. 33, 36 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

There are three elements a party in a criminal case seeking to take a deposition must satisfy 1) there must be exceptional circumstances, 2) it must be in the interest of justice, and 3) it must be the party's own prospective witness whose testimony is to be preserved for use at trial. The movant has the burden of showing whether "exceptional circumstances" exist, and what must be shown is that the witness is unavailable to attend the trial, that the witness's testimony would be material, and that such testimony would be for the moving party's benefit or in some other way in the interest of justice. Chuuk v. Emilio, 19 FSM R. 33, 36 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions; Evidence – Witnesses

A witness is unavailable if he is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A foreign resident's attendance at trial cannot be secured by process since the FSM Supreme Court's subpoena power does not extend into other countries. Chuuk v. Emilio, 19 FSM R. 33, 36 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

Merely being resident in a foreign country does not necessarily mean the witness is unavailable, but when the travel expenses are burdensome or when the witness is unwilling to return for trial testimony, a possibility that may be more likely when he is an adverse, or even hostile, witness, a foreign resident may be considered unavailable and a deposition warranted. Chuuk v. Emilio, 19 FSM R. 33, 36 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

An exceptional circumstances analysis must be conducted in order to establish whether a Rule 15 deposition is appropriate. The analysis must include whether 1) the witness is unavailable to testify at trial; 2) injustice will result because testimony material to the movant's case will be absent; and 3) countervailing factors render taking the deposition unjust to the nonmoving party. Chuuk v. Emilio, 19 FSM R. 33, 36 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

A witness that is currently beyond the Chuuk state court's subpoena powers combined with her unwillingness to return to Chuuk is unavailable under the meaning of Chuuk Criminal Procedure Rule 15. Chuuk v. Emilio, 19 FSM R. 33, 37 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

When the alleged incidents occurred in a room in the presence of both defendants and the witness and the events that transpired within the room can be verified by the room's occupants and the witness's testimony is the plaintiff's crux for the case against the defendants because the plaintiff expects the witness's testimony to refute the defendants' account of the occurrences, the witness's testimony is material to the plaintiff. Chuuk v. Emilio, 19 FSM R. 33, 37 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

There are no countervailing factors when the defendants have not opposed the prosecution's request for a deposition and there is no evidence, on the record, indicating that any countervailing factors exist that would render the taking of the witness's deposition unjust. Chuuk v. Emilio, 19 FSM R. 33, 37 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

Rule 15 depositions require a request by the party who is planning to call the prospective witness or a detained witness's request. Chuuk v. Emilio, 19 FSM R. 33, 37 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Depositions

When the government points out that the witness, as the alleged victim in the case, is necessarily a witness for the prosecution, and her deposition is necessary to make a case; when the government made the request under Rule 15; when there have been no objections to the depositions; when the government and the witness presented exceptional circumstances since the witness was both unable and unwilling to return to Chuuk due to her concerns regarding her safety and well being in Chuuk; and when the witness is therefore "unavailable," the necessary Rule 15 factors have been met as required and the court will grant the request for the deposition. Chuuk v. Emilio, 19 FSM R. 33, 37 (Chk. S. Ct. Tr. 2013).

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COURT'S OPINION

MIDAS O. AISEK, Associate Justice:

This matter is before the Court on Plaintiffs Motion *in Limine* to depose a witness pursuant to Rule 15 of the Chuuk State Rules of Criminal Procedure.<sup>1</sup> Defendant has filed no response. The Court

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<sup>1</sup> This motion was misnamed. A Motion in Limine is a pretrial request that certain inadmissible evidence not be referred to or offered at trial, this motion is requesting the Court's permission to depose a witness

having reviewed the Motion and related papers; due and proper notice of the Motion having been provided, and after due deliberation and sufficient cause appearing therefore, the Court finds that the motion should be GRANTED.

#### I. BACKGROUND

This action arises from an incident occurring on or about March 18, 2011. On April 18, 2011, Plaintiff filed a criminal information charging the Defendants with (1) two counts of Misconduct in Public Office; (2) one count of Threat; (3) one count of Reckless Endangering; (4) one count of Assault and Battery; and (5) one count of Assault with a Dangerous Weapon. The facts as stated in the complaint and affidavit allege that Theresa Price was an American tourist who was residing at Blue Lagoon resort. Defendants Jimmy Emilio and Damian John were the Director of the Department of Public Safety and a detective at the Department of Public Safety respectively. Defendants along with other police officers responded to a complaint by Theresa Price at Blue Lagoon on March 18, 2011. During the interview, Price was arrested and placed into the cab of the police truck. Upon arriving at the police station, Price was placed into a room with Defendants. At some time Price was transferred to another room with the Defendants. After the interrogation, Price was taken to the hospital. Sometime thereafter, Price left the jurisdiction and has not returned.

#### II. LEGAL STANDARD

Rule 15 permits the court to authorize a deposition in a criminal case when exceptional circumstances exist. See Chk. Crim. R. 15(a). Rule 15 only allows depositions to be taken to preserve testimony for use at trial. It does not permit a witness who is available to attend trial to be deposed beforehand. FSM v. Wainit, 13 FSM Intrm. 301, 305 (Chk. 2005). There are thus three elements a party in a criminal case seeking to take a deposition must satisfy 1) there must be exceptional circumstances, 2) it must be in the interest of justice, and 3) it must be the party's own prospective witness whose testimony is to be preserved for use at trial. The movant has the burden of showing whether "exceptional circumstances" exist. Wolfe v. FSM, 2 FSM Intrm. 115, 122 (App. 1985). What must be shown is that the witness is unavailable to attend the trial, that the witness's testimony would be material, and that such testimony would be for the moving party's benefit or in some other way in the interest of justice. *Id.*

A witness is unavailable if he is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A foreign resident's attendance at trial cannot be secured by process since the FSM Supreme Court's subpoena power does not extend into other countries. Merely being resident in a foreign country does not necessarily mean the witness is unavailable, but when the travel expenses are burdensome or when the witness is unwilling to return for trial testimony, a possibility that may be more likely when he is an adverse, or even hostile, witness, a foreign resident may be considered unavailable and a deposition warranted. Wainit, 13 FSM Intrm. at 305-06.

#### III. ANALYSIS

An exceptional circumstances analysis must be conducted in order to establish whether a Rule 15 deposition is appropriate. Said analysis must include whether (1) the witness is unavailable to testify at trial; (2) injustice will result because testimony material to the movant's case will be absent; and (3) countervailing factors render taking the deposition unjust to the nonmoving party.

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outside of the jurisdiction.

*Unavailability*

Following the alleged incident, Theresa Price left the state of Chuuk. Plaintiff sought to take the deposition of Theresa Price. Price, however, has refused to enter Chuuk State under any circumstances. Price asserts that her safety is at issue indicating that the Defendants were employees of the Chuuk State Department of Public Safety, one of who was the Director of the Department. Price is currently beyond the subpoena powers of the Chuuk State Court and this combined with her unwillingness to return to Chuuk establishes unavailability under the meaning of Rule 15 of the Chuuk State Rules of Criminal Procedure.

*Materiality*

Plaintiff asserts that the entire case rests on the testimony of Theresa Price. The alleged incidents occurred in a room, in the presence of both Defendants and Theresa Price. The events that transpired within the room can be verified by the occupants of the room and the testimony of Theresa Price is the Plaintiff's crux for the case against the Defendants. The Plaintiff expects the testimony of Theresa Price to refute Defendants' account of the occurrences. The testimony of Theresa Price is therefore material to the Plaintiff.

*Countervailing Factors*

The Defendants have not opposed the request for a deposition. There is no evidence, on the record, indicating that any countervailing factors exist, which would render the taking of Theresa Price's deposition unjust. It is apparent that Rule 15 depositions require a request by the party who is planning to call the prospective witness or a request of a detained witness. The Government points out that as the alleged victim in the instant case, Theresa Price is necessarily a witness for the prosecution, and her deposition is necessary to make a case. The Government made the request under Rule 15. There have been no objections to the depositions. Furthermore, the Plaintiff and Theresa Price presented exceptional circumstances in that the witness has stated that she both unable and unwilling to return to the State of Chuuk due to her concerns regarding her safety and well being in Chuuk.

IV. CONCLUSION

Accordingly, the witness is therefore "unavailable" and the necessary factors have been met as required. The Defendant's Motion to obtain the deposition of Theresa Price, pursuant to Rule 15, is therefore GRANTED.

WHEREFORE, IT IS HEREBY ORDERED as follows:

1. The deposition of Theresa Price shall be conducted pursuant to all applicable Chuuk State Rules.
2. Cost to be borne by the Plaintiff.
3. The parties shall confer regarding the specifics necessary for the deposition on or before May 15, 2013.
4. The Plaintiff shall submit to the Court the proposed date for the depositions, flight arrangements, and proposed arrangements for the recording of the deposition.
5. The deposition must occur on or before June 19, 2013.

6. The deposition must be recorded and said recording must include both clear audio and clear visual recordings of the deposition in its entirety.
7. Someone authorized to give oaths in the jurisdiction must swear in witness.
8. Upon culmination of the deposition, the Plaintiff must notify the Court to allow for future scheduling of the case.

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CHUUK STATE SUPREME COURT TRIAL DIVISION

CHUUK STATE,	)	CSSC CR NO. 049-2003
	)	
Plaintiff,	)	
vs.	)	
	)	
LIGHTARO NOBORU and KERESSEN NOBORU,	)	
	)	
Defendants.	)	
_____	)	

ORDER

Camillo Noket  
Chief Justice

Decided: May 17, 2013

APPEARANCES:

For the Plaintiff:	Jayson Robert Deputy Attorney General Siena Seker State Prosecutor Office of the Chuuk Attorney General P.O. Box 1050 Weno, Chuuk FM 96942
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HEADNOTES

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – Speedy Trial

The four-factor balancing test for determining speedy trial violations: 1) length of delay; 2) the reason for the delay; 3) the defendant's assertion of his right, and 4) prejudice to the defendant, is also an appropriate tool to use in analyzing a Rule 48(b) dismissal. Chuuk v. Noboru, 19 FSM R. 38, 41 (Chk. S. Ct. Tr. 2013).

Criminal Law and Procedure – Speedy Trial

Whether there has been a lengthy delay, is a triggering mechanism for further analysis to