

FSM SUPREME COURT TRIAL DIVISION

BANK OF HAWAII, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 VITUS H. SUSAIA, )  
 )  
 Defendant. )  
 )

CIVIL ACTION NO. 2008-044

ORDER

Dennis K. Yamase  
Associate Justice

Decided: June 24, 2013

APPEARANCES:

For the Plaintiff: Michael J. Sipos, Esq.  
P.O. Box 2069  
Kolonia, Pohnpei FM 96941

For the Defendant: Salomon M. Saimon, Esq.  
Micronesia Legal Services Corporation  
P.O. Box 129  
Kolonia, Pohnpei FM 96941

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HEADNOTES

Judgments – Relief from Judgment

When a motion for relief from judgment is made pursuant to Rule 60(b)(1), a court must first consider whether it was made within a reasonable time even when it is made within the one year time limit. To determine if the time was reasonable, it considers whether the nonmoving party was prejudiced and whether the moving party had some good reason for his failure to take appropriate action sooner. Bank of Hawaii v. Susaia, 19 FSM R. 66, 69 (Pon. 2013).

Civil Procedure – Default and Default Judgments – Entry of Default – Setting Aside; Judgments – Relief from Judgment – Default Judgments

Rule 55(c) governs the setting aside of a default, but when a default judgment was already entered, FSM Civil Rule 60 applies. Bank of Hawaii v. Susaia, 19 FSM R. 66, 69 n.1 (Pon. 2013).

Judgments – Relief from Judgment – Default Judgments

The criteria to be met in order to justify setting aside a default judgment are whether the default was willful, caused by the defendant’s culpable conduct, whether the defendant has a meritorious defense, and whether setting aside the default would prejudice the plaintiff. Relief from judgment is

addressed to the court's discretion, which must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality. Bank of Hawaii v. Susaia, 19 FSM R. 66, 69 (Pon. 2013).

#### Civil Procedure – Pleadings; Statutes of Limitation

The statute of limitations is an affirmative defense which, if not pled, is waived. Bank of Hawaii v. Susaia, 19 FSM R. 66, 69 n.2 (Pon. 2013).

#### Judgments – Relief from Judgment – Default Judgments

Relief from judgment will be granted when the culpability and meritorious defense requirements are met because the defendant has a meritorious statute of limitation defense as to part of the default judgment and because if the defendant had had legal representation during the case's early stages, the statute of limitation defense would have been raised, which would affect a part of the amount granted in the plaintiff's default judgment and when not setting aside the default judgment would prejudice the defendant, instead of the plaintiff, because as it stands, the defendant would be liable for an amount greater than what he is supposed to pay by law. Bank of Hawaii v. Susaia, 19 FSM R. 66, 69-70 (Pon. 2013).

#### Contracts – Account Stated; Statutes of Limitation – Accrual of Action

By Pohnpei statute, in an action brought to recover the balance due upon a mutual and open account, or upon a cause of action upon which partial payments have been made, the cause of action is considered to have accrued at the time of the last item proved in the account. Bank of Hawaii v. Susaia, 19 FSM R. 66, 70 n.3 (Pon. 2013).

#### Contracts – Installment Contracts

An installment contract is one in which the agreed performance of at least one of the parties is to be rendered, not as a whole at one time and place, but piecemeal at different times or different places. Bank of Hawaii v. Susaia, 19 FSM R. 66, 70 (Pon. 2013).

#### Contracts – Installment Contracts; Statutes of Limitation – Accrual of Action

A cause of action accrues and the statute of limitations begins to run, when a suit may be successfully maintained thereon. When a note is payable in installments, each installment is a distinct cause of action and the statute of limitations begins to run against each installment from the time it becomes due, that is, from the time when an action might be brought to recover it. Bank of Hawaii v. Susaia, 19 FSM R. 66, 70 (Pon. 2013).

#### Contracts – Installment Contracts; Statutes of Limitation

The applicable statute of limitation period for an installment contract is six years. Bank of Hawaii v. Susaia, 19 FSM R. 66, 70 (Pon. 2013).

#### Contracts – Breach

Only a breach which is material, justifies a halt in performance by the injured party. A material breach is a question of fact which relies on several factors, but most particularly on whether the breach deprives the injured party of the contract's benefits. Bank of Hawaii v. Susaia, 19 FSM R. 66, 71 (Pon. 2013).

#### Banks and Banking; Contracts – Breach

Since the making payments at the Pohnpei branch bank office was not a material part of loan agreement and since the bank provided a means so that loan payments and other services might still be made locally, the bank did not deprive the borrower of any benefit under the promissory note and, since the borrower provided no evidence showing that he did not know where or how to continue to

make the required loan payments, he did not show that the bank's conduct rendered his performance under the contract difficult or impossible. Bank of Hawaii v. Susaia, 19 FSM R. 66, 71-72 (Pon. 2013).

Banks and Banking; Contracts – Breach

A bank did not breach a material provision of the contract when the bank notified the borrower of the bank branch's closure and the borrower knew of alternative agents and locations of making payments due on the loan. Bank of Hawaii v. Susaia, 19 FSM R. 66, 72 (Pon. 2013).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

I. BACKGROUND

An Order entered on February 19, 2013 instructed the parties to submit further submissions on the issue of whether this action was brought within the prescriptive periods by law. The Plaintiff Bank of Hawaii (BOH), filed their supplemental evidence on February 26, 2013. The Defendant Vitus H. Susaia (Susaia) entered his submission of further proof on March 6, 2013. The court makes the following findings.

II. FACTS

After a review of the submissions by both parties, the following facts are undisputed:

1. On April 18, 2000, the parties entered into a Promissory Note for a loan agreement in the amount of \$26,630.40. At this time, the BOH was operating a branch in Pohnpei. The Defendant Susaia promised to pay the BOH \$554.80 per month for 48 months, beginning on June 1, 2000 and ending on May 1, 2004 at the annual percentage rate of 16%.
2. Scheduled payments were made until March, 2002, when Susaia began missing payments or was only making partial payments. Payments on the loan stopped all together around August, 2002.
3. The BOH closed its Pohnpei Branch on November 29, 2002. Due to non-payment, this matter was referred to the Law Office of Andrea Hillyer for collection on the loan. The filings show that the Defendant Susaia made a payment of \$100 to the Law Office of Andrea Hillyer in August, 2004.
4. The Complaint was filed on December 30, 2008. On August 12, 2009, default judgment was entered in favor of the BOH and against Susaia in the amount of \$25,535.19, plus per diem interest at the rate of \$5.32, including reasonable attorney's fees for the BOH in the amount of \$250.00 and costs of \$25.00. The Defendant Susaia was not represented by legal counsel.
5. A Motion to Set Aside Default Judgment was filed by Susaia, through the Micronesian Legal Services Corporation (MLSC), on September 21, 2009, and a Renewed Motion to Set Aside Default and Default Judgment was filed on October 9, 2009. These motions were opposed by the BOH on November 4, 2009.
6. On February 19, 2013, after a hearing on January 25, 2012, an Order was entered

instructing the parties to make further submissions on the issue of whether this action was brought within the statutory period as provided by law. The court stated that the issue of statute of limitations must be considered before ruling on setting aside the default judgment. Pursuant to the Order, the BOH filed its supplemental evidence in opposition to setting aside the default judgment on February 26, 2013. Susaia filed his submission of further proof on March 6, 2013.

### III. DISCUSSION

#### A. *Setting Aside Default Judgment*

The first issue is the setting aside of the default judgment entered on August 12, 2009. FSM Civil Rule 60(b) states in pertinent part:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .<sup>1</sup>

When a motion for relief from judgment is made pursuant to FSM Civil Rule 60(b)(1), a court must first consider whether it was made within a reasonable time even when it is made within the one year time limit. To determine if the time was reasonable it considers whether the nonmoving party was prejudiced and whether the moving party had some good reason for his failure to take appropriate action sooner. Walter v. Meippen, 7 FSM Intrm. 515, 518 (Chk. 1996); Mid-Pacific Constr. Co. v. Senda, 7 FSM Intrm. 129 (Pon. 1995).

Here, default judgment was entered against the Defendant Susaia on August 12, 2009. Susaia filed his Motion to Set Aside Default Judgment on September 21, 2009, and a Renewed Motion to Set Aside Default and Default Judgment was filed on October 9, 2009. Susaia argues that he did not have the assistance of legal counsel from the onset of this case in December, 2008 until MLSC filed the Motion to Set Aside Default Judgment on September 21, 2009. The court finds that Susaia filed his motions within a reasonable time and that no prejudice against the Plaintiff BOH exists under FSM Civ. R. 60(b).

The criteria to be met in order to justify setting aside a default judgment are whether the default was willful, caused by the defendant's culpable conduct, whether the defendant has a meritorious defense, and whether setting aside the default would prejudice the plaintiff. Relief from judgment is addressed to the court's discretion, which must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 122 (Chk. 2002); College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 180 (Pon. 2001); Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM Intrm. 512, 515 (Truk 1988).

The court concludes that Susaia has a statute of limitation argument as a meritorious defense<sup>2</sup>

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<sup>1</sup> FSM Civil Rule 55(c) governs setting aside of default. Here, because a default judgment was already entered, FSM Civil Rule 60 applies.

<sup>2</sup> The statute of limitations is an affirmative defense which, if not pled, is waived.

as to part of the default judgment entered in this matter, which will be discussed later. If Susaia had legal representation during the early stages of this case, the statute of limitation defense would have been raised, which would affect a portion of the amount granted to the BOH as reflected in the default judgment that was entered. Thus, the culpability and meritorious defense requirements are met. Not setting aside the default judgment would prejudice Susaia, instead of the BOH, because as it stands, Susaia would be liable to the BOH for an amount greater than what he is supposed to pay by law.

B. *Installment Contract and Statute of Limitation*

The BOH argues that the loan in question is an installment contract because when the note was executed on April 18, 2000, the agreement was that Susaia would make 48 installment payments of \$554.80 per month for a period of 48 months, beginning on June 1, 2000. The BOH claims that pursuant to 58 Pon. C. § 3-108(3), this transaction is to be considered a mutual account.<sup>3</sup>

An installment contract is one in which the agreed performance of at least one of the parties is to be rendered, not as a whole at one time and place, but piecemeal at different times or different places. H.J. Tucker & Assocs., Inc. v. Allied Chucker & Eng'g Co., 595 N.W.2d 176, 190 (Mich. Ct. App. 1999) (Markman, J., concurring) (citing 3A CORBIN, CONTRACTS §687, at 245. Autonumerics, Inc. v. Bayer Indus., Inc., 696 P.2d 1330, 1337 (Ariz. Ct. App. 1984).

Based on the characteristics of the agreement, the court finds that the promissory note is an installment contract. 20 Atlantic Ave. Corp. v. Allied Waste Indus., Inc., 482 F. Supp. 2d 60, 83 (D. Mass. 2007); Berezin v. Regency Sav. Bank, 234 F.3d 68, 73 (D. Mass. 2000) (citing Clark v. Trumble, 492 N.E.2d 74, 79 (Mass. App. Ct. 1998)) (concluding that a promissory note is an installment contract). In an installment contract setting, the statute of limitations begins to run from the time that each installment is due. Segal v. National Fisheries Corp., 11 FSM Intrm. 340, 342 (Kos. 2003). A cause of action accrues and the statute of limitations begins to run, when a suit may be successfully maintained thereon. Where a note is payable in installments, each installment is a distinct cause of action and the statute of limitations begins to run against each installment from the time it becomes due, that is, from the time when an action might be brought to recover it. Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14, 17 (App. 1993).

Pursuant to 6 F.S.M.C. 805, the applicable statute of limitation period in this matter is six years.<sup>4</sup> Here, the promissory note was executed on April 18, 2000. Payments were to commence on June 1, 2000, to be made on a monthly basis for 48 consecutive months. Payments by Susaia were made up until March, 2002. Applying the six year statute of limitation, any claims under the note prior to December, 2002 would be barred because the Complaint was filed on December 30, 2008.

A matter decided by this court is on point with the present case. In FSM Development Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335 (Chk. 2009), the parties entered into an agreement under a promissory note where the FSM Development Bank (FSMDB) would loan Chuuk Fresh Tuna,

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<sup>3</sup> 58 Pon. C. §3-108(3) states "*Mutual account*. In an action brought to recover the balance due upon a mutual and open account, or upon a cause of action upon which partial payments have been made, the cause of action shall be considered to have accrued at the time of the last item proved in the account."

<sup>4</sup> 6 F.S.M.C. 805 states "All actions other than those covered in the preceding sections of this chapter shall be commenced within six years after the cause of action accrues." The facts of the present case show that the preceding sections of Title 6 under the FSM Code do not apply. This section is similar to 58 Pon. C. § 3-107 under the Pohnpei Code, which also sets a six year statute of limitation on similar actions.

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Inc.(CFTI) the amount of \$200,000.00 at 7% interest. *Id.* at 337. The note was executed on May 22, 1995, with monthly payments of \$3,410 to begin on October 10, 1995 and end on September 10, 2001.<sup>5</sup> *Id.* CFTI made payments up to March 4, 1998, and the FSMDB filed its complaint on July 20, 2007. *Id.*

In applying the six-year statute of limitation period, the court in Chuuk Fresh Tuna, Inc. held that installment payments that became due before July 20, 2001 were time barred. *Id.* at 338. Similar to the present case, the statute of limitation period would bar any payments due by Susaia prior to December, 2002. Accordingly, any payments due from March, 2002 to November, 2002 would be barred, totaling 9 monthly payments, amounting to \$4,993.20.

C. *Breach of Contract by Bank of Hawaii*

Susaia also claims that when the BOH closed its branch in Pohnpei on November 29, 2002, it breached its agreement because it did not amend the promissory note to reflect where payments would be made. The promissory note states "On the dates stated in your Payment Schedule, you will pay us at our branch address above, or at any of our other branches, the amounts stated."<sup>6</sup>

This court has previously ruled on this issue in Bank of Hawaii v. Welsin Helgenberger, Civil Action No. 2009-004. In its decision entered on December 5, 2011, the court held:

Only a breach which is material, justifies a halt in performance by the injured party. Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM Intrm. 123, 128 (Pon. 1991). A material breach is a question of fact which relies on several factors, but most particularly on whether the breach deprives the injured party of the benefits of the contract. *Id.*

After the branch closure, BOH employed agents who set up an office in Pohnpei. Aff. of Michael Sipos at 2 and 3. For some time after the Pohnpei BOH branch closed, these agents responded to inquiries and received loan payments from BOH's customers. *Id.* at 3. These actions by BOH did not deprive Helgenberger of the benefits of the contract, nor did it deprive him of being able to make payments locally.

Additionally, making payments at Pohnpei BOH branch office is not a material part of the contract between BOH and Helgenberger. BOH provided a means so that loan payments and other services might still be made locally. It did not deprive Helgenberger of any benefit under the promissory note. Helgenberger provided no evidence showing that he did not know where or how to continue to make the required loan payments and he did not show that BOH's conduct rendered his performance under the contract difficult or impossible.

The BOH submits the Affidavit of Roger Rivera, credit manager of the BOH. Mr. Rivera states that Susaia was contacted by a BOH recovery specialist, who informed him of the general agents for the BOH in Pohnpei, the Law Offices of Sipos and Berman, also provided him with a mailing address for payments. Aff. of Roger Rivera at 2. Also, Susaia made a payment of \$100 in August, 2004 to the Law Office of Andrea Hillyer, which shows that he had knowledge of where to make payments after

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<sup>5</sup> To secure the debt, CFTI mortgaged a blast freezer to the FSMDB.

<sup>6</sup> This provision is in the "Your Promise To Pay" section of the agreement between the parties.

the closure of the BOH in Pohnpei.

In line with the analysis in Helgenberger, the BOH did not breach a material provision of the contract because it notified and Susaia knew of alternative agents and locations of making payments due on the loan.

IV. CONCLUSION

The Defendant Susaia’s Motion to Set Aside the Default Judgment entered on August 12, 2009 is HEREBY GRANTED IN PART. The court finds that claims from March, 2002 to November, 2002 are barred under 6 F.S.M.C. 805, which totals 9 monthly payments, amounting to \$4,993.20. Accordingly, the default judgment entered in the amount of \$25,535.19 is reduced to \$20,541.99. The clerk shall therefore enter an amended judgment in that amount.

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FSM SUPREME COURT TRIAL DIVISION

MOHNER ESIEL, APINER HADLEY, BRIGIDA PRIMO, )  
CECILIA JOEL, MIYUMI CARL, MELIDA SANTOS, )  
MERIANA PABLO, ARTHUR SKILLING, )  
CHRISTOPHER SCALIEM, WAYNE H. HADLEY, )  
IOLANI IRONS, MIRAH WAGUK, ELIHTER EDGAR, )  
SEFIT YOMA, EUGENE MARQUES, OLIVER EDGAR, )  
GLAYNE FRANKLIN, DICKSON DAVID, PETRING )  
ALBERT, DAVID WOLPHAGEN, SAIORY D. JOAB, )  
AKAPITO SEMENS, JAYDEE CARL, REAGAN )  
ARTUI, KEN MANUEL, JR., RENWICK WEILBACHER, )  
JENS IRONS, KORETY MORI, PHIL BISALEN, )  
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ESTE, RENTON K. RENTON, MELTINA A. KIPPY, )  
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MONGKEYA, ASSU JACKSON, STEVE GEORGE, )  
BERCIL CHARLEY, WILSON TAULUNG, MERORINA )  
SIGRAH, STACY SANTOS, WETSIN PELEP, KOHLER )  
CARL, MAYUMINA MATHIAS, PERRY PERMAN, )  
JANET WICHEP, FRANCIS SILBANIUS, TANYA )  
SILBANIUS, and JACKSON SMITH, )

CIVIL ACTION NO. 2012-017

Plaintiffs, )

vs. )

FSM DEPARTMENT OF FINANCE, DEPARTMENT OF )  
ECONOMIC AFFAIRS, DEPARTMENT OF JUSTICE, )  
and FSM GOVERNMENT, )

Defendants. )

\_\_\_\_\_ )