sub nom., Weno v. Stinnett, 9 FSM Intrm. 200, 211 (App. 1999). The FSM may also be able to prove statute of limitations defenses for some or all of the tax payments.

GMP has appealed the Secretary's denial of relief. That appeal should afford it a plain, speedy, and adequate remedy and a forum in which it may prove its right to relief and the extent of that relief. Questions of fact are best determined in the trial division. A writ of prohibition is an extraordinary writ and cannot be issued when there is a plain, speedy, and adequate remedy otherwise available that has not been exhausted. Berman (I), 7 FSM Intrm. at 10. Such a remedy is available. GMP's petition clearly should not be granted.

IV. Conclusion

Although normally a petition for a writ of mandamus filed in the appellate division when the trial division has concurrent original jurisdiction should be dismissed without prejudice to a future petition filed in the trial division, when it is obvious that the writ clearly should not be granted, the appellate division can deny it.

* * * *

FSM SUPREME COURT TRIAL DIVISION

EOT MUNICIPALITY, ETTAL MUNICIPALITY, FANANOU MUNICIPALITY, FANAPANGAS MUNICIPALITY, LUKINOCH MUNICIPALITY, MOCH MUNICIPALITY, NOMWIN MUNICIPALITY, PAREM MUNICIPALITY, RUO MUNICIPALITY, SATOWAN MUNICIPALITY, TAMATAM MUNICIPALITY, and UDOT MUNICIPALITY,

Plaintiffs,

vs.

JOHNSON ELIMO, in his capacity as Governor of Chuuk State, CHUUK STATE, and FEDERATED STATES OF MICRONESIA,

Defendants.

CIVIL ACTION NO. 2012-1024

FEDERATED STATES OF MICRONESIA,

Cross-Claimant/
Counter-Cross-Defendant,

vs.

STATE OF CHUUK,

Cross-Defendant/
Counter-Cross-Claimant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Dennis K. Yamase
Associate Justice

Decided: March 18, 2014

APPEARANCES:

For the Plaintiffs: Stephen V. Finnen, Esq.
P.O. Box 1450
Kolonia, Pohnpei FM 96941

For the Defendants: Sabino S. Asor, Esq.
(Elimo and Chuuk) Attorney General
Office of the Chuuk Attorney General
P.O. Box 1050
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Settlement

While the court encourages settlement whenever possible and is always willing, if necessary, to allow time for settlement to occur, a request by only one party that is too amorphous to determine even whether a settlement attempt can or will be made must be denied when insufficient grounds have been shown to suspend the litigation in a vague hope that settlement may occur. The parties are still encouraged to pursue all settlement possibilities. Eot Municipality v. Elimo, 19 FSM R. 290, 293 (Chk. 2014).

Civil Procedure – Summary Judgment – Grounds

A court must deny a motion for summary judgment unless it, viewing the facts presented and the inferences made in the light most favorable to the non-moving party, finds there is no genuine issue as to any material fact. Eot Municipality v. Elimo, 19 FSM R. 290, 293-94 (Chk. 2014).

Civil Procedure – Summary Judgment – Procedure

The moving party has the burden of showing a lack of triable issues of fact, and a plaintiff, in order to succeed on a summary judgment motion, must also overcome all affirmative defenses that the defendant has raised. Eot Municipality v. Elimo, 19 FSM R. 290, 294 (Chk. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When, although the defendants raised the defenses of unclean hands, estoppel, and waiver in their answer, they did not assert in their opposition to the plaintiffs' partial summary judgment motion that any of these defenses applied to the plaintiffs' claim for repayment of the Chuuk airport renovation loan, they have, for the loan repayment claim, waived these defenses. Eot Municipality v. Elimo, 19 FSM R. 290, 294 (Chk. 2014).

Contracts – Breach; Statutes of Limitation

The statute of limitations period for a breach of contract claim against the State of Chuuk is six years. Eot Municipality v. Elimo, 19 FSM R. 290, 294 (Chk. 2014).

Statutes of Limitation – Accrual of Action

In an action brought to recover the balance due upon a mutual and open account, or upon a cause of action on 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. Eot Municipality v. Elimo, 19 FSM R. 290, 294-95 (Chk. 2014).

Statutes of Limitation – Accrual of Action

When it is unclear from what the court has before it exactly when Chuuk made a loan repayment but it must have been some time after April 2005, otherwise that payment would have reduced the loan principal by some degree and since that partial loan repayment was also an acknowledgment of the debt Chuuk owed the municipalities for the airport renovation loan, the plaintiffs' cause of action could not have first accrued and the statute of limitations could not have started to run in 1999 when the loan was made or in 2002 when the loans, as per the memorandum of understanding between Chuuk and its municipalities, started to earn interest. Eot Municipality v. Elimo, 19 FSM R. 290, 295 (Chk. 2014).

Contracts – Interpretation

Contracts frequently do not specify the time of performance and courts routinely decide what a reasonable time for performance is when no time has been specified. Eot Municipality v. Elimo, 19 FSM R. 290, 295 (Chk. 2014).

Debtors' and Creditors' Rights; Statutes of Limitation – Accrual of Action

Since a partial payment constitutes an acknowledgment of the debt, it is implicitly treated as a new promise to pay, and a new promise to pay has the effect of starting any limitations period all over again. Eot Municipality v. Elimo, 19 FSM R. 290, 295 (Chk. 2014).

Contracts – Interpretation; Statutes of Limitation – Accrual of Action

When repayment of the airport renovation loan was due a reasonable time after the $500,104.65 partial payment and when, without identifying the exact date that would constitute a reasonable time after the partial payment that the repayment should be complete, the court is confident that, based on the attendant circumstances, that time frame would be within the six-year period before suit was filed on January 24, 2012. Eot Municipality v. Elimo, 19 FSM R. 290, 295 (Chk. 2014).

Contracts – Interpretation

What constitutes a reasonable time depends on the attendant circumstances in each case and is often based on factual determinations. Eot Municipality v. Elimo, 19 FSM R. 290, 295 (Chk. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Contracts

A defendant's inability to pay does not eliminate the defendant's liability to pay. Eot Municipality v. Elimo, 19 FSM R. 290, 295 (Chk. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Statutes of Limitation

When, since the State of Chuuk and its Governor cannot prevail on their limitations defense, the plaintiffs' motion for partial summary judgment will be granted against the defendant state because Chuuk was the borrower on the airport renovation loan but since the Governor is not liable on the loan partial summary judgment will not be granted against him. Eot Municipality v. Elimo, 19 FSM R. 290, 295-96 (Chk. 2014).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This comes before the court on the plaintiffs' Motion for Partial Summary Judgment, filed October 16, 2013; Defendant Elimo's Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed November 18, 2013; the plaintiffs' Reply Supporting Motion for Partial Summary Judgment, filed December 6, 2013; Defendant Elimo's Motion to Suspend Litigation, filed December 17, 2013; the plaintiffs' Opposition to Motion to Suspend Litigation, filed January 2, 2014; and the plaintiffs' Supplemental Brief Supporting Motion for Partial Summary Judgment, filed February 19, 2014.

I. Motion to Suspend Litigation

Governor Johnson S. Elimo moves to suspend this litigation because of a December 17, 2013 Memorandum of Understanding executed between him and the Chairman (Weno Mayor Pintas Kenneth) and Vice-Chairman (Moch Mayor Serino Sinem) of the Chuuk State Mayors Conference in which the memorandum's parties agreed to ask the court to suspend this litigation with a view toward discussing the subject debt in favor of further negotiation and an amicable settlement and eventual dismissal of this lawsuit.

The plaintiffs note that this is not a class action and no organization has the authority to speak for the named plaintiffs and that, of the two mayoral signatories, one is the mayor of a municipality that is not a party to this case (Weno) and the other (Moch), while he is the mayor of a party, it is unclear in what capacity he is acting. The plaintiffs further note that discovery responses are overdue from defendants Elimo and the State of Chuuk and also from the other defendant, the Federated States of Micronesia, and that any suspension would hinder discovery production even though those responses concern the plaintiffs' accounting cause of action which the memorandum of understanding does not seem to address. The plaintiffs also note that no concrete terms are mentioned and that only the Chuuk Legislature, not the Governor, has the authority to obligate state funds to satisfy public debts and that the State of Chuuk has been having difficulty meeting its debt obligations.

While the court encourages settlement whenever possible and is always willing, if necessary, to allow time for settlement to occur, this request by only one party[1] is too amorphous to determine even whether a settlement attempt can or will be made. The motion must be denied. This does not mean that the parties are precluded from reaching a settlement. It is just that sufficient grounds have not been shown to suspend the litigation in a vague hope that settlement may occur. The parties are still encouraged to pursue all settlement possibilities.

II. Partial Summary Judgment

The twelve municipal plaintiffs seek summary judgment on their claim against Governor Johnson S. Elimo and the State of Chuuk for Chuuk's failure to repay the money borrowed from the municipal capital improvement project funds in 1999 (with 5% interest per annum starting in October 2002). Chuuk borrowed the sum of $3,757,790 from a total of thirty-nine municipalities so that the Chuuk airport could be renovated and kept open for use.

A court must deny a motion for summary judgment unless it, viewing the facts presented and

---

[1] The other party to the memorandum of understanding is apparently the Chuuk State Mayors Conference, which is not a party to this litigation.

the inferences made in the light most favorable to the non-moving party, finds there is no genuine issue as to any material fact. Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 48 (App. 1995). The non-movants do not dispute that the loan agreement was made in 1999, that the 5% interest per annum started in October 2002, that there has only been one payment on each loan, and the amount still owed on each plaintiff. Chuuk and Elimo, however, claim that their affirmative defenses bar the plaintiffs from recovering the unpaid amount.

The moving party has the burden of showing a lack of triable issues of fact, and a plaintiff, in order to succeed on a summary judgment motion, must also overcome all affirmative defenses that the defendant has raised. Zion v. Nakayama, 13 FSM Intrm. 310, 312 (Chk. 2005). The affirmative defenses raised by Governor Elimo and the State of Chuuk in their answer are unclean hands, failure to state a claim on which relief can be granted, and the six-year statute of limitations.

A. *Unclean Hands, Estoppel, and Waiver*

The plaintiffs argue that the equitable estoppel and unclean hands defense are frivolous because they are equitable defenses and the plaintiffs' action does not sound in equity. They further contend that the estoppel defenses cannot apply because it was they who relied on Chuuk's promises to pay, not Chuuk or Elimo who relied on the municipalities' conduct or promises to their detriment.

Although Elimo and Chuuk raised the defenses of unclean hands, estoppel, and waiver in their answer, they did not assert in their opposition to the plaintiffs' partial summary judgment motion that any of these defenses applied to the plaintiffs' claim for repayment of the Chuuk airport renovation loan. They have therefore, for the loan repayment claim, waived these defenses.

B. *Failure to State a Claim*

Chuuk and Elimo, in their opposition to the plaintiffs' partial summary judgment motion, do not assert that the plaintiffs' claim for repayment of the Chuuk airport renovation loan fails to state a claim for which the municipalities could obtain relief. They only contend that the statute of limitations bars the plaintiffs from obtaining that relief.

C. *Statute of Limitations*

It is undisputed that the statute of limitations period for a breach of contract (the airport renovation loan agreement) claim against the State of Chuuk is six years. Chk. S.L. No. 5-01-39, § 11. This suit was filed on January 24, 2012. Chuuk and Elimo contend that the cause of action had accrued well before January 24, 2006, and that therefore the limitations period has run and this claim is time-barred.

Chuuk and Elimo assert that the plaintiffs' cause of action must have first accrued either in 1999 when the loan was made or in 2002 when the loans, as per the memorandum of understanding between Chuuk and its municipalities, started to earn interest. Chuuk and Elimo further assert that the statute of limitations on an open account, which they assume the airport loan repayment is, is also six years from when the cause of action accrues. The plaintiffs contend that since there is no repayment date set forth, the repayment only had to be made within a reasonable time and only when the ability to pay the debt arises.

Chuuk and Elimo contend that the renovation loan was or was similar to an open account. In an action brought to recover the balance due upon a mutual and open account, or upon a cause of action on 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. Mid-Pacific Liquor Distrib. Corp. v. Edmond, 9 FSM Intrm. 75, 78 (Kos. 1999). In this case, the last item proved would be Chuuk's payment of $500,104.65.

It is undisputed that Chuuk has difficulty paying its debts and that it is or was unable to repay the airport renovation loan in one lump sum. It is also undisputed that it did make one payment of $500,104.65 on the loan. It is unclear from what the court has before it exactly when this payment was made. But it must have been some time after April 2005, otherwise that payment would have reduced the loan principal by some degree. Since that partial loan repayment was also an acknowledgment of the debt Chuuk owed the municipalities for the airport renovation loan, the statute of limitations could not have started to run at either of the earlier times that Chuuk and Elimo claim it must have.

Contracts frequently do not specify the time of performance and courts routinely decide what a reasonable time for performance is in those cases where no time has been specified. Iriarte v. Micronesian Developers, Inc., 6 FSM Intrm. 332, 335 (Pon. 1994). Chuuk therefore was expected to repay the airport renovation loan within a reasonable time. It had taken Chuuk at least six years (or longer) to make the first ($500,104.65) payment on the $3,757,790 loan. It was therefore reasonable, since the loan was of a size that it is undisputed that Chuuk could not pay all at once with one payment, that either full repayment or another $500,000 installment payment would not be made for some time.

Furthermore, since the $500,104.65 partial payment constituted an acknowledgment of the debt, it is implicitly treated as a new promise to pay. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 5.7 (5th ed. 2003). A new promise to pay has the effect of starting any limitations period all over again. *Id.*

Repayment of the airport renovation loan was thus due a reasonable time after the $500,104.65 partial payment. Without identifying the exact date that would constitute a reasonable time after the $500,104.65 partial payment when the repayment should be complete, the court is confident that, based on the attendant circumstances, that time frame would be within the six-year period before this suit was filed. What constitutes a reasonable time depends on the attendant circumstances in each case and is often based on factual determinations. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 587-88 (Pon. 2011).

Lastly, Chuuk and Elimo state that "[w]hen the subject loan was executed, it was during the First Compact of Free Association when the state was guaranteed government operations and capital improvement projects in the millions from the United States [but n]ow, during the Amended Compact, the state no longer has that much revenue to work with . . . ." Def. Elimo's Opp'n to the Pls.' Mot. for Partial Summ. J. at 2 (Nov. 18, 2013). They contend that "[s]uch changing government financial situations are the compelling policy basis behind the statute of limitations' requirement to bring claims such as the present action within the six years period." *Id.* at 2-3. This last contention must be summarily rejected because a defendant's inability to pay does not eliminate the defendant's liability to pay. Weriey v. Chuuk, 16 FSM Intrm. 329, 332 (Chk. 2009) (inability to pay is not a defense to liability; thus, whether the state had funds to pay has no bearing on whether it is liable for payment).

III. CONCLUSION

Accordingly, since Chuuk and Elimo cannot prevail on their limitations defense, NOW THEREFORE IT IS HEREBY ORDERED that the plaintiffs' motion for partial summary judgment is granted against the defendant State of Chuuk. Chuuk was the borrower on the airport renovation loan. Governor Elimo

is not liable on the loan and partial summary judgment is not granted against him.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF MOSES HENRY and JOHN SIGRAH, Appellants, vs. HEIRS OF ELISE AKINAGA, Appellees.	APPEAL CASE NO. K4-2013 Kosrae Civil Action No. 81-10

OPINION

Argued: February 18, 2014
Decided: March 19, 2014

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellants: Alik Jackson, Esq. (brief and argued)
Richard D. Gronna, Esq., pro hac vice (brief)
P.O. Box PS-64
Palikir, Pohnpei FM 96941

For the Appellees: Snyder H. Simon, Esq.
P.O. Box 1017
Tafunsak, Kosrae FM 96944

* * * *

HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo

Questions of law are reviewed de novo. Heirs of Henry v. Heirs of Akinaga, 19 FSM R. 296, 300 (App. 2014).

Appellate Review – Standard – Civil Cases – Factual Findings

Since a trial court's findings are presumptively correct, any challenged findings of fact will be reviewed on a clearly erroneous standard. Heirs of Henry v. Heirs of Akinaga, 19 FSM R. 296, 300-01 (App. 2014).