NGIRBEDUL BUTIRANG, Plaintiff

V.

ONGALIBANG UCHEL, Defendant

Civil Action No. 356 Trial Division of the High Court

Palau District

December 29, 1967

Action for damages for personal injuries sustained when defendant bit off tip of plaintiff's nose during altercation. Although injury occurred more than three years prior to the filing of complaint, defendant failed to raise affirmative defense of two-year statute of limitations in T.T.C., Sec. 317. The Trial Division of the High Court, Associate Justice D. Kelly Turner, held that Court may take judicial notice of statutory two-year limitation within which tort action must be commenced without defense having been specifically pleaded, and denied recovery.

1. Courts-Judicial Notice

Court may take judicial notice of an affirmative defense, including limitation of actions in appropriate cases, without defense having been specifically pleaded.

2. Civil Procedure-Affirmative Defenses

Court can and should consider and apply any affirmative defenses upon face of record.

3. Civil Procedure-Generally

In Trust Territory, where no procedure has been specified, court may proceed in any manner not inconsistent with law or rules or procedure and which court deems will promote justice. (Rules of Crim. Proc., Rule 30)

4. Civil Procedure-Affirmative Defenses

Where no procedure is directed in Trust Territory regarding specially pleading affirmative defenses, court may apply defense of limitations. (Rules of Crim. Proc., Rule 30)

5. Civil Procedure-Untrained Counsel

There is recognized need in Trust Territory for special consideration for Micronesian practice as compared to United States practice by trained lawyers.

6. Civil Procedure-Untrained Counsel

Court will not hold Micronesian counsel to rules of pleading and procedure employed in United States when matters are not covered by Trust Territory rules or Code.

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7. Courts-Judicial Notice

Judicial notice may be taken without request by party, of common law, constitutions and public statutes in force in any part of Trust Territory, including statutory limitation of tort actions to two years. (Rules of Evidence, Rule 9; T.T.C., Sec. 317)

8. Courts-Judicial Notice

Where complaint for personal injury shows on its face that cause of action arose more than three years prior to filing of complaint, court will take judicial notice that action is barred. (T.T.C., Sec. 317)

Assessor:

Interpreter:

Reporter:

Counsel for Plaintiff:

Counsel for Defendant:

JUDGE PABLO RINGANG
SINGICHI IKESAKES
HARUO 1. REMELIIK
NANCY K. HATTORI
AUGUSTO UCHEL
WILLIAM O. WALLY

TURNER, Associate Justice

OPINION

This is an action for damages for personal injuries in which it is agreed defendant bit off the tip of plaintiff's nose during an altercation. The tort was committed August 3, 1963, and the complaint was filed September 21, 1966. During the interim, defendant Uchel was prosecuted, appealed without success, and served sentence for the crime of mayhem.

The fact of defendant's invasion of plaintiff's legally protected rights having been conceded, the sole remaining question is plaintiff's entitlement to damages. Trial of the question was held on the merits of plaintiff's claim, the defendant having answered the complaint by general denial. Defendant's principal theory of defense was an agreement, supported by consideration, between the parties purportedly extinguishing any civil liability. An absolute affirmative defense, the bar of the two year statute of limitations for commencement of an action for personal

injury, Section 317, Trust Territory Code, was not raised by the defendant.

This affirmative defense appears on the face of the complaint. The question therefore is whether the court should apply the defense of limitations without the defendant having raised it in his pleadings or at the trial.

No provision is found in the Trust Territory Code or the court rules issued pursuant to Section 178 of the Code relating to raising specific affirmative defenses of law such as the statutes of limitation, laches, waiver, contributory negligence and similar matters, which in United States Federal Courts and most State Courts must be specifically set forth in the pleadings before a court will consider them.

Federal Rules of Civil Procedure, Rule 8(c) l'equires "a party shall set forth affirmatively" such matters as the statute of limitations or "any other matter constituting an avoidance or affirmative defense". Unless this is done the party having such a defense generally loses his right to raise it and rely upon it.

Quite clearly in the present proceeding the defense of limitations was not specifically raised. The defense not having been presented to the court by written motion or during the trial, the question now concerns us whether the court may take judicial notice of the statutory two year limitation within which a tort action must be commenced, and enter judgment in accordance with its application.

[1] The court is of the opinion that it may take judicial notice of an affirmative defense, including the limitation of actions in appropriate cases, without the defense having been specifically pleaded. However, we admonish all counsel that reliance upon the court to discover and apply an affirmative defense without bringing it to the court's attention is indeed a risky proceeding because of the very

probable chance that the court will not look for such a defense and even though it may exist will therefore not discover or apply it. The much better practice, particularly when the answer is a general denial of the complaint, by means of "demand for trial" is to raise an affirmative defense by motion to dismiss for failure to state a claim upon which relief can be granted. The motion may be then heard and decided before the merits of plaintiff's claim need be considered.

- [2] The opinion that the court can and should consider and apply any affirmative defenses evident upon the face of the record, is derived from the practice that prevails in the Trust Territory and certain exceptions made in American courts to the general rules requiring pleading affirmative defenses.
- [3] Trust Territory Rule 30, Rules of Criminal Procedure, incorporated by reference in the Rules of Civil Procedure, provides: -

"Where no procedure has been directed in any matter which arises, a court may proceed in any manner, not inconsistent with law or with these rules, which the court deems will promote justice."

[4] No procedure having been directed regarding specially pleading affirmative defenses, the court may apply the defense of limitations.

In *Naoro and Pios v. Inekis H.*, 2 T.T.R. 232, it appears the court considered limitations of actions and in lieu thereof applied the doctrine of laches, another affirmative equitable defense, even though it is evident from the record neither defense was specifically pleaded. The same result, in the interest of justice, was achieved in two other Truk District cases-Nos. 172 and 173 [2 T.T.R. 481].

[5] For many years the Chief Justice, both in his decisions and his procedural rules, has recognized the

need for special consideration for Micronesian practice as compared to United States practice by trained lawyers. In the first High Court Appellate Division case, Kumtak Jatios v. L. Levi, et al., 1 T.T.R. 578, arising from Jajuro, the court said: –

"It is recognized that counsel involved in this case, both in the Trial Division and on appeal, lacked anything like the education and training expected of a lawyer in the United States; that trained lawyers are not l'eadily available to the parties, and generally are not available to most Micronesians as a practical matter for civil actions in most parts of the Trust Territory. We have endeavorec to make allowances for these facts,"

[6] Since the decision, many trial assistants have come a long way in advancing by experience, particularly, we add, the counsel in the present case. But, even though there is much greater legal sophistication today than then, we do not believe it appropriate to hold counsel to the rules of pleading and procedure employed in the United States when such matters are not covered by our own rules or Code. We do this, however, with the reminder, previously made to counsel, of the danger inherent in failing to bring matters of this kind to the court's attention.

There are, it is noted, some applicable exceptions to the requirement of Federal Rule 8(c) that affirmative defenses are lost unless specifically pleaded.

[7] In *Buell v. Roebuck*, 321 F.2d 468, the Federal Circuit Court held that matters which may be judicially noticed need not be pleaded, but may be raised by counsel. Matters subject to judicial notice include the statutory law, the court decisions and established custom. Rule 9, Rules of Evidence, provides:-

"Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in any part of the Trust TelTitory, ',.."

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[8] One of the statutes is Section 317, Trust Territory Code, limiting actions in tort to two years. The complaint on its face shows the cause of action arose August 3, 1963, and complaint was filed September 21, 1966, more than three years thereafter. The action was barred by the statute of limitations. Since the action is barred, it is unnecessary to consider the merits of plaintiff's claim for damages for his injury.

JUDGMENT ORDER

It is ordered, adjudged, and decreed: -

- 1. That judgment be and hereby is ordered for the defendant Ongalibang Uchel and that plaintiff Ngirbedul Butirang be and hereby is denied recovery.
- 2. That costs are awarded to defendant in accordance with law upon filing itemized affidavit.

TRUST TERRITORY OF THE PACIFIC ISLANDS

v

BENSON POLL

Criminal Case No. 92
Trial Division of the High Court
Ponape District

January 31, 1968

Hearing to determine admissibility of two alleged statements made by accused. The Trial Division of the High Court, Chief Justice E. P. Furber, held that as to cases to a certain date court would apply traditional standards regarding right to counsel in the case of confessions obtained by police from persons in custody, however, after that date *Miranda* type standards would be applied.

Motion to suppress denied.

1. Criminal Law-Rights of Accused-Generally

Decision of the United States Supreme Court concerning protection against self-incrimination and the right to counsel are entitled to great