Kumangai v. Isechal, 1 ROP Intrm. 587 (1989)
MYOKANG KUMANGAI, ETIBEK SHMULL,
Appellants,

v.

YASHINTO ISECHAL, TOMOE POLLOI, and DILKEDIL OSAM,
Appellees.

CIVIL APPEAL NO. 22-87
Civil Action No. 11-87

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: April 12, 1989

Counsel for Appellants: Kaleb Udui

Counsel for Appellees: Jonas Olkeriil, T.C.

BEFORE: LOREN A. SUTTON, Associate Justice; EDWARD C. KING, Associate Justice; ROBERT A. HEFNER, Associate Justice.[1]

SUTTON, Associate Justice:

The suit is for title to and possession of a Palauan money called Ngeru Techong. The history of this money goes ⊥588 back in time to the early part of this century and ends with its possession by one Tmerukl at the time of his death in 1970.

The merits turn upon the nature of Tmerukl's possession of Ngeru Techong at the time of his death as defined by Palauan traditional law and custom.

Trial on this issue commenced on April 16, 1987. After the first Plaintiffs' witness was called and in the midst of his testimony the trial judge raised, sua sponte, the issue of the statute of limitations (14 PNC Sections 405 & 411) and recessed the trial with orders to counsel to brief the question.

Counsel for Plaintiffs/Appellants objected to the relevancy of the statute citing the usage

[1] The Honorable Edward C. King is Chief Justice of the Supreme Court, Federated States of Micronesia and the Honorable Robert A. Hefner is Chief Judge of the Commonwealth Trial Court, CNMI.

Both are part-time Associate Justices of the Supreme Court, Republic of Palau, by Presidential Appointment and sit as such from time to time when exigencies demand it.

of Palauan custom and arguing briefly that the six (6) year limitation imposed by the statute of limitations does not apply to customary process which often operates over large blocs of time.

Counsel for Defendants/Appellees, made an oral motion to dismiss based upon the statute of limitations.

On May 20, 1989, after hearing further argument and considering the briefs, the trial judge held that his sua sponte raising of the issue of the statute of limitations constituted leave to amend the pleadings to include that affirmative defense in compliance with ROP R. Civ. Pro. 8(c) & 15(b) and that Plaintiffs'/Appellants' suit was barred by the Statute of limitations and dismissed the case.

Plaintiffs filed a notice of appeal on June 18, 1987. Appellants' opening brief was filed in due course, however, the Appellees failed to file their responsive brief on time and on ⊥589 March 16, 1989, this court granted Appellants' motions to preclude oral argument on appeal and to strike Appellees' tardy brief.

Appellants' argument was heard on April 10, 1989.

The sole issue we consider on appeal is whether or not the trial judge abused his discretion in raising the issue of the unpleaded statute of limitations sua sponte, over the objection of the Appellants' and subsequently dismissing the suit on that ground.

WE FIND that he did.

ROP R. Civ. Pro. 8(c) requires a party to set forth affirmatively the defense of the statute of limitations. Failure to do so constitutes waiver of this affirmative defense. *Meyers v. John Deere, Ltd.*, 683 F. 2d 270, 273 (8th Cir. 1982), *Senter v. General Motors Corp.* , 532 F.2d 511, 530 (6th Cir. 1976).

ROP R. Civ. Pro. 15(b) clearly requires the consent of the parties (emphasis ours) to the raising of issues at trial which have not been pleaded and precludes the introduction of such issues by the court in an effort to summarily dispose of litigation by, sua sponte, amending pleadings to add affirmative defenses. ROP R. Civ. Pro. 15(b), *Banks v. Chesapeake and Potomic Tele. Co.*, 802 F.2d 1416, 1427 (D.C. Cir. 1986).

In addition, Rule 15(b) precludes such amendment during trial where objection is made to evidence not within the issues raised by the pleadings and where admission of such evidence ⊥590 would prejudice the objecting party in maintaining his action or defense on the merits.

Here, clearly, there exists no showing of consent, either explicit or implicit, by Appellants to the raising of the affirmative defense of the statute of limitations. Likewise it may be clearly seen that the admission of such evidence by the trial judge, indeed the introduction sua sponte of this issue, lies at the extreme edge of prejudice to Appellants since it precluded Appellants completely from further presentation of evidence on the merits of their case.

There may be an argument resident in these facts that the statute of limitations should not be applied at all to actions involving some issues of custom and traditional law based upon Art. V, Section 2, Republic of Palau Constitution. The fact that certain Palauan customary processes take longer in their normal course to work themselves out within the parameters of traditional law than would be allowed by the statute of limitations supports this argument to some degree, however, such argument is not properly before us.

Although this argument was briefly touched upon by Appellant in his hasty oral response to the trial judge when the issue of the statute of limitations was raised, it was never expanded upon then nor was it specifically raised in Appellants' brief on appeal [2]. In addition, we are impressed with the prejudicial effect, imposed in this matter to date upon Appellants.

⊥591 They have been summarily precluded from trial on the merits and we note and recognize the existence of a public policy which demands, on these facts, that the merits be decided with all due dispatch.

The right of the parties to have this matter speedily decided on the merits and upon the pleadings before the trial court with no further amendments allowed, since none were properly made within the ambit of court rules, requires, in our view, the approach and decision which follows:

We reverse the trial court order of dismissal and remand the case to that court with instructions to proceed with trial on the merits and upon the pleadings as they stood prior to the raising of the issue of the statute of limitations.

The trial judge may either begin anew at the trial commencement point or simply re-institute proceedings already commenced and proceed from the place reached just prior to the improper raising of the issue of the statute of limitations.

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[2]Transcript of Trial, p. 49, Ins. 15-22.