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Jane Reim
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REPUBLIC OF THE MARSHALL ISLANDS

**HIGH COURT
MARSHALL ISLANDS**

RESTY JOHNNY, Plaintiff vs. MAJURO STEVEDORE & TERMINAL CO., & CHARLES STENETT, et al., Defendants	CIVIL ACTION NO. 2022-02453 ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO AMEND
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Counsel:

Rosalie Aten Konou, Counsel for Plaintiff, Resty Johnny

David Strauss, Counsel for Defendants, Majuro Stevedore & Terminal Co., & Charles Stenett, et al.

INTRODUCTION

On December 29, 2022, Plaintiff, Johnny Resty, in his personal capacity as the Father of Marton Johnny, by and through Counsel, filed a "Complaint for wrongful death, compensatory damages, and other damages, Summons & service certificate" (hereafter, "The Initial Complaint"). In The Initial Complaint, the Plaintiff alleges that the Defendant is liable for the wrongful death of the Plaintiff's son, that Plaintiff's son was providing support to his parents at the time of his death, as well as to his wife and children, and that the Plaintiff is entitled to compensation for wrongful death, loss of income and other damages.

On December 30, 2022, Defendant, Majuro Stevedore & Terminal Co., et al., by and through Counsel, filed "Defendant's Motion to Dismiss; Memorandum in Support" and a "Memorandum in Support" (collectively hereafter, "Motion to Dismiss"), In the Motion to Dismiss, the

Defendant moves the Court to dismiss the original complaint submitting that the action is barred based upon the two-year statute of limitations, citing Marshall Islands Rules of Civil Procedure 12(b)(6).

On January 6, 2023, Plaintiff filed a “Motion for an order to amend plaintiff’s pleadings, and for denial of defendant’s dismissal motion and service certification” (hereafter “Motion to Amend”). Plaintiff did not file an opposition to the Defendants’ Motion to Dismiss. Plaintiff’s Motion to Amend did not include a proposed Amended Complaint.

Although the caption for the Motion to Amend indicated that a service certification was included with the pleading, no service certification was included in the motion to amend. On January 12, 2023, Counsel for the Plaintiff sent the Motion to Amend attached to an email sent to Counsel for Defendant.

On January 16, 2023, Defendant filed “Defendants’ Response to Plaintiff’s ‘Motion for Denial of Defendants’ Dismissal Motion’; Certificate of Service” (hereafter, “Defendant’s Response”).

On January 19, 2023, Plaintiff filed “Additional arguments against dismissal and service certification” (hereafter “Additional Arguments”). In this document, Counsel for Plaintiff states: “The court should allow amending plaintiff’s complaint as it is for money recovery and not for death. Few days remaining for the six year statute of limitation to run out unless the day plaintiff filed his complaint (December 29, 2022) is viewed by the court as a stopper on the statute from running against plaintiff.” (pages 4-5 of “Additional Arguments”).

On February 10, 2023, this Court heard oral arguments on the “Motion to Dismiss”. At the same hearing, this Court heard oral arguments on the “Motion to Amend”. Although not stating what other cause of action or theory of recovery might apply, Plaintiff requested that the Court issue an order to allow amendment of Plaintiff’s Complaint to allow the action to be filed under

the six-year statute of limitations, rather than the two year statute of limitations, and referred the Court to the Marshall Islands Civil Procedure Act, Part VI, Section 120.

On February 24, 2023, the Court received the proposed “Findings of Fact and Conclusions of Law” submitted by the Plaintiff and the Defendant by and through their respective Counsel.

Having considered all matters presented, for the reasons stated hereafter, the Defendant’s Motion to Dismiss the Initial Complaint is GRANTED. Further, for the reasons stated hereafter, the Plaintiff’s Motion for an Order to Amend Plaintiff’s Pleadings is DENIED.

FINDINGS OF FACT

All relevant facts are either alleged in the Complaint, contained in the papers attached to or incorporated into the Complaint, or are a matter of public record.

1. Marton Johnny died in the Republic of the Marshall Islands on January 28, 2016.
2. At the time of his death, the Decedent was employed as a forklift operator by Majuro Stevedore and Terminal Company on Majuro, Republic of the Marshall Islands.

Decedent was 29 years old at the time of his death.
3. Decedent was survived by a wife, Antila Laidren Johnny, and children, as well as his Father, Resty Johnny.
4. Plaintiff, Resty Johnny, is the Decedent’s Father and a resident of the Republic of the Marshall Islands.
5. Following Decedent’s death, the Decedent’s widow filed a Workmen’s Compensation Claim which Plaintiff concedes was promptly paid to his widow. (“Initial Complaint” at paragraph 20).
6. No wrongful death action was filed in this matter prior to the Plaintiff’s Complaint filed on December 29, 2022.

7. No evidence of record indicates that the Plaintiff in this matter has applied or has been appointed as the personal representative of the Decedent.
8. No evidence of a “debt” of any type owed by Defendants to Plaintiff has been included in any of the pleadings, in a verified affidavit, or otherwise.

LEGAL STANDARD FOR A RULE 12(b)(6) MOTION TO DISMISS

1. A Court may dismiss a Complaint under Rule 12(b)(6) under the following standard:
“[a] complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory.”
Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1216, *aff’d*, 386 F. 3d 1271 (9th Cir. 2004, *cert. den.* 545 U.S. 1114 (2005)).
2. Further, “a statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from Plaintiff’s pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like.” *King-White v Humble Independent School District*, 803 F.3d 754, 758 (5th Cir, 2015)(citing *Jones v Alcoa, Inc.*, 339 F/3d 359, 366)5th Cir., 2003).
3. Whether an untimely complaint should be allowed based on principles of equitable tolling presents an issue of law that is properly decided on a motion to dismiss under Rule 12(b)(6). *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 266 (5th Cir., 1991)

ANALYSIS

A. Plaintiff’s Initial Complaint for Wrongful Death is time-barred.

1. At oral argument on the Motion to Dismiss, Plaintiff’s Counsel conceded that the initial Complaint in this matter, filed as an action in “wrongful death” is barred under

Section 118(d) of the Civil Procedure Act, 29 MIRC Chapter 1. That provision states, in pertinent part:

§118. Limitation of two years.

The following actions shall be commenced only within two (2) years after the cause of action accrues:

(d) actions for injury to or death of one caused by the wrongful act or neglect of another, except as otherwise specifically provided herein and in subsections 112-115 of this Chapter, or a depositor against a bank for the payment of a forged or raised check, or a check which bears a forged or unauthorized endorsement.

2. The exceptions contained in §118 are not relevant to the disposition of the Motion to Dismiss.

B. Plaintiff is not a proper person to bring an action for wrongful death even if the statute of limitations did not bar the complaint.

1. There is no evidence that the Plaintiff in this matter applied for or has been appointed as the personal representative for the Decedent, and he would, therefore, not be a proper party to bring a wrongful death action in this matter.

2. Section §114 of the Civil Procedure Act also bars action on the initial Complaint, as §114 states:

“Every action for wrongful death **must** be brought in the name of the personal representative of the deceased, but shall be for the exclusive benefit of the surviving spouse, the children and other next of kin, if any, of the decedent as the Court may direct.” (Emphasis added).

3. It is clear from the initial Complaint in this matter that Plaintiff brings this action not on behalf of the Decedent's widow, nor on behalf of the estate of the Decedent. As is stated in the Motion to Amend, Plaintiff states that the amendment should be permitted to permit "for the sole purpose of maintaining his money claims (not death) against defendants." (Motion to Amend at paragraph 6). Further, in the "Additional Arguments" submission, Plaintiff states, "The court should allow amending plaintiff's complaint as it is for money recovery and not for death." (Additional Arguments" at p. 4).
4. There is no evidence or averment that Plaintiff is or has ever been appointed as the personal representative of the estate of the Decedent.
5. Plaintiff's Counsel does not submit that Plaintiff is the Personal Representative of the Decedent, and does not provide this Court with any evidence to support a claim that the Plaintiff is a proper person to bring a wrongful death action on behalf of the Decedent's estate. Further, the Complaint is not filed on behalf of the Decedent's estate, but rather has been filed by the Plaintiff in his personal capacity.
6. For all of these reasons the initial Complaint in this matter is DISMISSED and the Motion to Dismiss the initial Complaint is GRANTED.

C. Plaintiff's Motion to Amend Fails to State a Cause of Action on Which Relief May be Granted.

1. Under the Marshall Islands Rules of Civil Procedure, Rule 8, titled "General Rules of Pleading:

“(a) Claim for Relief. A pleading that states a claim for relief must contain:

- (1) A short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
 - (2) A short and plain statement of the claim showing that the pleader is entitled to relief; and
 - (3) A demand for the relief sought, which may include relief in the alternative or different types of relief." (Emphasis added.)
2. Plaintiff's Motion to Amend does not state a cause of action or theory of law under which the amended pleading must proceed. The lack of specificity in the Motion to Amend fails to provide Defendants with any legal theory against which it must defend. In essence, the pleading is one of general equity without a basis identified under law. Therefore, the Motion to Amend fails under Marshall Islands Rules of Civil Procedure 12(b)(6), as it fails to state a claim upon which relief can be granted.

D. Plaintiff's Motion to Amend Also is Time-Barred.

1. At the February 10, 2023 hearing, the Court inquired of Plaintiff's Counsel what theory the Plaintiff advanced with respect to the Motion to Amend falling within the six-year statute of limitations. Plaintiff seemed unclear about when and how the Statute of Limitations must be calculated.
2. It is without dispute that the Decedent's death occurred on January 28, 2016. The statute of limitations for causes of action arising from his death, whatever those might be, and in whatever form, would, therefore, begin to run on that date.

3. In order to avail themselves of the six-year statute of limitations for some other cause of action, Plaintiff's complaint for that other action, whatever it may be, had to be filed not later than January 26, 2022.
4. There is no question that the Initial Complaint in the matter, filed as a wrongful death action, was filed on December 29, 2022, after the two-year statute of limitations had run, and after the six-year statute of limitations had also run.

E. Plaintiff has not established that there is a legal basis on which the Statute of Limitations for either the Initial Complaint or its Motion to Amend has been or should be tolled or that equitable estoppel applies in this case.

1. The Plaintiff's Petition, Motion for an Order to Amend and Additional Arguments Against Dismissal submit that the Defendants have "unclean hands" and that therefore, the statute of limitations with respect to the initial wrongful death Complaint filed in this matter as well as the unspecified amended action should be tolled to allow an action to be brought for collection of a debt. However, Plaintiff does not indicate any legal basis which indicates that the Defendants took any measure to preclude Plaintiff from taking the necessary steps to be appointed as the personal representative for the estate of the Decedent, nor does Plaintiff indicate that there is any action by Defendant which precluded Plaintiff, or any other person with standing to do so, to file an action for wrongful death within the two year statute of limitations. Plaintiff does not specify that any debt was owed, but complains that Defendant did not pay sums which have not been reduced to judgment through any legal proceeding brought during the period of time permitted for the filing of any cause of action.

2. As noted above, Plaintiff's Motion requests that the Court permit the original Complaint to be amended without specifying a cause of action or basis under law under which this Plaintiff might properly be recognized before this Court on the facts contained in any of Plaintiff's pleadings.
3. It further appears that the Plaintiff's initial Complaint, filed on December 29, 2022, as well as Plaintiff's Motion for an order to Amend Plaintiff's Pleadings, filed on January 6, 2023 both fall outside the six year statute of limitations found in the Civil Procedure Act, 29 MIRC Chapter 1, Part VI, §120.
4. Plaintiff alleges that equitable estoppel should be applied to toll the statute of limitations. Without factual support or evidence, Plaintiff argues that "Insurance carrier of defendants, (Moylan Insurance Underwriters), paid out "double indemnity to surviving family of decedent) and death of decedent was closed." Motion to Amend, at paragraph 2.
5. Again, without legal support or evidence, Plaintiff's Counsel argues that Defendants MSTC, et al., have "unclean hands", and that, as such, a cause of action should lie despite Plaintiff not having filed a wrongful death action within the two year statute of limitations or an other cognizable action under which the six year statute of limitations might be available.
6. Four elements must ordinarily be proved to establish an equitable estoppel:
 - (1) The party to be estopped must know the facts;
 - (2) The party to be estopped must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppels had the right to believe that it was so intended;

- (3) The party asserting the estoppel must be ignorant of the facts, and
- (4) The party asserting the estoppels must rely upon the conduct to his injury.

DRG/Beverly Hills, Ltd. V ChopstixDim Sum Café & Takeout III, Ltd (1994), 30 Cal. App.4th 54, 59; *Insurance Co. of the West v Haralambos Beverage Co.* (1987) 195 Cal.App.3d 1308, 1321.

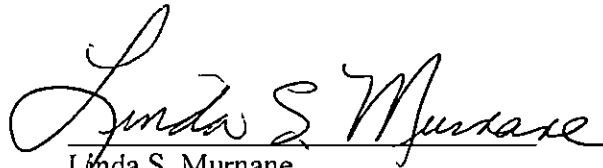
7. Plaintiff was aware of the details surrounding Decedent's death through the delivery of the police report, which is attached to the initial complaint in this matter. There is no action which Plaintiff alleges which would have interfered with the probate of Decedent's estate, and the filing of a timely wrongful death action responsibility for which lies at the hands of the Defendant, based upon available facts submitted to the Court. Had a timely probate and wrongful death action been filed, the discovery of any insurance benefits available would have been duly discovered in the course of that litigation.

CONCLUSION

1. Plaintiff concedes that its initial Complaint must be dismissed. The initial Complaint is time barred as it was filed outside the two-year statute of limitations established for wrongful death actions set out in Section 118(d) of the Civil Procedure Act.
2. Plaintiff is not a proper party to bring a wrongful death action in his personal capacity and has not established that he has been appointed as the personal representative of the estate of the Decedent under the provisions of Section 114 of the Civil Procedure Act.

3. Plaintiff has failed to state with specificity a cause of action which would give rise to a claim for debt which might fall within the six-year statute of limitations as set out in Section 120 of the Civil Procedures Act.
4. Even if Plaintiff has stated a cause of action which might lie within the six-year statute of limitations as set out in Section 120 of the Civil Procedures Act, the Plaintiff's filing on December 29, 2022 is time-barred under the six-year statute of limitations.
5. Plaintiff has failed to plead or prove facts upon which either the two-year or six-year statute of limitations must be tolled.
6. Plaintiff has failed to plead or prove facts upon which equitable estoppel must be applied in the instant case.
7. Therefore, the Motion to Amend the Initial Complaint is DENIED.

So ordered and entered.

A handwritten signature in cursive script, reading "Linda S. Murnane". The signature is written in black ink and is positioned above a horizontal line.

Linda S. Murnane
Associate Justice, High Court
February 24, 2023