

IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ZHANG, GUI JUAN,	)	Civil Action No. 99-163
	)	
Plaintiff,	)	<b>ORDER GRANTING</b>
	)	<b>DEFENDANT’S MOTION</b>
vs.	)	<b>TO DISMISS</b>
	)	
COMMONWEALTH OF THE	)	
NORTHERN MARIANA ISLANDS	)	
AND TRICIA S. AGUON,	)	
	)	
Defendants.	)	
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**I. PROCEDURAL BACKGROUND**

This matter came before the Court on August 13, 1999, at 1:30 p.m. in Courtroom 223 on Defendants’ Motion to Dismiss. Assistant Attorney General Robert Goldberg, Esq. appeared on behalf of the Defendants. Joe Hill, Esq. appeared on behalf of the Plaintiff. The Court, having heard and considered the arguments of counsel and being fully informed of the premises, now renders its decision.

**II. FACTS**

On March 12, 1998, Plaintiff instituted a civil action in the United States District Court for the Northern Mariana Islands (District Court) against the Government of the Commonwealth of the Northern Mariana Islands (Commonwealth) and against Tricia S. Aguon. See Zhang v. Cabrera, Civil [p. 2] Action No. 98-0012 (D.N.M.I. March, 12, 1999) (Complaint).

On November 14, 1998, the District Court dismissed Plaintiff’s local claims, those alleging violation of Commonwealth law, on the grounds that they contained “novel and complex” local issues best reserved for interpretation by Commonwealth Courts. See Zhang v. Cabrera, Civil Action No. 98-0012 (D.N.M.I. Nov. 14, 1998) (Order Re: Motions to Dismiss) (Munson, J.)

On March 16, 1999, Plaintiff instituted a civil action in the Commonwealth Superior

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Court alleging that the Commonwealth acted in violation of Article I § 3(c) of the Commonwealth Constitution and that the Commonwealth and Officer Tricia S. Aguon (Aguon) acted in such a manner as to constitute the tort of “common law negligence.” See Zhang v. Commonwealth, Civil Action No. 99-163 (N.M.I. Sup. Ct. Mar. 16, 1999) (Complaint).

On June 29, 1999, Defendants filed a Motion to Dismiss the present civil action pursuant to Com. R. Civ. P. 12(b)(6).

### III. ISSUE

1. Whether the Court shall grant Defendant’s Motion to Dismiss pursuant to Com. R. Civ. P. 12(b)(6) on the grounds that Plaintiff’s complaint fails to state a claim upon which relief can be granted due to the fact that Plaintiff’s complaint is barred by the two year statute of limitations period of 7 CMC § 2503.

### IV. ANALYSIS

Defendants move the Court to dismiss the present civil action with prejudice pursuant to Com. R. Civ. P. 12(b)(6), which allows a party to make a motion to dismiss for “failure to state a claim upon which relief can be granted.” Com. R. Civ. P. 12(b)(6).

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, “the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff.” Govendo v. Micronesian Garment Mfg., Inc., 2 N.M.I. 270, 283 (1991), citing Abramson v. Brownstein, 897 F.2d 389 (9<sup>th</sup> Cir. 1990); see also, Bolalin v. Guam Publications, [p. 3] Inc., 4 N.M.I. 176, 179 (1994). Dismissal is improper unless the Court is absolutely certain that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Id., see also, Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59 (1984) The burden is on the Defendants in the present matter as “[t]he defendant must . . . demonstrate that, even after taking the well pleaded facts as true, the plaintiff still fails to state a claim for relief.” Govendo v. Marianas Public Land Corp., 2 N.M.I. 482, 490 (1992).

Defendants argue that Plaintiff’s complaint must be dismissed for the following reasons: (1) the two year statute of limitations period of 7 CMC § 2503 bars Plaintiff’s complaint; (2) no

cause of action exists under Article I § 3 of the Commonwealth Constitution; and (3) neither the Commonwealth nor Aguon may be held liable pursuant to the Government Liability Act and principles of “sovereign immunity.”

A. Statute of Limitations.

Defendants argue that Plaintiff’s complaint filed on March 16, 1999, is barred by the two year statute of limitations period set forth at 7 CMC § 2503. Plaintiff, however, argues that the complaint was timely filed pursuant to the tolling provisions of 7 CMC § 2506 and 28 U.S.C. § 1367(d).

1. Applicable Statute of Limitations Period.

Plaintiff’s complaint alleges that Defendants assumed an affirmative duty to guard and protect Plaintiff and then negligently performed that duty. Therefore, as Plaintiff alleges the tort of “common law negligence,” the applicable statute of limitations period is set forth at 7 CMC § 2503(d). 7 CMC § 2503 states, in pertinent part:

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

- (a) Actions for assault and battery, false imprisonment, or slander;
- (b) Actions against the Director of Public Safety, a police officer or other person duly authorized to serve process, for any act or omission in connection with the performance of official duties;
- (c) Actions for malpractice . . .
- (d) Actions for injury . . . caused by the wrongful act or neglect of another
- . . .

7 CMC § 2503. As such, Plaintiff had two years in which to file a complaint from the date on which her cause of action “accrued.” **[p. 4]**

2. Tolling of the Statute of Limitations Period Due to Plaintiff’s Incarceration.

The first issue in determining when a statute of limitations period begins and ends is to calculate the date on which such cause of action “accrued.” Pursuant to 7 CMC § 2512, “[e]xcept as otherwise provided, periods prescribed in this chapter shall be reckoned from the date when the cause of action accrued . . .” 7 CMC § 2512. A cause of action “accrues” as soon as the right to maintain a legal action arises. The true test to determine when an action “accrues” is when the plaintiff could have first filed and prosecuted his or her action to successful

conclusion. See Kansas Public Employees Retirement System v. Kroger Associates, Inc., 936 P.2d 714, 719 (Kan. 1997). “Ordinarily, a cause of action accrues at the time of the act giving rise to the alleged injury or damage.” See v. Hartley, 896 P.2d 1049, 1054 (Kan. 1995).

In the present matter, the rape occurred on November 20, 1996. Defendants argue that the cause of action “accrued” on that date as the rape was the act giving rise to the alleged injury or damage. Defendants, therefore, contend that the two-year statute of limitations period expired on November 20, 1998, and as Plaintiff did not file the present action in the Superior Court until March 16, 1999, Defendants argue that Plaintiff’s complaint is barred by the statute of limitations.

Plaintiff, however, argues that the cause of action did not “accrue” until January 23, 1997, due to the fact that the rape occurred while she was in the custody of the Department of Immigration. Pursuant to 7 CMC § 2506, imprisonment is considered a disability which affects the determination of when the statute of limitations period begins to run.

7 CMC § 2506 states, in pertinent part:

If the person entitled to a cause of action . . . is imprisoned when the cause of action first accrues, the action may be commenced within the time limits in this chapter after the disability is removed.

7 CMC § 2506. Plaintiff, therefore, had two years within which to file a complaint from the date on which she was released. Plaintiff was released from incarceration on January, 23, 1997. See Office of the Attorney General, et al. v. Zhang, Gui Juan, Civil Action No. 96-952 (N.M.I. Super. Ct. Jan. 23, 1997) (Release Order/Stay of Deportation). As such, Defendant had until January 23, 1999, to file her complaint in the Superior Court. Plaintiff, however, did not file the present action in the [p. 5] Superior Court until March 16, 1999. Thus, Plaintiff’s cause of action is still time barred, regardless of the application of the tolling provisions of 7 CMC § 2506.

3. Tolling of the Statute of Limitations Period Pursuant to 28 U.S.C. § 1367(d).

Plaintiff argues that the complaint filed in the Superior Court on March 16, 1999, was timely on the grounds that the two year statute of limitations period of 7 CMC § 2503 was tolled pursuant to 28 U.S.C. § 1367(d).

28 U.S.C. § 1367(d) states, in pertinent part:

The period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d). 28 U.S.C. § 1367(d) applies within the Commonwealth as a matter of law pursuant to 28 U.S.C. § 1367(e), which states that “[a]s used in this section, the term ‘State’ includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.” 28 U.S.C. § 1367(e); see also, Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801, reprinted in CMC at B-101 et seq.

28 U.S.C. § 1367(d) tolls the limitation period of any supplemental claims dismissed when the federal court declines to exercise supplemental jurisdiction or where claims are voluntarily dismissed by the plaintiff. See 28 U.S.C. § 1367. All such claims are tolled while they are pending in federal court and for thirty days after their dismissal, unless state law provides for a longer tolling period. Id.

The purpose for this provision is to prevent the loss of claims to statute of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. See H.R.REP. No. 734 (1990), reprinted in U.S.S.C.A.N. 6802, 6876.

Plaintiff filed her complaint in District Court on March 12, 1998, thirteen months after the cause of action “accrued” on January 23, 1997. Plaintiff argues that the two year statute of limitations period ceased to run at this point and that the remaining eleven months of the statutory period did not begin to run again until the District Court dismissed Plaintiff’s complaint on November 14, 1998. Plaintiff contends, therefore, that pursuant to 28 U.S.C. § 1367(d), the statute of [p. 6] limitations period will not expire until November 14, 1999, 12 months and 30 days after the dismissal by the District Court. As such, Plaintiff contends that the complaint filed in the Superior Court on March 16, 1999, was timely.

Defendants, however, argue that Plaintiff misinterprets the tolling provision of 28 U.S.C. § 1367(d). Defendants argue that pursuant to 28 U.S.C. § 1367(d), the applicable statute of limitations “clock” continues to run while a complaint is pending in District Court.

As noted above, Plaintiff urges the Court to interpret 28 U.S.C. § 1367(d) to exclude from

the limitations computation the entire interval that the federal claim was pending in District Court. Courts, however, have held that 28 U.S.C. § 1367(d) only tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal, not for the entire period of time in which the case was pending before the federal court. Huang v. Ziko, 511 S.E.2d 305, 307-308 (N.C. Ct. App. 1999). See also; Edmondson v. Gallagher, 48 F.3d 1260, 1267 (D.C. Cir. 1995). In Huang, the Court upheld a trial court's order granting summary judgment in favor of the defendant on the grounds that the applicable statute of limitations period had expired. In Huang, the plaintiff argued "that once the federal action was no longer pending, the time for filing his complaint in state court should have been extended for the portion of the three-year limitations period that had not been used when he filed the federal action." Id. at 307. The Court, however, reasoned:

Plaintiff's contention is untenable. The rule which plaintiff would have this Court adopt is contrary to the policy in favor of prompt prosecution of legal claims. Furthermore, such a rule is contrary to the general rule that '[i]n the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him.'

Id. at 308, citing 51 Am.Jur.2d Limitation of Actions § 311 (1970).

The Court finds that 28 U.S.C. § 1367(d) only tolls the Commonwealth statute of limitations period on any local claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal, not for the entire period of time in which the case was pending before the federal court. In the present matter, therefore, 28 U.S.C. § 1367(d) does not toll the statute of [p. 7] limitations period of 7 CMC § 2503 beyond January 23, 1999, two years from that date on which the cause of action "accrued." As such, Plaintiff's complaint filed on March 16, 1999, was untimely.

#### 4. Equitable Tolling Principles.

Plaintiff makes a further argument that 28 U.S.C. 1367(d) codifies the common law principle of "equitable tolling." As such, Plaintiff argues that if Defendants have notice of a claim filed in one forum, that the statute of limitations equitably tolls while the claim is pending, thus permitting the Plaintiff an opportunity to re-file in another forum.

“In order for a statute of limitations to be equitably tolled, there must be a showing of three things: first, that the plaintiff gave timely notice to the defendant of the plaintiff’s claim; second, that the resultant delay did not cause prejudice to the defendant’s position; and third, that the plaintiff acted reasonably and in good faith.” Ervin v. County of Los Angeles, 848 F.2d 1018, 1019 (9<sup>th</sup> Cir. 1988); see also, Cervantes v. City of San Diego, 5 F.3d 1273 (9<sup>th</sup> Cir. 1993).

Plaintiff did in fact give timely notice of its claims against Defendants by virtue of the federal complaint filed on March 12, 1998. Plaintiff, however, has not shown that Defendants have not been prejudiced by the delay in filing the claim. Furthermore, Plaintiff’s delay, while not in bad faith, was not reasonable. Plaintiff was aware that at the time the supplemental claims were dismissed by the District Court on November 14, 1998, that it had in excess of two months in which to re-file its local claims.

Furthermore, even if the Court were to look to principles of equity, the opposite equitable principle of “laches” becomes pertinent and there is a presumption of “laches” where the statute of limitations has run. Rios v. Marianas Public Land Corp., 3 N.M.I. 512, 524 (1993). “Laches” is defined as the “neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar.” “Once a presumption arises, the plaintiff must offer proof directed to rebutting the laches factors.” Id. As such, Plaintiff must show that the delay in filing the complaint in the Superior Court was not unreasonable. The Court, as previously stated, the has found such delay to be unreasonable. [p. 8]

#### B. Defendants’ Alternative Theories in Support of Motion to Dismiss.

Defendants also argue that Plaintiff’s complaint should be dismissed on the grounds that no cause of action exists under Article I § 3 of the Commonwealth Constitution or, in the alternative, that the Commonwealth is not liable under the Government Liability Act and principles of “sovereign immunity.”

Given the fact that the Court has found that the two year statute of limitations period of 7 CMC § 2503 acts to bar Plaintiff’s claim, the Court need not reach Defendants’ other arguments in favor of its motion to dismiss.

## V. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff's complaint filed on March 16, 1999, is barred by the two year statute of limitations period set forth at 7 CMC § 2503. Defendants, therefore, have met their burden and have demonstrated that even after taking the well pleaded facts as true, Plaintiff still fails to state a claim for relief. As such, Defendant's Motion to Dismiss is **GRANTED**.

So ORDERED this 30<sup>th</sup> day of September, 1999.

/s/ Juan T. Lizama  
JUAN T. LIZAMA, Associate Judge