

**IN THE SUPREME COURT OF GUAM**

**MISAKO H. AMSDEN**

Plaintiff-Appellant

**vs.**

**GODOFREDO B. YAMON, MOYLAN'S  
INSURANCE UNDERWRITERS, DOES I TO X**

Defendant-Appellee

**OPINION**

Supreme Court Case No. CVA98-002

Superior Court Case No. CV1885-95

Filed: April 30, 1999

**Cite as: 1999 Guam 14**

Appeal from the Superior Court of Guam  
Submitted on the briefs December 14, 1998  
Hagåtña, Guam

Appearing for the Plaintiff-Appellant:

Misako H. Amsden, Pro se  
P.O. Box 8407  
Tamuning, Guam 96910

Appearing for the Defendant-Appellee:

John A. Spade, Esquire  
Suite 807, GCIC Building  
414 W. Soledad Avenue  
Hagåtña, Guam 96910

---

BEFORE: PETER C. SIGUENZA, Chief Justice<sup>1</sup>; JANET HEALY WEEKS, and BENJAMIN J. F. CRUZ, Associate Justices.

CRUZ, J.:

[1] Misako H. Amsden appeals the lower court's decision: 1) Granting summary judgment because the claim was time-barred by the relevant statute of limitations; 2) Granting dismissal for failure to prosecute; and 3) Granting dismissal as a sanction pursuant to Rule 11 of the Guam Rules of Civil Procedure. We hold that the relevant statute of limitations had run to effectively bar Appellant's claim. In addition, Appellant's failure to plead affirmatively specific facts precluded 7 GCA § 11403 from operating to toll the statute of limitations. Accordingly, the trial court's decision to dismiss the complaint is **AFFIRMED**.

### **I. BACKGROUND**

[2] On December 14, 1993, Appellant Misako H. Amsden ("Amsden") and Appellee Godofredo B. Yamon ("Yamon") were involved in a vehicle collision. As a result, Amsden sought both general and consequential damages in the amount of \$150,000.00 inclusive of medical costs. This initial complaint was filed on December 19, 1995, however, it was dated December 12, 1995. Although the complaint named Yamon as the sole defendant, it was not served on him.

[3] Approximately eight and one half months after the filing of the initial complaint, Amsden filed a First Amended Complaint thereby adding Moylan's Insurance Underwriters ("Moylan's") as a co-defendant. This amended complaint was filed on September 6, 1996, although it was dated

---

<sup>1</sup> The signatures in this opinion reflect the titles of the justices at the time this matter was considered and decided.

---

March 7, 1996. In addition, while Yamon was served this amended complaint on February 21, 1997, it was never served upon Moylan's. Neither the initial complaint nor the amended complaint contained a reference to the date of the accident that gave rise to the claim.

[4] On March 7, 1997, both Yamon and Moylan's filed an answer. Subsequently, they also filed a motion for summary judgment based on the running of the statute of limitations, or in the alternative, dismissal based on the failure to prosecute and as a sanction for willful violations of Rule 11. Approximately six weeks later, Amsden's counsel deposed Yamon. Amsden then filed her opposition on July 31, 1997.

[5] On October 21, 1997, the Superior Court ruled from the bench and dismissed the complaint on the basis of all three grounds set forth in motion. The court later issued a written Decision and Order on January 15, 1998.

## II. ANALYSIS AND APPLICATION OF LAW

[6] This court has subject matter jurisdiction based upon 7 GCA § 3107 (1994).

### A. Applicability of 7 GCA § 11403

[7] This court reviews an appeal of the trial court's decision to grant summary judgment *de novo*. *Yasuda Fire & Marine Ins. Co. v. Heights Enter.*, 1998 Guam 5, ¶ 6; *Iizuka Corp. v. Kawasho Int'l (Guam) Inc.*, 1997 Guam 10, ¶ 7. "A grant of summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Yasuda* at ¶ 6.

[8] The lower court dismissed the case at issue on three distinct grounds. We first address the

---

decision to dismiss the complaint because 7 GCA § 11306 (1996), the relevant statute of limitations, had run and 7 GCA § 11403 (1996), a tolling statute, did not apply.

[9] When the underlying claim is based upon an automobile accident, the relevant statute of limitations provides that an action for injury to a person caused by the wrongful act or neglect of another must be commenced within two years. 7 GCA § 11306 (1996).<sup>2</sup> In the instant case, it is undisputed that the statute of limitations on the underlying claim began to run on the day of the accident, December 14, 1993. Accordingly, a suit based on the accident involving Amsden and Yamon should have been filed on or before December 14, 1995. However, the record reveals that Amsden filed suit on December 19, 1995, five days beyond the statutory limitations period.

[10] Amsden contends that 7 GCA § 11306 was tolled when Yamon was off-island for a period of approximately thirty (30) days by operation of 7 GCA § 11403, a tolling statute.

[11] Section 11403 provides in its entirety:

If, when the cause of action accrues against the person, he is out of Guam, the action may be commenced, within the term herein limited, after his return to Guam and if, after the cause of action accrues, he departs from Guam, the time of his absence is not a part of the time limited for the commencement of the action.

7 GCA § 11403 (1996). The lower court disagreed with Amsden and granted summary judgment on this particular issue “because [Amsden] failed to plead any specific acts to justify her failure to file the initial Complaint within two years, and because Yamon remained continuously amenable to personal service of process at all relevant times, the off-island tolling statute [was] inapplicable, and [Amsden’s] Complaint [was] time-barred.” *Amsden v. Yamon*, CV 1885-95, Decision and Order at

---

<sup>2</sup> In its entirety, the statute provides: “**Within Two Years.** (1) An action for assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to, or for the death of, a person caused by the wrongful act or neglect of another except as provided for in § 11315.”

5. (January 15, 1998).

[12] In *Ponderosa Homes Inc. v. City of Ramon*, 23 Cal. App. 4th 1761, 1768, 29 Cal Rptr. 2d 26, 29, (1994), the court held that, “[w]hen a complaint shows on its face or on the basis of judicially noticeable facts that the cause of action is barred by the applicable statute of limitations, the plaintiff must plead facts which show an excuse, tolling, or for some other basis for avoiding the statutory bar.” *Id.* Failure to plead affirmatively specific facts, the court held, was a fatal defect subjecting the case to dismissal. *See id.*

[13] In the case at bar, Amsden’s complaint, for reasons that remain unknown, omitted any reference to the date of the accident giving rise to the cause of action. Thus, although the complaint did not appear to be time barred “on its face,” we hold that *Ponderosa* applies in light of the fact that “judicially noticeable facts,” namely the date of the accident as relayed orally in court, alerted the trial court to the action’s untimeliness.

[14] Furthermore, in *Campbell v. Campbell*, 157 Cal. App. 2d 548, 321 P.2d 133 (Cal. Dist. App. 1958), the court spoke precisely to the question of whether an affirmative pleading of a defendant’s absence from the jurisdiction was necessary to keep a claim viable in light of the statutory bar. The court stated, “[w]ith respect to appellant’s contention that the statute of limitations has been tolled, suffice it to say that the language of § 351, Code of Civil Procedure, makes no reference to place of residence. We are of the opinion that an affirmative allegation of absence from the state would be required to toll the running of the statute of limitations.” *Id.* at 555, 321 P.2d at 137. Guam’s version of this very same tolling statute, 7 GCA § 11403, merely recodifies California Code of Civil Procedure § 351. Accordingly, we explicitly adopt this requirement of an affirmative pleading.

[15] Locally, the case of *Bourland v. Salas*, 1986 WL 68918, (D.Guam App. Div. Oct. 24, 1986),

---

supports the requirement of an affirmative pleading. In *Bourland*, the Appellate Division, in deciding upon whether a plaintiff must affirmatively plead specific facts when it was apparent that the complaint was time barred, stated: “[a]s early as 1896, the California Supreme Court held that a plaintiff must affirmatively plead that his claim is not barred by the statute of limitations when the pleading on its face appears to be time-barred.” *Id.* at \*3 (citing *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482, 486, 45 P.809, 810 (1896)).

### III. Conclusion

[16] Due to Amsden’s failure to plead affirmatively specific facts, 7 GCA § 11403 did not operate to toll the statute of limitations. Consequently, the complaint was time-barred and in the absence of any triable issues of fact, the dismissal was proper. We need not address the second ground for which the trial court granted summary judgment relating to the amenability to suit issue. Based on our holding, we need not address the issues relating to the failure to prosecute and Rule 11 sanctions. Accordingly, we AFFIRM the lower court’s decision to grant summary judgment.

---

BENJAMIN J. F CRUZ  
Associate Justice

---

JANET HEALY WEEKS  
Associate Justice

---

PETER C. SIGUENZA  
Chief Justice