

Ngatpang State v. Ngirdilubech, 16 ROP 310 (Tr. Div. 2009)
NGATPANG STATE,
Plaintiff,

v.

ABRAHAM NGIRDILUBECH,
Defendant.

CIVIL ACTION 05-143

Supreme Court, Trial Division
Republic of Palau

Decided January 7, 2009

ALEXANDRA F. FOSTER, Associate Justice:

Plaintiff Ngatpang State filed a complaint against Defendants on June 29, 2005. At that time, the Ngaimis (the traditional Council of Chiefs of Ngatpang) ran the government of Ngatpang State. Defendants answered on July 13, 2005, and July 26, 2005. From 2005 through 2007, the parties exchanged discovery, filed lengthy motions and cross-motions for summary judgment, and responded to each other's motions and cross-motions.

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In 2006, the voters of Ngatpang State passed amendments which radically changed the structure of the Ngatpang State government, and shifted power from the Ngaimis to elected government officials. Elections were held and the elected legislature took office in April, 2007. As of August, 2007, no gubernatorial candidate had garnered the required majority vote, but an acting governor was temporarily installed.¹

On June 22, 2007, counsel for Ngatpang State filed "Notice of Pursuing This Case With Undersigned Counsel." At that time, counsel for Ngatpang State explained that although he had received a letter from Acting Governor Constantino Ngiraked terminating counsel's contract, counsel had been instructed by "Head of State Chief Rebelkuul," who spoke for the Ngaimis, to maintain prosecution of this matter. On May 21, 2008, Defendant Whipps filed a motion to dismiss, or cross motion for summary judgment. Exhibit 1 of his motion was Ngatpang State Resolution 1-08-29, which states, in relevant part, that "the Olbiil Ra Ngatpang [the Ngatpang State Legislature] . . . declares that the law suit before the Supreme Court titled *Ngatpang State v. Abraham Ngiradilubch, et al.*, Civil Action No. 05-143 be dismissed." The Resolution appears to have been signed by all Ngatpang State legislators on February 5, 2008. Plaintiff did not respond to this motion.

On October 20, 2008, the Court held a status conference and instructed the Ngaimis's

¹The Court bases its factual chronology on *The Ngaimis v. Republic of Palau and Ngirngetrang*, Civil Appeal No. 07-045 (filed on November 11, 2008), where the Appellate Division of the Palau Supreme Court affirmed the constitutionality of the Ngatpang elections.

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counsel to confer with his client and inform the Court whether the Ngaimis sought to proceed. As detailed in the Court's order of November 18, 2008, both Ngatpang's Acting Governor and Speaker of the House appeared at the conference on November 17, 2008, and informed the Court that Ngatpang State did not seek to proceed in this matter. Counsel for the Ngaimis also appeared and represented that his client did seek to proceed in this matter. Thereafter, the Court ordered counsel for the Ngaimis "to file a motion for substitution of parties under ROP R.Civ.P. 25 and/or any other motion that Plaintiff deems appropriate" by December 1, 2008, and Defendant would have the proper time to respond.

On December 8, 2008, Plaintiff Ngaimis filed a motion for leave of court to amend its complaint under ROP R. Civ. P. 15(a). Plaintiff Ngaimis' motion cited Rule 15, but included no law to support its position that the complaint should be amended. With its motion, Plaintiff filed an amended complaint substituting its name, "Ngaimis," for "Ngatpang State" as Plaintiff, and making allegations which differed from the original complaint.

On December 17, 2008, Defendant Whipps filed an opposition to Plaintiff Ngaimis' motion to amend the complaint. Defendant argued that ROP R. Civ. P. 15(a) assumed that the parties did not change, only that the pleadings between the parties were amended. Since everyone agreed that the named party, the Ngatpang State government, sought to dismiss the case, the Court should abide by Plaintiff's oft- p.312 repeated wish to dismiss this case. Finally, Defendant noted that "Ngaimis' motion looks more like [a] Rule 25 motion rather than [a] Rule 15(a) motion."

DISCUSSION

ROP R. Civ. P. 15 is entitled "Amended and Supplemental Pleadings." Plaintiff relies on ROP R. Civ. P. 15(a), which reads: "[A] party may amend the party pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Since Plaintiff Ngaimis is seeking to substitute itself for Ngatpang State, as evidenced by its amended complaint, it should have properly sought to substitute parties under ROP R. Civ. P. 25, along with amending its complaint under ROP R. Civ. P. 15(a).

Although not argued, the Ngaimis could fall into one of two categories of Rule 25, 25(c) concerning transfers of interest or Rule 25(d) concerning the rotation of public officers. In relevant part, Rule 25(c) reads, "[i]n case of any transfer of interest, the action may be continued . . . against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." The Court has found no discussion of ROP R. Civ. P 25(c) in Palauan case law. ROP R. Civ. P 25(c) is identical to U.S. Federal Rule of Procedure 25(c), however, so the Court turns to U.S. law for guidance. Rule 25(c) contemplates transfers in interest from corporate parents to subsidiaries, *see, e.g., General Battery Corp. v. Globe-Union Inc.*, 100 F.R.D. 258 (D.Del. 1982), or transfers of interest after corporate mergers, *see, e.g., Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350 (11th Cir. 1994). *See generally* Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 1958 ("Wright, Miller & Kane"). Not surprisingly, there is no discussion of a transfer of interest in proceedings such as these. [1] As discussed in Wright, Miller & Kane, an order of

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joinder under Rule 25(c) is not required, it is “merely a discretionary determination by the trial court that the transferee’s presence would facilitate the conduct of the litigation.” Wright, Miller & Kane, Civil 2d § 1958. This logic does not square with the case before this Court. Rule 25(c) is not meant for a situation such as this one where the action requested by the Ngaimis is mandatory.² It is also relevant that the substitution of parties would require significant additional work by Defendant. *See Barker v. Jackson Nat. Life Ins. Co.*, 163 F.R.D. 364 (D. Fla. 1995) (fact that substitution would require opposing party to amend answer, possibly reopen discovery, and potentially postpone trial was relevant factor to court’s refusal to allow substitution). After two years of litigation, substitution would require Defendant to file a new answer and make different affirmative defenses, potentially re-open discovery, and likely file new summary judgment motions.

Alternatively, the Ngaimis could seek substitution under ROP R. Civ. P. 25(d). In relevant part, ROP R. Civ. P. 25(d)(1) reads: “When a public officer is a party to an action in an official capacity and during the pendency . . . **p.313** ceases to hold office, the action does not abate and the officer’s successor is automatically substituted as a party An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.” Under this rule, the current Ngatpang State government is automatically substituted for the outgoing Ngaimis. The Rule does not provide a vehicle by which the Ngaimis can shoehorn itself back into the litigation. [2] Like Rule 25(c), Rule 25(d) is discretionary. The Court is not required to substitute the parties. Again, for this litigation to survive, the substitution would not be discretionary. The Court would be required to substitute the Ngaimis for the Ngatpang State government.

Plaintiff Ngaimis is trying to fit a square peg into a round hole. Its requests do not fall squarely into any one category - not Rule 15(a), not Rule 25(c) and not Rule 25(d). It seeks to substitute the party in interest and substantively amend the complaint. At some point, this starts to look like a new case with new litigants and a new complaint.

The current Ngatpang State government automatically becomes the Plaintiff under ROP R. Civ. P. 25(d). The current Ngatpang State government seeks to dismiss this matter. The Ngaimis has not proposed any satisfactory way of getting itself back into this litigation. The Court will therefore exercise its discretion to dismiss Civil Action No. 05-143, without prejudice to the Ngaimis bringing a new case against Defendants should they seek to do so.

²If the Court did not agree to the Ngaimis’ request, the case would be dismissed, since the current government of Ngatpang seeks a dismissal of the case.