

Omelau v. ROP Div. of Fish and Wildlife Prot., 16 ROP 319 (Tr. Div. 2009)
NGIRAGRENGES OMELAU,
Plaintiff,

v.

**REPUBLIC OF PALAU DIVISION OF FISH AND WILDLIFE PROTECTION, AND
KAMMEN CHIN, CHIEF OF FISH AND WILDLIFE PROTECTION, in his official
capacity,
Defendants.**

CIVIL ACTION NO. 09-032

Supreme Court, Trial Division,
Republic of Palau

Decided May 22, 2009

ALEXANDRA F. FOSTER, Associate Justice:

PROCEDURAL BACKGROUND

Plaintiff Ngirabrenges Omelau filed a Petition for Return of Seized Property and Verified Complaint (“Complaint”) on February 16, 2009. In essence, Plaintiff alleged that he spent \$10,000 purchasing netting from the Philippines, \$4,500 purchasing lead bars for weights, and \$2,000 to have the netting and lead bars turned into 28 kesokes nets and one net bag. He fished with these nets for three years, but on September 10, 2004, agents from the Division of Fish and Wildlife Protection (“DFWP”) seized the nets, alleging that the nets were of an illegal mesh size. Despite the seizure, Plaintiff has never had a hearing to determine the legality of his nets, nor has he been charged with a crime. Plaintiff sued Defendants (The Republic of Palau, DFWP and Kammen Chin, as the chief of DFWP) for the return of his property in pre-seizure condition or for just compensation, and for damages for “injuries suffered to [Plaintiff] and his property as a result of Defendant Chin’s intentional tort of conversion.”

On March 9, 2009, Defendants moved to dismiss the complaint. They contend that Plaintiff “would seek to hold the Republic and its agencies civilly liable simply for doing their job.” Specifically, Defendants allege that the complaint is barred by the statute of limitations under 14 PNC § 403(b). Further, Plaintiff failed to state a claim for which relief could be granted, because he did not allege that the actions of the state agents were taken for an improper purpose and, alternatively, the Republic and its agents are immune from these types of law suits under the doctrine of sovereign immunity, codified under 14 PNC § 502 (b) and (c).

On March 20, 2009, Plaintiff filed his response to the Defendants’ motion to dismiss. Plaintiff first points to Justice Salii’s Order in *Rdialul v. ROP et al.*, C.A. No. 08-037 (May p.320 28, 2008). Plaintiff also counters that his complaint was timely under 14 PNC § 405. Alternatively, he claims that the injury was not the seizure of the nets, but the lack of due process

Omelau v. ROP Div. of Fish and Wildlife Prot., 16 ROP 319 (Tr. Div. 2009) after the seizure of the nets, and since this violation is ongoing, no statute of limitations applies. Further, Plaintiff responds that he is not seeking the return of illegal fishing nets, he seeks due process, namely, a hearing to determine whether the nets were in fact illegal. Finally, Plaintiff argues that sovereign immunity does not apply, because sovereign immunity cannot shield a sovereign from constitutional violations. Alternatively, Plaintiff distinguishes the facts in his complaint from those envisioned by the exceptions set out in 14 PNC § 502 (b) and (c).

LEGAL ARGUMENTS

The Court finds that first, Plaintiff need not plead “improper purpose” when alleging a violation of procedural due process. Second, the relevant sovereign immunity statute, codified as 14 PNC § 502 (b) and (c), cannot shelter Defendants from Plaintiff’s action in equity, but does shield Defendants from claims for just compensation and monetary damages. Third, the due process violation and the seizure of the nets is ongoing, and therefore the statute of limitations clock has not yet started ticking as to those allegations. Accordingly, as discussed more fully below, Defendants’ motion to dismiss is granted in part and denied in part.

A. Improper Purpose

Defendants cite *Governor of Kayangel et al. v. Wilter et al.*, 1 ROP Intrm. 206, 211 (Tr. Div. 1985), for the proposition that Plaintiff has to allege that Defendants acted with “malicious intent or purpose.” In *Kayangel*, the state governors challenged the legality of the president’s impoundment of state block grant funds, which had already been appropriated by the legislature. 1 ROP at 206. Plaintiffs in *Kayangel* also raised a due process argument, that the president could not seize their property -the block grant funds- without due process. 1 ROP at 209-10. In the context of this alleged seizure, the Court explained that there are two components to due process: procedural and substantive. 1 ROP at 209. Procedural due process mandates notice and an opportunity to be heard before plaintiffs can be deprived of their property. *Id.* The Court found no violation of procedural due process in the president’s impoundment of state block grant funds. 1 ROP at 210. Substantive due process dictates that “governmental action shall not be unreasonable, arbitrary or capricious, and . . . the means selected shall have a real and substantial relation to the object sought to be attained.” 1 ROP at 211 (citing *Nebbia v. New York*, 54 S.Ct. 505, 511 (1934)). The Court held that Plaintiffs had to allege that “the impoundment authority was exercised in an arbitrary or capricious manner, was founded on other than a regional basis or was invidiously discriminatory” to show a violation of substantive due process. *Id.* Therefore, to prove a violation of substantive due process, plaintiffs initially had to allege that the money was impounded “for improper reasons,” and that the Republic was acting under an “improper motive,” not just that the money was impounded. *Id.* See also *Perrin v. Remengesau*, 11 ROP 266, 269 (Tr. Div. 2004); *Ngirmekur v. Office of Palau Election Comm’n*, 9 ROP 295, 297 (Tr. Div. 2002).

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Defendants quote only the conclusion concerning substantive due process. In this matter, however, the Court need not reach the issue of substantive due process, because Plaintiff alleges a violation of procedural due process, that he was never afforded an opportunity to be heard after he was deprived of his property. There is no “improper motive” or “improper purpose”

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B. Sovereign Immunity

“Sovereign immunity protects the government from lawsuit, except to the extent that such protection has been waived, and [Plaintiff], as the party raising a claim against the government, bears the burden of demonstrating waiver.” *Giraked v. Estate of Rechucher*, 12 ROP 133, 145 (2005). To determine whether Plaintiff met his burden in the context of a motion to dismiss, “all allegations in the complaint are accepted as true, and this Court is left to determine whether those allegations are sufficient to justify relief.” *Id.*

Under 14 PNC § 501(a), actions allowed against the Republic include “civil actions against the government of the . . . Republic on claims for money damages, . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the government of the . . . republic, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 14 PNC § 501(a)(3). However, 14 PNC § 502 (c) forecloses any claim “arising in respect of the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.” 14 PNC § 502 (b) bars “any claim based on an act or omission of an employee of the government, exercising due care, in the execution of a law or regulation, whether or not such law or regulation be valid, or based upon the exercise or performance . . . [of] a discretionary function or duty on the part of any agency or employee of the government, whether or not the discretion involved be abused.”

Counterbalancing statutory sovereign immunity, the Palau Constitution, under the title “Fundamental Rights,” reads, “[t]he government shall take no action to deprive any person of . . . property without due process of law” Palau Const. Art. IV, Sect. 6. The Constitution “is the supreme law of the land” and “[a]ny [or] act of government . . . shall not conflict with this Constitution and shall be invalid to the extent of such conflict.” Palau Const. Art. II, Sects. 1 and 2.

How to square Plaintiff’s Constitutional right to due process with the Republic’s claim of sovereign immunity? The Court has found nothing directly on point in Palauan law, nor have the parties pointed to any customary Palauan law which would resolve the issue. Accordingly, the Court turns to “[t]he rules of the common law . . . as generally understood and applied in the United States” 1 PNC § 303. A reading of recent U.S. case law in this area reflects that a party can move for equitable action against the sovereign under 41(e) or (g) of the U.S. Federal **p.322** Rules of Criminal Procedure,¹ and/or under the Federal Tort Claims Act (“FTCA”). [2]

¹U.S. Federal Rule of Criminal Procedure 41 (“U.S. Rule 41”) was amended in 2006. U.S. Rule 41(e) was amended, and became U.S. Rule 41(g). ROP R. Crim. P. 41(e) reads much like old U.S. Rule 41(e) and current U.S. Rule 41(g). Under ROP R. Crim. P. 41(e), “[a] person aggrieved by an unlawful search and seizure may move the court for the return of property which was illegally seized” Such motions can be brought as civil equitable actions, before or after a criminal conviction. *See United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) (string citation omitted). Because no criminal action was

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After seizure, courts will grant a hearing and the return of the seized property if the moving party prevails, but sovereign immunity prevents an award of monetary damages or compensation. *See Diaz v. United States*, 517 F.3d 608, 611 (2d Cir. 2008) (“currency taken from Diaz . . . has been disbursed, so that all he can seek now is to be paid the cash equivalent of the seized currency That claim is frustrated by the principle of sovereign immunity, which absent a waiver, shields the federal government and its agencies from suit.”); *Adeleke v. United States*, 355 F.3d 144, 147 (2nd Cir. 2004) (“ . . . Adeleke’s equitable claim for money damages should have been dismissed for lack of subject matter jurisdiction because sovereign immunity bars a federal court from ordering the United States to compensate for property that cannot be returned”); *United States v. Bein*, 214 F.3d 408, 411-12 (3rd Cir. 2000) (“For the reasons set forth below, we find that, as a result of the Government’s immunity from suit, the district court lacked subject matter jurisdiction over the Beins’ claims for monetary damages.”).² *But see United States v. Martinson*, 809 F.2d 1364, 1365-66 (9th Cir. 1987) (“Where a court of equity assumes jurisdiction because the complaint requires equitable relief, the court has power to award damages incident to the complaint.”).³ Courts have barred recovery of monetary damages both under Rule 41 and the FTCA. *See, e.g., Diaz*, 517 F.3d at 611; *Adeleke*, 355 F.3d at 147,153-54; *Bein*, 214 F.3d at 411-12, 416.

The provisions cited by the Republic in this case mirror the provisions in the FTCA, and courts in Palau have previously turned to U.S. courts to interpret these exclusions. *See Giraked*, 12 ROP at 146-48; *Taro v. ROP*, 12 ROP 175, 175-76 (Tr. Div. 2004). The Court finds that Defendants acts fall under 14 PNC § 502 (c), which forecloses any claim “arising in respect of the detention of any goods or merchandise by any . . . law enforcement officer.” In *Kosak v. United States*, 104 S.Ct. 1519, p.323 1523 (1984), the U.S. Supreme Court accorded a broad reading to this exception, to include any claim “arising out of” the detention of goods by a law enforcement officer. The *Kosak* Court cited approvingly to a report by Judge Alexander Holtzoff, “one of the major figures in the development of the Torts Claims Act.” 104 S.Ct. at 1524. Holtzoff explained that the provision was meant to exempt “seizures by law enforcement officials.” *Id.* Plaintiff’s claim certainly arises out of Defendants’ seizure of the nets. Like Plaintiff, Mr. Adeleke claimed damages under the FTCA. *Adeleke*, 355 F.3d at 153-54. The *Adeleke* court held that the exception in 28 U.S.C. § 2680 (c) (codified as 14 PNC § 502 (c) in Palau) barred any recovery under the FTCA. *Id.* *See also Bein*, 214 F.3d at 415-16 (reading this same exception of the FTCA sovereign immunity waiver to likely bar recovery of monetary damages); *Diaz*, 517 F.3d at 613 (same FTCA exception bars recovery of monetary damages).⁴

brought in this case, Plaintiff could not seek recovery under ROP R.Crim.P. 41(e). The Court finds the case law under U.S. Rule 41 instructive, however, since it involves seizures in quasi-criminal matters.

²*See also Adeleke*, 355 F.2d at 151 (string citation of those Circuits which have adopted the principle that sovereign immunity bars the recovery of monetary damages in cases involving the return of seized property); *Diaz*, 517 F.3d at 612 (another string citation).

³The Court notes, however, that other jurisdictions have repeatedly disagreed with, or distinguished, this holding in *Martinson*. *See, e.g., Bein*, 214 F.3d at 412-13, *Adeleke* 355 F.2d at 151 n.5.

⁴The Court notes that the express reservation of sovereign immunity in 14 PNC § 502 (c) reinforces the conclusion that courts lack equitable jurisdiction to award money damages under ROP R.Crim.P. 41 (e). “To allow a party to recover damages against [the Republic] pursuant to the equitable application of a procedural rule that makes no mention of such relief at the same time that [the legislature], by statute, expressly reserves sovereign immunity to bar such awards . . . ‘would be directly contrary to the intent of

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The Court can see no principled reason to distinguish this case from *Adeleke*, *Bein* and *Diaz*.

The inquiry does not end here, however, because Plaintiff seeks both equitable and monetary damages. The statute at issue in this case contemplates trial and conviction prior to forfeiture. 27 PNC § 1208(b)(3) (nets are “subject to forfeiture . . . upon conviction of a criminal violation pursuant to subsection 1209 (a)”). *Cf.* 27 PNC § 184 (civil forfeiture proceeding presumed in the context of seizure of foreign fishing vessel and fishing gear). Alternatively, the Republic can commence civil forfeiture proceedings. *See* 27 PNC § 1210. How can a citizen regain his nets if the Republic never files criminal charges or initiates a forfeiture proceeding? To keep the statute within constitutional bounds, the Court must read in a right to due process after a seizure of property. If there is no criminal trial or forfeiture proceeding, the Court will, at least, hold a hearing for the return of the property, akin to a civil forfeiture hearing. *Cf.* ROP R. Crim. P. 41(e). At the hearing, the Court will consider whether the government has the right to continued retention of the property, and, if not, whether the government should return the property to movant. *Id.* When the movant seeks the return of property before the indictment or information, the movant bears the burden of showing that the seizure was illegal and that he is entitled to lawful possession of the property. *Martinson*, 809 F.2d at 1369. However, “. . . when the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or, as here, the government has abandoned its investigation, the burden of proof changes. The person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate p.324 reason to retain the property.” *Id.* In a case such as this one, where the delay is several years, the delay shifts the burden of proof to the Republic. *Martinson*, 809 F.2d at 1369, n. 5. Finally, “even if it is alleged that the property the movant seeks to have returned is no longer within the Government’s possession, the district court has jurisdiction to determine whether such property has been in [the Government’s] possession and whether [the Government] wrongfully disposed of such property.” *Bein*, 214 F.3d at 411.

For the reasons discussed in *Diaz*, *Adeleke*, *Bein*, Plaintiff’s petition for the return of property and his request for a hearing is maintained, but his request for damages for “injuries suffered to [Plaintiff] and his property as a result of Defendant Chin’s intentional tort of conversion” is dismissed as barred by sovereign immunity. Further, Plaintiff’s request for “just compensation” if the nets cannot be returned must also be dismissed as barred by sovereign immunity.

C. Statute of Limitations

Defendants allege that Plaintiff is barred from bringing this suit under 14 PNC § 403, which requires that any action “against the Director of the Bureau of Public Safety, policeman, or other person duly authorized to serve process, for any act or omission in connection with the performance of his official duties” must be brought within two years after the cause of action accrues. Since the seizure occurred on September 10, 2004, Defendants claim, any suit should have been filed by September 10, 2006. Plaintiff points to Justice Salii’s Order in *Rdialul* and alleges that this suit properly falls under 14 PNC § 405, which has a six-year statute of

[the legislature].” *Adeleke*, 355 F.3d at 154-55, n.8 (*citing Bein*, 214 F.3d at 416).

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limitations.

The Court need not reach whether the cause of action falls under 14 PNC § 403 or § 405, however, since the cause of action as to the violation of due process and DFWP's continued retention of the nets has yet to accrue. Plaintiff acknowledges that DFWP and Defendant Chin originally had a right to seize his nets under 27 PNC § 1208(b)(2). His complaint focuses on the due process violation of the ongoing seizure without criminal conviction, as required under 27 PNC § 1209, or any forfeiture proceeding. As a matter of common sense, the clock for the cause of action on the due process violation, and the attendant continued confiscation of the nets, could not have started ticking at the time of seizure. How could Plaintiff have known at the time of seizure that the Republic was not going to prosecute him or bring civil forfeiture proceedings for over four years? The cause of action is ongoing, and has yet to accrue, and therefore neither statute of limitation applies.⁵

CONCLUSION

Defendants' motion to dismiss is denied in part, and granted in part. Defendants' motion is denied insofar as: Plaintiff need not plead improper purpose; Plaintiff properly seeks a hearing and the return of his kesokes nets, if he prevails at the hearing; and those causes of action **p.325** are not barred by the statute of limitations. Defendants' motion is granted insofar as Plaintiff's claims for monetary damages and due compensation are barred by sovereign immunity and therefore, the Court will not hear Plaintiff's claims concerning due compensation for the kesokes nets or monetary damages for conversion.

Because the Court has resolved the issue, the hearing currently scheduled for June 8, 2009, is hereby vacated.

⁵The Court does not reach the statute of limitations issue as to Plaintiff's causes of action for conversion or monetary damages, since these matters were already dismissed on sovereign immunity grounds.