

IN THE COURT OF APPEALS

FOR THE

ROSEBUD SIOUX TRIBE

CA 87-03

ROSEBUD HOUSING AUTHORITY,

Plaintiff and Appellant,

v.

LOUIE and LENA ZAHN YOUNG (JACKSON),

Defendants and Appellees,

PAUL and LINDA SEDLMAJER,

Defendants and Appellees,

SHIRLEY (LARVIE) BURNETTE,

Defendant and Appellee.

O R D E R

This case having received complete appellate review, including oral argument, and the Court having issued opinion and being fully advised in the premises, it is hereby

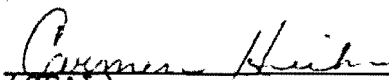
ORDERED AND ADJUDGED, that the judgment of the Tribal Court be, and the same is hereby, affirmed.

Dated this 14 day of September, 1987.

BY THE COURT:


ACTING CHIEF JUDGE

ATTEST:


(SEAL)

CLERK

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APPEAL FROM THE ROSEBUD
SIOUX TRIBAL COURT OF THE
ROSEBUD SIOUX TRIBE

HONORABLE SHERMAN MARSHALL
Presiding Judge

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On the Brief:
GARY SOKOLOW

OPINION FILED 9.14-87

Case # _____

ROUBIDEAUX, Chief Justice

Appellant, Rosebud Housing Authority, had brought action by complaints filed to recover claimed unpaid rents owed to the Housing Authority. The Rosebud Sioux Tribal Court ruled that the complaints were barred by the applicable statute of limitations and the complaints were dismissed. All three cases were consolidated for appeal as they involve the same legal questions, to-wit:

1. Whether the statute of limitations applies through Chapter 2, Section 2, of the Rosebud Sioux Tribal Code adopted in 1975.

2. If there is no bar by the statute of limitations, whether or not the doctrine of laches bars the complaints.

The primary issue in these cases is whether the trial court erred as a matter of law when it dismissed Appellant's complaints on the theory that each was barred by the applicable statute of limitations. Because the trial court's orders of dismissal were based upon both the 1975 tribal code statute of limitations defense and the 1985 tribal code statute of limitations defense, this court should affirm if either ground were sufficient for dismissal. See Berger v. General United Group, Inc., 268 N.W.2d 630 (IA 1978).

Whether this cause of action is characterized as an implied obligation in contract, express obligation in contract or an action upon an open account, it is beyond dispute that the

action against the Sedlmajers accrued in 1973 and the action against the others in 1976. Therefore the law applicable in 1973 and 1975 governs in both cases.

The Rosebud Sioux Tribal Council enacted a new tribal code which was in existence from 1975 until October, 1985, when the present code was passed. Chapter 2, Section 2, of that code contained the following provision:

Law Applicable to Civil Action

The civil actions and civil remedies that may be commenced in the Rosebud Sioux Tribal Court shall include declaratory judgments, changing of names of persons, attachment, garnishment, foreclosure of liens on personal property, claim and delivery, injunction, and other actions against individuals. However, no action may be commenced against the Rosebud Sioux Tribe, nor against a Council member or officer or employee of the Tribe while carrying out a tribal function, authorized by the action of the Tribal Council. The procedure for commencing such action and the grounds, conditions, and qualifications therefore shall be the same as provided by the law of the State of South Dakota, which is incorporated by this reference.

As was correctly noted by the trial judge, this section of the code was enacted at the time when tribal civil law was in a developing stage and the code did not prescribe particular remedies in civil actions. A glance at the table of contents of the 1975 tribal code reveals that although the Rosebud Sioux Tribe had succeeded in implementing substantive criminal statutes, in the area of civil actions and remedies, the code is almost silent, except with respect to Chapter 2, Section 2, styled "Law Applicable to Civil Actions." As the tribal judge properly noted, this section was obviously an attempt by the drafters to fill that void.

The language used by the drafters of the 1975 code defies the Appellant's proposed construction of Chapter 2, Section 2. The section refers to the "law" applicable to civil actions, not merely the procedural law. If the drafters of Section 2 had intended to incorporate only the procedure for commencing a civil action, as the Appellant contends, they would have said so unequivocally. Instead, the drafters explicitly incorporated the "grounds, conditions and qualifications" for commencing civil actions, after they delineated several of the remedies that would be available in tribal court. This language clearly evinces an intent on the part of the drafters to refer to state law to test the sufficiency of a cause of action in all respects, necessarily including the statutes of limitation.

In October of 1985, the Rosebud Sioux Tribe enacted the present tribal code which includes, at Title IV, Chapter 2, Section 4, a two-year statute of limitations for all actions excepting those brought against tribal officials acting in their official capacities. None of the parties claims this enactment has any effect whatsoever on these cases, either prospective or retrospective. However, it need not be asserted to affect these claims since the 1975 code provision applies and is dispositive of that issue herein.

One of the state law grounds for commencing an action such as those present here is that it be commenced within six years of its accrual. SDCL § 15-2-13 provided in 1975, inter alia, that:

15-2-13. Contract obligation or liability --

Statutory liability -- Trespass -- Personal property -- Injury to noncontract rights -- Fraud -- Setting aside corporate instruments. Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued:

- (1) An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in §§ 15-2-6 to 15-2-8, inclusive, and subdivision (4) and (5) of § 15-2-15.

The statute admits of no other conclusion but that the timely filing of the action is itself a ground, as established pursuant to Rosebud Sioux Tribal Code, Chapter 2-2, for the commencement of an action. This is consistent with the most widely accepted definition of the statute of limitations, found in Black's Law Dictionary.

A statute prescribing limitations to the right of action on certain described cause of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued.

Black's Law Dictionary 835 (5th Ed. 1979) (emphasis added).

It is clear therefore that the 1975 Rosebud Sioux Tribal Code bars suit against the Appellees. The tribal court itself had settled this question in two previous decisions, Home Oil & Tire Co. v. Two Charger, CIV. 85-326, (1986) and United Church Cattle Association, Inc. v. Frederick, CIV. 86-73 (1986), wherein the tribal court held that the 1975 tribal code provision incorporated the South Dakota civil remedies and their concomitant limitations periods.

Appellant attempts to distinguish this case by arguing that all the parties involved in Home Oil and United Church were nongovernmental entities whereas the Appellant is a government agency against which the statute of limitations cannot be invoked. Initially, it should be noted that the Appellant raises this argument for the first time on appeal. It is a cardinal rule of appellate review that an issue not properly raised before the trial court is not subject to review by an appellate court. See, e.g., Associated Press v. Heart of Black Hills Stations, Inc., 325 N.W.2d 49 (S.D. 1982), Krumm v. Feverhelm, 298 N.W.2d 187 (S.D. 1980).

Even if this Court were to conclude that this question is properly before the Court, Appellant's argument runs contrary to the emerging case law in this area. Most courts have held that statutes of limitations apply to governmental entities acting in a private/proprietary capacity as opposed to a governmental/public capacity. 51 Am. Jr. 2d Limitations of Actions §§ 416-417, (1970); Re Bird's Estate 410 Ill. 390, 102 N.E.2d 329 (1951); State ex rel State Comrs. v. Weems, 197 Okla. 106, 168 P.2d 629 (1946). In determining whether or not the Appellant is acting in a public or private capacity, the Bird case inquires as to whether the rights asserted are on behalf of all the people of the tribe or a limited group. Bird, supra.

The Appellant, when suing for eviction and rent arrearages, is acting as a private landlord and is not acting in its sovereign capacity. In this respect, it is important to note that the newly-enacted tribal code ordinance number 86-12, Title

VIII, Chapter 3 of the Rosebud Sioux Tribal Code, pertaining to Landlord-Tenant relations, makes no distinction between a private landlord and the Appellant. See R.S.T.C. § 8-3-1.5(h). The section gives tenants the same rights against the Appellant and private landlords. Moreover, Article V, § 2 of the Appellant's Articles of Incorporation provides that the Rosebud Sioux Tribe proper "is not liable for the debts of or obligations of the Authority." The Appellant has clearly distanced itself from the tribe by this provision, and by restricting the responsibility of the Tribe for its actions, Appellant indicates that it operates more like a private agency than one representing the entire tribe.

Therefore, the Appellant's argument that the statute of limitations cannot be applied to it fails and the trial court's ruling that Home Oil and United Church govern this case is upheld.

With regard to Appellees Sedlmajer, it is difficult if not impossible to determine what tribal law was in effect in 1973 when the cause of action against them accrued because of the lack of adequate tribal records.

Even if this Court should find that plaintiff's suits are not barred by the statute of limitations, the doctrine of laches controls.

There are fundamentally three elements to the laches defense:

1. That the plaintiff had full knowledge of facts upon which the action was based.

2. Regardless of such knowledge, he engaged in unreasonable delay before commencing suit.

3. Allowing plaintiff to maintain the action would prejudice other parties. Golden v. Oahe Enterprises, Inc., 240 N.W.2d 102 (S.D. 1976). Oahe is analagous to the instant case in that it too involved an appeal of a dismissal of an action at law. As to the first element, the plaintiff did have full knowledge of the rent arrearages as evidenced by the introduction of the ledgers into evidence. It shows that Appellant was fully aware of the mounting debts of both early on. The Authority then was on continual notice of this debt. This debt balance constitutes the very facts upon which this action is based.

As to the second element of laches, viz, unreasonable delay in bringing the action, the plaintiffs chose to wait nearly eleven and thirteen years, respectively, before bringing suit. The Appellant has offered no credible defense which would excuse its negligence in bringing the actions in a timely manner. The ledgers indicate that the Rousebud Housing Authority was aware early that rent arrears were continuing to accumulate. Yet the plaintiff chose to wait until March, 1987, to serve notice to defendants to vacate premises.

The third element of laches, as established by Golden is also met in this case. The defendants would clearly be prejudiced if this court permitted the Rosebud Housing Authority to maintain this action. Memories fade, and it would be difficult for anyone, let alone the defendants, to testify about everyday events which occurred over ten years ago. Also, defendants

should have a reasonable expectation that the plaintiffs have chosen not to exercise their rights in this matter. To permit suit now would work prejudice upon defendants as they would not be able to recall payments on this debt made years ago. One does not usually retain rent receipts for a decade.

This court holds that the elements of laches have been met in all three cases.

The judgment of the tribal court is affirmed.

AMIOTTE, Justice, FAST HORSE, Justice, concur.