

FSM SUPREME COURT TRIAL DIVISION

THE PEOPLE OF THE MUNICIPALITY OF GILMAN,)
YAP STATE, by and through CHIEF GEORGE)
TAMAGKEN and CHIEF OTTO BOWOO,)

CIVIL ACTION NO. 2007-3009

Plaintiffs,)

vs.)

M/V EASTERNLINE I and M/V NATIONWIDE II,)
in rem, their engines, masts, bowsprit, boats,)
anchors, chains, cables, rigging, apparel, furniture,)
and all other necessities thereunto appertaining;)

and)

WOODMAN EASTERNLINE SDN. BHD. and)
ALEXANDER MAKALUAS,)

Defendants.)

ORDER DENYING ENTRY OF DEFAULT AND ORDER DISMISSING DEFENDANTS

Dennis K. Yamase
Associate Justice

Decided: March 10, 2010

APPEARANCES:

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HEADNOTES

Admiralty – Ships; Civil Procedure – Defaults and Default Judgment

The thirty-day time period to answer or otherwise defend before a default can be entered found in 4 F.S.M.C. 204(3) and in Supplemental Admiralty and Maritime Rule B(2)(b) is the applicable time frame in an admialty case. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 83 & n.2 (Yap 2010).

People of Gilman *ex rel.* Tamagken v. M/V Easternline I
17 FSM Intrm. 81 (Yap 2010)

Admiralty – Ships; Jurisdiction – In Rem; Jurisdiction – Personal

The only way a vessel can be a defendant in a civil action is if the proceeding against it is *in rem*. A court cannot exercise *in personam* jurisdiction over a vessel, but can entertain an *in personam* suit against a vessel's owner if the court has obtained personal jurisdiction over the owner. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 84 (Yap 2010).

Jurisdiction – In Rem

For a court to exercise *in rem* jurisdiction, the thing (*res*) over which jurisdiction is to be exercised (or its substitute) must be physically present in the jurisdiction and under the court's control where it will be held to abide further order. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 84 (Yap 2010).

Admiralty – Ships; Civil Procedure – Dismissal – Lack of Jurisdiction; Jurisdiction – In Rem

When a vessel was never seized and brought under the court's control and is not in, or is no longer in, the FSM, the court cannot exercise *in rem* jurisdiction over it and all claims against the vessel will be dismissed without prejudice unless a letter of undertaking or a bond has been made a substitute *res* for the vessel in lieu of the vessel's seizure, thus permitting the court to exercise *in rem* jurisdiction. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 84 (Yap 2010).

Admiralty – Ships; Civil Procedure – Default and Default Judgments; Jurisdiction – In Rem

When two vessels were never arrested or seized in the FSM and no substitute *res*, a bond or letter of undertaking, has been provided to the court so that the court can exercise *in rem* jurisdiction through the substitute, the court lacks jurisdiction over the vessels regardless of the service on the vessels' agent, and no default can be entered against either vessel. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 84 (Yap 2010).

Admiralty – Ships; Civil Procedure – Service; Jurisdiction – In Rem

Vessels are not subject to service of process under Rule 4(d)(3) (service on corporations), but must be proceeded against *in rem* because they are things, not corporations. This is unlike the vessels' owner, which is a corporation. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 84 (Yap 2010).

Business Organizations – Corporations

A corporation is a juridical, or artificial person with a perpetual existence until properly dissolved and as such is sued *in personam*. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 84 (Yap 2010).

Civil Procedure – Dismissal – Lack of Jurisdiction; Jurisdiction – In Rem

When the court has not acquired *in rem* jurisdiction over the two vessels and since service on an agent cannot create jurisdiction over a vessel, the complaint against the two vessels will be dismissed without prejudice. People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 85 (Yap 2010).

Civil Procedure – Service

A natural person, not a corporation or juridical person should be served process in any manner authorized for service of process on individuals under Rule 4(d)(1), or Rule 4(d)(8), or Rule 4(i)(1). People of Gilman *ex rel.* Tamagken v. M/V Easternline I, 17 FSM Intrm. 81, 85 (Yap 2010).

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This comes before the court¹ on the Plaintiffs' Motion for Entry of Order of Default, filed January 22, 2010; plaintiffs' Amended Motion for Default and Conditional Reply to David Ledger's Response to Plaintiff's [sic] Motion for Default, filed January 22, 2010; and Plaintiffs' Second Request for Entry of Default Against Defendants M/V Easterline [sic] I, M/V Nationwide II, and Alexander Makaluas, filed January 22, 2010.

The requests to enter defaults are denied. The M/V *Easternline I* and the M/V *Nationwide II* are dismissed without prejudice. An order of dismissal nisi is entered for Alexander Makaluas. The court's reasons follow.

I.

On December 2, 2009, trial in this matter started against only defendant Woodman Easternline Sdn. Bhd., the only defendant that has appeared in this case and the only defendant represented by defense counsel David P. Ledger. That trial is currently in recess to obtain testimony from a key witness in Belgium.

The plaintiffs move for the entry of defaults against the three other defendants – M/V *Easternline I*, M/V *Nationwide II*, and Alexander Makaluas, the M/V *Easternline I*'s captain. The plaintiffs contend that the court has jurisdiction over these defendants because the complaint and the summons for each of these defendants were served on Jesse Gadjusek on January 16, 2008, and that, during the December 2009 trial, Gadjusek testified that he had acted in May 2006 as the agent for the vessels during their only visit to Yap. Since the State of Yap requires, with a few exceptions that do not apply here, every vessel that calls at or enters port in Yap to have a local agent, the plaintiffs contend that service on Gadjusek, the vessels' May 2006 agent, is good service on both vessels and on the captain, and that therefore the court may exercise *in personam* jurisdiction over them and can enter their default since it has been over twenty days² since they were served.

The evidence presented during trial indicated that the vessels M/V *Easternline I* and M/V *Nationwide II* had been sold to another owner on May 15, 2007, well before the plaintiffs filed their complaint on October 19, 2007, and that no witness knew the current whereabouts of Captain Alexander Makaluas although they had tried to locate him.

II.

The plaintiffs' complaint names and describes the vessels M/V *Easternline I* and M/V *Nationwide*

¹On January 4, 2010, Woodman Easternline Sdn. Bhd.'s counsel David Ledger filed a Response to Plaintiffs' Motion for Entry of Default Against Vessels and Alexander Makaluas. On January 5, 2010, the plaintiffs filed a Motion to Strike Response to Plaintiffs' Motion for Entry of Default Against Vessels and Alexander Makaluas; Exhibit A; Certificate of Service Filed by David P. Ledger in His Capacity as an Officer of this Court. And then on January 22, 2010, counsel Ledger filed a Withdrawal of Response to Plaintiffs' Motion for Default. The court has not considered these filings and deems them not to be before it.

²The thirty-day time period to answer or otherwise defend before a default can be entered found in 4 F.S.M.C. 204(3) and in Supplemental Admiralty and Maritime Rule B(2)(b) is the applicable time frame.

Il as *in rem* defendants. This is proper. The only way a vessel can be a defendant in a civil action is if the proceeding against it is *in rem*. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 51 (Chk. 2001). A court cannot exercise *in personam* jurisdiction over a vessel, but can entertain an *in personam* suit against a vessel's owner if the court has obtained personal jurisdiction over the owner. *See, e.g., Belcher Co. of Ala. v. M/V Maratha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984) ("the *in personam* action is filed against the owner personally; [a]n *in rem* action, on the other hand, is filed against the *res*, the vessel"); *cf. Yap v. M/V Cecilia I*, 13 FSM Intrm. 403, 407-12 (Yap 2005) (although vessel present in Yap, no personal jurisdiction over vessel's owner when vessel was under a bareboat charter and owner never purposefully availed himself of the privilege of conducting activities in the FSM).

For a court to exercise *in rem* jurisdiction, the thing (*res*) over which jurisdiction is to be exercised (or its substitute) must be physically present in the jurisdiction and under the court's control where it will be held to abide further order. Moses, 10 FSM Intrm. at 52; Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 370 (Kos. 2000); In re Kuang Hsing No. 127, 7 FSM Intrm. 81, 82 (Chk. 1995). When a vessel was never seized and brought under the court's control and is not in, or is no longer in, the FSM, the court cannot exercise *in rem* jurisdiction over it and all claims against the vessel will be dismissed without prejudice, Moses, 10 FSM Intrm. at 52; M/V Voea Lomipeau, 9 FSM Intrm. at 370; Kuang Hsing No. 127, 7 FSM Intrm. at 82, unless a letter of undertaking or a bond has been made a substitute *res* for the vessel in lieu of the vessel's seizure, thus permitting the court to exercise *in rem* jurisdiction, *see* People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 414 (Yap 2006).

The M/V *Easternline I* and the M/V *Nationwide II* were never arrested or seized in the FSM. Nor has a substitute *res*, a bond or letter of undertaking, been provided to the court so that the court can exercise *in rem* jurisdiction through the substitute. The court thus lacks jurisdiction over the M/V *Easternline I* and the M/V *Nationwide II* regardless of the service on Gadjusek. No default can be entered for either vessel.

III.

The plaintiffs contend that service was effective under Civil Rule 4(d)(3), which provides that service "[u]pon a domestic or foreign corporation or upon a partnership or other unincorporated association" may be effected

by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

They also rely on Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 93, 94-95 (Chk. 1997), where the court held that a law firm that had been designated as an agent for service of process by a foreign corporation that had been required by law to appoint one in the FSM remained the corporation's agent for service even though the corporation had left the FSM and discharged the firm as its attorney.

The M/V *Easternline I* and the M/V *Nationwide II* are not subject to service of process under Rule 4(d)(3), but must be proceeded against *in rem* because they are things, not corporations. This is unlike the vessels' owner, which is a corporation. A corporation is a juridical, or artificial person with a perpetual existence until properly dissolved, *see, e.g., Carlos Etscheit Soap Co. v. Do It Best Hardware*, 14 FSM Intrm. 152, 158 (Pon. 2006); In re Engichy, 11 FSM Intrm. 520, 525 (Chk. 2003); In re Estate of Setik, 12 FSM Intrm. 423, 429 (Chk. S. Ct. Tr. 2004), and as such is sued *in personam*, Carlos Etscheit Soap Co., 14 FSM Intrm. at 158 (a corporation has capacity to sue and be sued in its own

name).

Since the court has not acquired *in rem* jurisdiction over the M/V *Easternline I* and the M/V *Nationwide II* and since service on an agent cannot create jurisdiction over a vessel, the complaint against the M/V *Easternline I* and the M/V *Nationwide II* is dismissed without prejudice. The vessels shall be stricken from the caption.

IV.

The plaintiffs also want a default entered for Captain Alexander Makaluas. He also is not a corporation. He is a natural person, not a juridical person. The plaintiffs do not claim to have served process on him in any manner authorized for service of process on individuals under Rule 4(d)(1), or Rule 4(d)(8), or Rule 4(i)(1).

The plaintiffs cite a Yap state regulation that requires every vessel calling at or entering port in Yap to have an agent resident in and duly authorized to do business in Yap. Yap Reg. 2005-04, pt. 3-1. Assuming that this regulation implicitly authorizes service of process on the vessel's owner or charterer (the plaintiffs do not point to any explicit authorization in the regulation) by service on the duly-appointed Yap resident agent, nothing in the regulation cited appears to require the appointment of or to authorize the Yap agent to accept service of process for lawsuits against individual persons employed on the vessel for which the agent is acting. Therefore, the court will dismiss, without prejudice, the complaint against Alexander Makaluas for failure to serve the complaint and summons on him within 120 days of when the complaint was filed, FSM Civ. R. 4(j), unless the plaintiffs, no later than April 13, 2010, have provided authority that, when Jesse Gadjusek was served a complaint and summons for Alexander Makaluas, Gadjusek was appointed and authorized to accept service of process on Makaluas's behalf for lawsuits against Makaluas personally.

V.

Accordingly, the plaintiffs' requests for entries of default are denied. Defendants M/V *Easternline I* and M/V *Nationwide II* are dismissed without prejudice, and defendant Alexander Makaluas will be dismissed without prejudice unless the plaintiffs provide authority that Jesse Gadjusek was authorized to receive service of process for lawsuits against Makaluas personally. Defendants M/V *Easternline I* and M/V *Nationwide II* are henceforth stricken from the caption.

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