FSM SUPREME COURT TRIAL DIVISION

GORDON SMITH, Plaintiff, vs. FABIAN NIMEA, individually and d/b/a FSN FINANCIAL GROUP, INC., d/b/a FFGI CONSULTING GROUP, Defendants.	CIVIL ACTION NO. 2005-004

ORDER AND MEMORANDUM DENYING SECOND MOTION TO RECONSIDER

Martin G. Yinug
Associate Justice

Decided: May 11, 2010

APPEARANCES:

For the Plaintiff: Mary Berman, Esq.
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For the Defendants: Stephen V. Finnen, Esq.
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HEADNOTES

Civil Procedure – Motions

As a general principle, failure to file a memorandum of points and authorities with a motion constitutes a waiver of the motion, and, similarly, the failure of the nonmoving party's memorandum to set forth points and authorities constitutes a consent to the granting of the motion. Although there is no bright-line test appropriate for determining what a sufficient memorandum of points and authorities is, a court necessarily assesses a memorandum's sufficiency on the facts and law of a given motion. Still, a memorandum of points and authorities filed in opposition to a motion should set forth the law upon which the party relies and his theory as to how that law would be applied to the facts of the case. Smith v. Nimea, 17 FSM Intrm. 125, 128 (Pon. 2010).

Civil Procedure – Motions

Despite a failure to file a timely opposition being deemed as consent to granting of the motion, proper grounds for granting the motion must still exist before a court may grant it. Smith v. Nimea, 17 FSM Intrm. 125, 128 (Pon. 2010).

Civil Procedure – Motions

Although the FSM Rules of Civil Procedures neither specifically provide for nor bar replies to oppositions, the general practice has been to accept them and consider them to the extent that they address the opposition, and not to the extent that they raise issues extraneous to the original motion or the opposition. Smith v. Nimea, 17 FSM Intrm. 125, 128 (Pon. 2010).

Civil Procedure – Motions

Without a de minimis showing of the law upon which the opposition relies, an opposition must be considered not to have been filed, and without an opposition, the reply to the opposition must likewise be considered not to have been filed. Smith v. Nimea, 17 FSM Intrm. 125, 128 (Pon. 2010).

Civil Procedure – Motions; Civil Procedure – Summary Judgment

An order granting partial summary judgment may be characterized as final only upon an express determination that there is no just cause for delay and upon an express direction for the entry of judgment. When no such determination or direction appears in an order, a plaintiff's motion for relief from judgment is one to reconsider an interlocutory order, and cannot rest on Rule 60(b). Smith v. Nimea, 17 FSM Intrm. 125, 128-29 (Pon. 2010).

Civil Procedure – Motions

When the court has acted on and previously denied a similarly mischaracterized motion to reconsider, the court must properly consider that the plaintiff's "supplement," which sets out a novel argument, is a second motion to reconsider. Smith v. Nimea, 17 FSM Intrm. 125, 129 (Pon. 2010).

Administrative Law – Judicial Review; Employer - Employee

Because it makes no sense to authorize an official to conduct hearings and investigations without also authorizing that official to do something with the information thus obtained, when the statute authorizes the Pohnpei Treasury Director to conduct hearings and investigations and, except for an appeal, makes the Director's decision final, it follows that the finality of the Director's decision applies to the entire administrative process before a judicial appeal. Smith v. Nimea, 17 FSM Intrm. 125, 130 (Pon. 2010).

Administrative Law; Employer - Employee

Whereas the Pohnpei Division of Personnel, Labor and Manpower Development may issue orders and decisions, the Treasury Director has the final decision, and to give meaning to that finality, the Director's powers include issuing any orders necessary to arrive at and give effect to the decision. Smith v. Nimea, 17 FSM Intrm. 125, 130 (Pon. 2010).

Administrative Law; Employer - Employee

While the Pohnpei PL&MD Division must establish procedures to ensure compliance with the Pohnpei Residents Employment Act of 1991 and the rules and regulations promulgated thereunder, the statute does not mention a "Chief of the Division," and where the Division of PL&MD is mentioned specifically, it is specifically envisioned that the Division must establish procedures to ensure compliance. By providing the Division with the responsibility for making the rules, the Act nevertheless does not empower only the Division to ensure compliance. Rather, it establishes that responsibility as part of the overall effort to ensure compliance and the statute vests the power of the final decision for effecting compliance with the Director, not the Division or its Chief. Smith v. Nimea, 17 FSM Intrm. 125, 130 (Pon. 2010).

Administrative Law; Employer - Employee

Since the Pohnpei Residents Employment Act of 1991 does not solely empower the Division of PL&MD to hold hearings, and since it does vest the power of the final decision in the Director, it follows

both that the hearing before the Director was legiti ... pursuant to the Act, and that there was a legitimate hearing pursuant to the Act. Smith v. Nim ... 7 FSM Intrm. 125, 130 (Pon. 2010).

Administrative Law – Judicial Review; Employer - Em

When the statute subjects the finality of the D ... 's decision to judicial appeal, and when it directs that judicial appeals of the Director's order or ... n must be made to the Pohnpei Supreme Court trial division within 15 days of the date of the ... n or order, the statute creates a statutory obligation to appeal a decision to Pohnpei Supreme ... and, as the statutory law governing the administrative review of labor contracts disputes, it is ... cessary part of the administrative process. Smith v. Nimea, 17 FSM Intrm. 125, 130-31 (Pon. 2

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COURT'S O ... ON

MARTIN G. YINUG, Associate Justice:

I. INTRODU ... N

This matter comes before the Court on Plaintiff's ... pplement to Motion to Reconsider, filed April 29, 2010.

II. PROCEDURAL ... GROUND

This matter is a dispute between Plaintiff and De ... dant arising out of Plaintiff's termination late in 2004. Plaintiff first brought the matter to the a ... tion of the Division of Personnel, Labor and Manpower Development ("PL&MD") in November ... 4. Decision, Department of Treasury and Administration, Labor Matter No. 001-2006, at 3 (A ... 7, 2006). After filing the Complaint in the FSM Supreme Court, Plaintiff requested and obtained a ... y to pursue his claim administratively before the Pohnpei State Department of Treasury and Admini ... ion ("Treasury"), of which PL&MD is a part. The hearing was held on April 6 and 7, 2006, on the w ... , overtime, and wrongful termination claims. On April 17, 2006, Director Finley S. Perman ("Perm ... ") issued a decision denying the claims. The plaintiff never appealed Perman's decision, but did as ... n for reconsideration twice, and was denied both times, the last on June 21, 2006. Motion to A ... d Answer, at 4 (Mar. 12, 2007).

After the Decision, Defendant filed a Motion t ... mend Answer on March 12, 2007. Through the spring of 2007, both parties filed Motions for Su ... ary Judgment.

On November 17, 2008, this Court issue ... Order: (1) granting Plaintiff's Motion for Enlargement; (2) granting Defendant's Motion to A ... Answer; (3) denying Plaintiff's Motion for Summary Judgment; (4) granting Defendant's Motio ... Summary Judgment as to Plaintiff's claims for unpaid wages, overtime, wrongful termination and ... inal penalties for nonpayment of wages; (5) denying Defendant's Motion for Summary Judgment ... Plaintiff's claim for unpaid commission; (6) denying Defendant's Motion for Summary Judgment a ... laintiff's claim of libel and interference with business opportunity; (7) and denying Defendant's Mo ... o Dismiss Defendant Nimea in his individual capacity. [Smith v. Nimea, 16 FSM Intrm. 186 (Po ... 08).]

On November 24, 2008, Plaintiff filed a Moti ... Reconsider this Court's Order of November 17. The Motion argued that, contrary to the Court ... er of November 17, Plaintiff had exhausted all administrative procedures despite not appealing ... Decision of April 17, 2006 to the Pohnpei Supreme Court, because jurisdiction had been ve ... FSM Supreme Court, such that Pohnpei

Supreme Court could no longer assume jurisdiction. Plaintiff did not mention at the time any lack of jurisdiction on the part of Perman. On December 22, this Court denied the Motion, noting that although Perman's ruling ended Plaintiff's resources as to administrative agencies, exhaustion of administrative remedies included appealing the administrative ruling to a judicial process via either Pohnpei Supreme Court or the FSM Supreme Court, and in the latter through either a new complaint, or an appeal in this matter.

On April 29, 2010, more than 16 months later, Plaintiff filed a Supplement to that Motion. On April 30, Defendant filed an Opposition to the Motion, and on May 3, Plaintiff filed a Reply to the Opposition.

III. Motions

A. *Motions in general*

As a general principle, failure to file a memorandum of points and authorities with a motion constitutes a waiver of the motion. Actouka v. Etpison, 1 FSM Intrm. 275, 277 (Pon. 1983). Similarly, the failure of the nonmoving party's memorandum to set forth points and authorities constitutes a consent to the granting of the motion. FSM Civ. R. 6(d); Enlet v. Truk, 3 FSM Intrm. 459, 461 (Truk 1988). Although there is no bright-line test appropriate for determining what a sufficient memorandum of points and authorities is, a court necessarily assesses a memorandum's sufficiency on the facts and law of a given motion. Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999). Still, a memorandum of points and authorities filed in opposition to a motion should set forth the law upon which the party relies and his theory as to how that law would be applied to the facts of the case. *Id.* Nevertheless, despite a failure to file a timely opposition being deemed as consent to granting of the motion, proper grounds for the granting of the motion must still exist before a court may grant it. Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994).

Further, although the FSM Rules of Civil Procedures neither specifically provide for nor bar replies to oppositions, the general practice of the Trial Division has been to accept them and consider them to the extent that they address the opposition, and not to the extent that they raise issues extraneous to the original motion or the opposition. Sipos v. Crabtree, 13 FSM Intrm. 355, 360-61 (Pon. 2005).

In the instant matter, although Defendant's Opposition included a section entitled "Memorandum of Points and Authorities," that section includes only the subsections "Facts" and "Conclusion." Although Defendant makes a plausible argument, particularly in the first paragraph of the "Facts" subsection, at no point does Defendant cite authority for his arguments, whether in support thereof or as counterexamples thereto. Without a de minimis showing of the law upon which the opposition relies, Defendant's Opposition must be considered not to have been filed. Nevertheless, the Court is within its discretion to consider the arguments made in the Opposition as it considers the Motion to Reconsider on its merits.

Without an Opposition, the Reply must likewise be considered not to have been filed. The Court within its discretion may consider the arguments made to the extent that they are within the original Motion to Reconsider.

B. *Motions to Reconsider*

Plaintiff couches the Motion to Reconsider in terms of Rule 60(b) of the FSM Rules of Civil Procedure. A Rule 60(b) motion may only be brought in search of relief from a final judgment. An order granting partial summary judgment may be characterized as final only "upon an express

determination that there is no just cause for delay and upon an ss direction for the entry of judgment." FSM Civ. R. 54(b). No such determination or direction s in the Order of November 17, 2008. Thus, Plaintiff's Motion is one to reconsider an interlocu rder, and cannot rest in Rule 60(b).

This Court previously denied a similarly mischaracterized M o Reconsider. Because this Court has acted on that Motion, Plaintiff may not now characterize th ant Motion as a Supplement, because the previous motion has already been disposed. Further, stant Motion sets out a novel argument, and as such is properly considered a Second Motion to sider.

IV. ARGUMENTS

A. *The Second Motion to Reconsider*

Plaintiff makes the arguments that Perman had no jurisdi under the Pohnpei Residents Employment Act of 1991, S.L. No. 2L-204-91 (1991) ("the Act") to a ruling; that the Act grants no authority to the Director to conduct hearings or issue orders the "Chief of the Division of Personnel, Labor and Manpower Development" is the only empow entity; that because the April 17, 2006 Decision was issued by Perman under the aegis of Treas no legitimate hearing was held pursuant to the Act; and that therefore Plaintiff had no statutory obli to appeal the April 17, 2006 Decision.

B. *The Opposition to the Motion*

Defendant argues that there is nothing to file a supplemen because the motion has been denied, and that the arguments raised in the Supplement should be on appeal. Defendant further argues that because Plaintiff was the party that had requested a s this matter in 2005, and that had sought the administrative hearing which culminated in the April 006 Decision, Plaintiff got the hearing he requested, even if the result was not what he wanted that therefore Plaintiff should now be stopped from claiming that there was no jurisdiction.

C. *The Reply to the Opposition*

Plaintiff argues that Rule 60(b) does not in itself limit the ber of different arguments on which a Rule 60(b) motion may be founded or the number of su otions which may be made, or require that they be made at once. Plaintiff cites both Rule 60(b) f s argument, and Rule 12(h)(3) as an example of improper jurisdiction voiding a judgment, regar of the length of time that has passed. Plaintiff also argues that, contrary to Defendant's second ent in the Opposition, parties cannot confer jurisdiction upon an illegitimate panel.

V. ANALYSIS

This Court now analyzes each of the five related arguments b Plaintiff: (1) that Perman had no jurisdiction; (2) that the Act grants no authority to the Director t duct hearings or issue orders; (3) that the "Chief of the Division of Personnel, Labor and M ver Development" is the only empowered entity; (4) that no legitimate hearing was held pursuan he Act because Perman issued the April 17, 2006 Decision under the aegis of Treasury; and (5) tha efore Plaintiff had no statutory obligation to appeal the April 17, 2006 Decision.

In order to guide its analysis, this Court consulted section nd 18 of the Act.

A. *Perman Had Jurisdiction Under Sections 16(2) and 16(7)*

Section 16(2) states that "[t]he Director is authorized to conduct hearings and investigations," and Section 16(7) provides that "[e]xcept for an appeal under Sec. 18 the decision of the Director shall be final." In statutory interpretation, all parts of a statute must be given meaning. It makes no sense to authorize an official to conduct hearings and investigations without also authorizing that official to do something with the information thus obtained. As the Director in his capacity is mentioned twice, and as the second mention is in the final sentence of the section, it follows that the finality of the Director's decision applies to the entire administrative process before the Section 18 judicial appeal.

B. *The Act Authorizes the Director to Conduct Hearings Explicitly and to Issue Orders Implicitly*

As stated, Section 16(2) authorizes the Director "to conduct hearings and investigations," in direct contradiction to Plaintiff's argument. Section 16(4) provides that the Division of PL&MD "*may* issue such *orders and decisions* as are necessary to ensure compliance." (emphasis added). Considered together with the finality of Section 16(7), the logical conclusion is that, whereas the Division of PL&MD may issue orders and decisions, ultimately in that part of the life of an administrative proceeding which is spent within an administrative agency, the Treasury Director has the final decision. It is also logical to conclude that, to give meaning to that finality, the Director's powers include issuing any orders necessary to arrive at and give effect to the decision.

C. *The "Chief of the Division of Personnel, Labor and Manpower Development" is Not the Only Entity Empowered to "Ensure Compliance With This Chapter," Etc.*

The introductory clause of Section 16 provides that the Division of PL&MD "shall establish procedures to ensure compliance with this chapter and the rules and regulations promulgated hereunder," and that the subsections are to be considered "in connection with such enforcement responsibilities." At no point in Section 16 is a "Chief of the Division" mentioned, and where the Division of PL&MD is mentioned specifically with the phrase "to ensure compliance with this chapter," etc., it is specifically envisioned that the Division "shall establish procedures to ensure compliance." By providing the Division with the responsibility for making the rules, the Act nevertheless does not, as Plaintiff claims, empower only the Division to ensure compliance. Rather, it establishes that responsibility as part of the overall effort to ensure compliance. Moreover, Section 16(7) vests the power of the final decision for effecting compliance with the Director, not the Division or its Chief.

D. *Perman's Issuance of the Decision Under the Aegis of Treasury Does Not Make the Hearing Illegitimate Under the Act*

Plaintiff's fourth argument relied on establishing not only that the Act empowers the Division of PL&MD alone to hold hearings, but also that the Director has no power of final decision. As discussed above, the Act does not so solely empower the Division of PL&MD, and Section 16(7) does vest the power of the final decision in the Director. It follows both that the hearing was legitimate pursuant to the Act, and that there was a legitimate hearing pursuant to the Act.

E. *Plaintiff Had a Statutory Obligation to Appeal the Decision to the Trial Division of the Pohnpei Supreme Court*

Section 16(7) subjects the finality of the Director's Decision to judicial appeal, and Section 18(2) directs that judicial appeals of an order or decision of the Director must be made to the Trial Division of the Pohnpei Supreme Court, within 15 days of the date of the decision or order. Read together, they create a statutory obligation on the Plaintiff to appeal the April 17, 2006 Decision to Pohnpei Supreme

Court. As these are sections of statutory law governing the administrative review of such labor contracts disputes as in this matter, they are a necessary part of the administrative process. As this Court noted on page 5 of its November 17, 2008 Order and Memorandum, Plaintiff has "[made] no attempt to excuse his failure to appeal the April 17, 2006 decision to the Pohnpei Supreme Court as provided by state law." [Smith, 16 FSM Intrm. at 190.]

VI. CONCLUSION

Following the above analysis, it is well-established that Plaintiff has been remiss in his obligation, mandated by statute as well as by the principle of exhausting administrative remedies, to pursue the administrative process to its ultimate conclusion. In denying the November 24, 2008 Motion to Reconsider, this Court rejected Plaintiff's argument that he could not pursue the administrative process because this matter was pending in FSM Supreme Court, which denied Pohnpei State Court the power to assume jurisdiction. In the instant Motion, Plaintiff now argues that the lack of jurisdiction goes back to Perman. This Court is not persuaded by this argument. The Plaintiff may preserve this, and other interlocutory orders, for appeal pending the final resolution of this matter. Also, should he consider a third Motion to Reconsider arguing that the lack of jurisdiction was on the part either of the Division of PL&MD or of this Court, Plaintiff may be advised instead to contemplate moving this Court to dismiss this matter altogether. Finally, should Plaintiff truly believe that he has not exhausted his administrative remedies due to his perception that Perman lacked jurisdiction to issue the April 17, 2006 Decision, Plaintiff is welcome to continue seeking redress in the proper forum pursuant to the Act, and this Court will assist him by dismissing this matter without prejudice under Rule 41(a)(2), or by receiving a stipulated dismissal under Rule 41(a)(1)(ii).

This Court hereby DENIES this Second Motion to Reconsider.

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FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK, Plaintiff, vs. SHELTON NETH and GIDEON NETH, Defendants.	)	CIVIL ACTION NO. 2004-013

ORDER

Dennis K. Yamase
Associate Justice

Decided: May 17, 2010