

acquired by Rejoice Jessy and her descendants, not as lineage members, but as heirs.

V. CONCLUSION

Accordingly, we conclude that there was no abuse of discretion in the trial court's dismissal pursuant to Rule 41(b) for failure to show a right to relief. The trial court decision is affirmed.

\* \* \* \*

FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHUIT SOAP COMPANY,	)	CIVIL ACTION NO. 2005-007
	)	
Plaintiff/Counterdefendant,	)	
	)	
vs.	)	
	)	
ERINE McVEY and DO IT BEST HARDWARE,	)	
a business organization,	)	
	)	
Defendants/Counterclaimants/	)	
Cross-Claimants,	)	
	)	
vs.	)	
	)	
BOARD OF TRUSTEES OF THE POHNPEI STATE	)	
PUBLIC LANDS TRUST,	)	
	)	
Defendant/Cross-Defendant.	)	
_____	)	

ORDER DENYING STAY WITHOUT PREJUDICE

Ready E. Johnny  
Associate Justice

Decided: June 25, 2010

APPEARANCE:

For the Plaintiff:	Stephen V. Finnen, Esq.
	P.O. Box 1450
	Kolonia, Pohnpei FM 96941

\* \* \* \*

## HEADINGS

### Civil Procedure – Motions

When no opposition has been filed to a motion, the failure to oppose is generally deemed a consent to the motion, but even when there is no opposition, the court still needs good grounds before it can grant the motion. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 178 (Pon. 2010).

### Civil Procedure – Motions

For a motion to be granted, even if unopposed, it must be well grounded in law and fact, and not interposed for delay. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 178 (Pon. 2010).

### Appellate Review – Stay – Civil Cases

Generally, a court should weigh four factors in granting a stay pending appeal: 1) whether the appellant has made a strong showing that he is likely to prevail on the appeal's merits; 2) whether the appellant has shown that he will be irreparably harmed without the stay; 3) whether the stay's issuance would substantially harm other parties interested in the proceedings; and 4) whether the public interest would be served by granting a stay. Ordinarily, the first factor is the most important, but a stay may be granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 178-79 (Pon. 2010).

### Appellate Review – Stay – Civil Cases

When the appellant wants the court to stay the pending appeal, a court order that a lot be made available for immediate commercial lease, an appeal issue that involves only the amount of money damages awarded to the appellant is not pertinent to the stay request. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 179 & n.1 (Pon. 2010).

### Judgments; Remedies

A court cannot order as relief a de facto practice that is actually contrary to law, even if it has been the usual practice. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 179 (Pon. 2010).

### Appellate Review – Stay – Civil Cases

When, although the appellant's likelihood of success on its two pertinent issues may be uncertain, it is strong enough that if irreparable harm were shown and if the other factors generally favored a stay, the court could issue the stay. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 179 (Pon. 2010).

### Appellate Review – Stay – Civil Cases

The court can see irreparable harm if the lot is awarded to another party who develops the lot and then the appellant prevails on appeal, but it cannot see irreparable harm from the bidding process going forward since the appellant may well be the successful bidder. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 179 (Pon. 2010).

### Appellate Review – Stay – Civil Cases

There is no significant harm to others' interests in the litigation when throughout the litigation, both claimants have been more interested in preventing the other from using Lot No. 014-A-08 than in actually using it themselves and neither made any effort whatsoever to further prosecute their claims (or to settle the matter) for three years until the court added them into action. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 179 (Pon. 2010).

Appellate Review – Stay – Civil Cases

When the Pohnpei Legislature has directed that Lot. No. 014-A-08 be leased in an expeditious manner, with the intent that all public land within its plat should be fully leased, the court cannot say that the public interest favors a stay of the bidding process to lease that lot. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 180 (Pon. 2010).

Appellate Review – Stay – Civil Cases

When the court, weighing the four factors, concludes that they do not favor a stay in the form sought by the appellant, the court will deny the motion for a stay without prejudice since the court would be willing to consider a motion that sought to stay an award of the lot to another if the appellant had submitted a bona fide bid for the lot and that would also allow the court to set a more accurate figure for an appeal bond – the amount of lease payments that the Board of Trustees could have received but would not receive while the appeal was pending. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 176, 180 (Pon. 2010).

\* \* \* \*

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On June 18, 2010, plaintiff/counterdefendant Carlos Etscheit Soap Company's Motion for Stay Pending Appeal was received in the trial division. It had been served on opposing parties on May 27, 2010, and had been, at that time, (mis)filed in the appellate division. (The movant had put "Trial Division" in the heading but confusingly had also put the appellate docket number on the motion.)

No opposition was filed to the motion in either division. Failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d), but even if there is no opposition, the court still needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994). For a motion to be granted, even if unopposed, it must be well grounded in law and fact, and not interposed for delay. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 153 (Pon. 1993).

The part of the order appealed from that the Soap Company wants stayed provides that:

the Board [of Trustees of the Pohnpei State Public Lands Trust] shall, within 90 days of entry of this order, make Lot No. 014-A-08 available for immediate commercial lease, either by bid or by auction, conforming to all of its mandated and required practice and procedures for advertising to the general public the availability of lots for commercial lease. The Board shall also give both Erine McVey and the Carlos Etscheit Soap Company direct notice of the lot's availability and the procedure that will be followed.

Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010). In particular, the Soap Company wants the court to stay the order that the Board "make Lot No. 014-A-08 available for immediate commercial lease" while its appeal is pending.

Generally, a court should weigh four factors before granting a stay pending appeal: 1) whether the appellant has made a strong showing that he is likely to prevail on the appeal's merits; 2) whether the appellant has shown that he will be irreparably harmed without the stay; 3) whether the stay's issuance would substantially harm other parties interested in the proceedings; and 4) whether the public interest would be served by granting a stay. Department of Treasury v. FSM Telecomm. Corp., 9 FSM

Intrm. 353, 355 (App. 2000). Ordinarily, the first factor is the most important, but a stay may be granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay. *Id.*

The Soap Company raises three issues and contends that it has a strong likelihood of success on appeal. Only two of the three issues are pertinent<sup>1</sup> to its request for a stay—whether, as the prior lessee, the Soap Company is entitled to an automatic renewal of its lease, and whether it should have been awarded a six-month extension of its prior lease because the same lot had been simultaneously leased to Erine McVey for about that long.

The Soap Company claims that it is entitled to an automatic renewal of its lease because, as it asserted orally during the March 18, 2010 hearing on all pending matters, the Board's practice has been to renew existing leases, albeit a couple of years late, so that therefore the Soap Company has a "property interest" in a lease renewal.<sup>2</sup> Its success is uncertain. This is because if what the Soap Company alleges as the de facto practice is actually contrary to law, the court cannot order it as relief even if it has been the usual practice. Udot Municipality v. FSM, 9 FSM Intrm. 418, 420 (Chk. 2000) (court cannot order a remedy that, although it has been the practice followed by the government agency, is unlawful), *aff'd*, 12 FSM Intrm. 29 (App. 2003). The Soap Company's success on its claim that it should have been awarded a six-month extension of its pre-existing lease is also uncertain because this claim does not seem to have been raised before the Soap Company appealed. During the March 18, 2010 hearing, the Soap Company asserted only its claim that its lease was valid and that, because of the Board's usual past practice, it was entitled, as a property right, to that lease's automatic renewal. Although the likelihood of success on the Soap Company's two pertinent issues may be uncertain, it is strong enough that if irreparable harm were shown and if the other factors generally favored a stay, the court could issue one.

The Soap Company contends that if the Board is required to go forward with its immediate commercial lease of Lot No. 014-A-08 the Soap Company would suffer irreparable harm if the leasing process went ahead and if the lot were leased to another and if the Soap Company then prevailed on its [two pertinent] claim[s] to a renewal [or extension]. This seems to be one "if" too many. The court can see irreparable harm if the lot is awarded to another party who develops the lot and then the Soap Company prevails on appeal, but it cannot see irreparable harm from the bidding process going forward since the Soap Company may well be the successful bidder.

The Soap Company contends that there is no significant harm to others interested in the litigation. This seems to be true. Throughout this litigation, both the Soap Company and McVey have been more interested in preventing the other from using Lot No. 014-A-08 than in actually using it themselves. Once the preliminary injunction<sup>3</sup> was entered on October 18, 2006, Carlos Etscheit Soap Co. v. McVey, 14 FSM Intrm. 458, 463 (Pon. 2006), neither the Soap Company nor McVey made any effort whatsoever to further prosecute their claims (or to settle the matter) until three years later when the court prodded them into action.

---

<sup>1</sup> The other appeal issue is not pertinent to the stay request because it only involves the amount of money damages awarded to the Soap Company.

<sup>2</sup> In its November 17, 2009 motion, the Soap Company merely stated that it "should receive preference in seeking a renewal of the lease." Mot. to Determine Appeal, Request for Further Proceedings at 6 (Nov. 17, 2009).

<sup>3</sup> Earlier restraining orders, mostly agreed to by the parties, had been in effect since April 2005.

The Soap Company contends that the public interest is in the final resolution of land problems and in clarifying issues before any future leases and that because of this "[t]here is no need to put the Board of Trustees through the procedure of advertising and bidding out the land, if the entire process may be circumvented by the appeal . . ." Mot. for Stay at 7. However, this is public land, not a private land dispute. In 1998, the Pohnpei Legislature made a clear statement of the public interest in this particular public land – it directed that public lands in Cadastral Plat No. 014-A-00, of which Lot No. 014-A-08 is a part, be leased "in an expeditious manner," with the intent that all public land within that plat should "be fully leased." Pon. S.L. No. 4L-79-98, § 2 (codified at 42 Pon. Code § 10-136(2)). In face of that clear legislative directive, the court cannot say that the public interest favors a stay, particularly in the form sought.

For an appeal bond, the Soap Company suggests that the \$1,000 bond given the court for the trial court restraining orders and injunctions would, since it has not yet been returned; be a reasonable bond for the stay it seeks.

Weighing the factors discussed above, the court concludes that they do not favor a stay in the form sought by the Soap Company. The motion for a stay is therefore denied without prejudice. But the court would be willing to consider a motion that sought the stay of an award of Lot No. 014-A-08 to another if the Soap Company had submitted a bona fide bid for the lot, or perhaps even for a stay on opening the sealed bids submitted for Lot No. 014-A-08. That would also allow the court to set a more accurate figure for an appeal bond – the amount of lease payments that the Board of Trustees could have received but would not receive while the appeal was pending.

The Soap Company may renew its motion.

\* \* \* \*