

Motion was insufficient through a combination of failure to contend facts necessary to establish the elements of contempt and failure to support the remaining factual contentions with evidentiary support or identify what factual contentions are likely to gain evidentiary support after reasonable opportunity for further investigation or discovery. The Court also finds that, because the May 6 Motion was insufficient, and because of the Court's failure to order Defendant to appear, the June 15 Hearing was not a proper contempt hearing.

Now, therefore, the Court DENIES Plaintiff's May 6 Motion.

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FSM SUPREME COURT TRIAL DIVISION

CHURCH OF JESUS CHRIST OF THE)	CIVIL ACTION NO. 1990-1000
LATTER DAY SAINTS,)	
)	
Plaintiff,)	
)	
vs.)	
)	
KONIT ESIRON,)	
)	
Defendant.)	
_____)	

MEMORANDUM OF DECISION

Dennis K. Yamase
Associate Justice

Argued: April 8, May 20, June 26, 2008
Decided: August 30, 2010

APPEARANCES:

For the Plaintiff:	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonia, Pohnpei FM 96941
For the Defendant:	Tino Donre, Esq. Micronesia Legal Services Corporation P.O. Box D Weno, Chuuk FM 96942

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HEADNOTES

Constitutional Law – Due Process – Notice and Hearing; Property – Land Commission

Determination of a land's exact boundaries, certification of a survey map for the area, and the issuance of a certificate of title for the land, are all acts that a court is legally unable to do when the

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court would need before it all the current owners of the part of the land not claimed by the plaintiff, all owners of all property abutting the land's purported boundaries, and any other landowners in the vicinity whose property or property lines would have to appear on a certified survey map for the land and when none of these necessary parties, with the exception of the defendant are before the court and because the court cannot make rulings that would affect or determine their rights without their presence or participation. Church of the Latter Day Saints v. Esiron, 17 FSM Intrm. 229, 233 (Chk. 2010).

Constitutional Law – Due Process – Notice and Hearing; Property; Torts – Trespass

A court does not need the presence of all owners of all property abutting the land's purported boundaries, and any other landowners in the vicinity whose property or property lines would have to appear on a certified survey map to decide the limited issue raised by a plaintiff's cause of action for trespass, that is, to decide whether the defendant is trespassing or occupying land to which the plaintiff church has a better right to possess or occupy. The court does not need to (and without the other necessary parties cannot) determine where all of the other boundaries lie because the only issue properly before the court, and the only issue the court may rule upon without violating the due process rights of non-parties, is whether it is more likely than not that the land the plaintiff leased was owned by the lessor and because the determination of boundaries of any other parts of the land which the plaintiff does not claim a leasehold'or of the boundaries of any other parcels of land in the area is not before the court. Church of the Latter Day Saints v. Esiron, 17 FSM Intrm. 229, 233-34 (Chk. 2010).

Evidence – Burden of Proof; Property

In a trespass dispute over land, the only issue properly before the court, and the only issue the court may rule upon without violating the due process rights of non-parties, is whether it is more likely than not, and not whether it is certain beyond all doubt, or whether it is certain beyond a reasonable doubt, or whether it is clear and convincing that, as between the parties, the plaintiff has the superior right to possess the land. The plaintiff only has to prove its case by a preponderance of the evidence, that is, to show that it is more likely than not that its rights are superior. Church of the Latter Day Saints v. Esiron, 17 FSM Intrm. 229, 233 & n.4 (Chk. 2010).

Property – Land Commission

A court will not order the Land Commission to issue a certificate of title when that would require a determination of the current lessor(s), that is, who the lessor's heirs are since a Land Commission heirship proceeding is needed to determine current owners before an certificate of title can issue. Church of the Latter Day Saints v. Esiron, 17 FSM Intrm. 229, 235 (Chk. 2010).

Property – Land Commission

The court will not order the Land Commission to certify a survey map when that would require the determination of boundary lines to properties whose owners and claimants are not before the court. Church of the Latter Day Saints v. Esiron, 17 FSM Intrm. 229, 235 (Chk. 2010).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This case has a long history. It concerns land known as Nepunuset in Weno, Chuuk. Having reviewed the briefs, the parties' arguments, the transcripts of the December 17, 1991 trial and February 20, 1992 hearing before Associate Justice Richard H. Benson, and the transcript of the 2001 Land Commission hearing, the court concludes that, as between the parties, the plaintiff the Church of Jesus

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Christ of Latter Day Saints has a superior right, by virtue of its lease, to possess and occupy portions of Nepunuset known as lot C-1 and the major part of lot C-2. The reasons follow.

I. PROCEDURAL BACKGROUND

In 1972, when an area in Sapuk, Weno was surveyed, both Esiron Kapas and Kintaro Anes and his brothers (Kapas's nephews), claimed Nepunuset. On April 2, 1981, the Truk Land Commission issued a determination of ownership that "Lot 63363 known as Nepunuset situated in Sapuk village, Moen Island, Truk State" was owned by "Kintaro Anes and his brothers" in fee simple. Kapas appealed that determination to the Trust Territory High Court. That appeal, Civil Action No. 54-81, was dismissed on May 4, 1982. No certificate of title was ever issued for Nepunuset. On September 3, 1985, the Anes brothers sold part of Nepunuset, two lots, designated C-1 and C-2 and purporting to contain 0.46 acres, to Fujita Peter. On September 4, 1985, Fujita Peter leased these two lots to the Church of Jesus Christ of Latter Day Saints for 99 years. The purpose of this lease, when combined with a lease of adjoining land,¹ Neimuekis and Kainga, just to the west of C-1 and C-2, was to make the church's area in Sapuk about one acre, the size it needed for its construction plans.

On January 18, 1990, the lessee church filed suit in the FSM Supreme Court against Esiron Kapas, alleging that Kapas was interfering with its use of the land it had leased from Peter; that Kapas was occupying part of the land and building structures on it; and that Kapas still claimed ownership of the leased land. The church sought to enjoin Kapas and members of his clan and anyone acting under his direction and authority from trespassing and interfering with the church's use of its leasehold. Kapas contested the suit, but did not dispute Nepunuset's ownership. Kapas claimed that the land that the church believed was part of its Nepunuset lease was actually a part of another property, his lineage land called Neanenong. In his opening statement at trial, Kapas asked that the matter be referred to the Chuuk Land Commission for the Land Commission to determine Nepunuset's exact boundaries, the ownership and exact boundaries of Neanenong, and the reconciliation of adjacent property as it related to Neanenong and Nepunuset. Tr. at 10 (Dec. 17, 1991).

In its January 24, 1992 decision, the trial court ruled that lot C-1 and the major part of lot C-2 were part of Nepunuset and had been leased by the church and that, as between the parties, the church had the better right to possess the land. In fashioning its judgment, the trial court corrected a call in the lease description so that the lease boundaries would close, Tr. at 96 (Feb. 20, 1992), and since it was undisputed that a small triangle (or sliver) at the southeastern corner of C-2 was outside of Nepunuset,² that small part of C-2 was excluded from the court judgment in the church's favor, Tr. at 95 (Feb. 20, 1992). Kapas moved for a new trial, or in the alternative, an amended judgment. That motion was denied. Tr. at 98 (Feb. 20, 1992).

Kapas then appealed. On May 14, 1993, the FSM Supreme Court appellate division vacated the trial court decision. Kapas v. Church of Latter Day Saints, 6 FSM Intrm. 56, 61 (App. 1993). It held that it was the Land Commission's responsibility to make a final boundary determination and to certify the survey map with respect to Nepunuset because, under the doctrine of primary jurisdiction, the case's central dilemma – Nepunuset's boundaries – was for the Land Commission to decide. *Id.* at 60. It remanded the case with instructions that the trial court refer four matters to the Chuuk Land Commission: "(1) Determination of the exact boundaries of Nepunuset. (2) Determination of the

¹ In February 1987, Fujita Peter purchased this adjoining land, designated as Parcel B, and leased it to the church. Parcel B has a fence around it and a church building on it.

² The church does not claim that its leasehold rights include that southeastern triangle or sliver.

location of Neanenong in relation to Nepunuset. (3) Certification of a survey map for Nepunuset, resolving the discrepancies between the 1962 and 1972 survey maps. (4) Issuance of a certificate of title for Nepunuset." *Id.* at 61. The appellate division added that "[i]n light of the fact that twenty years has passed without certifying a survey map for Nepunuset or issuing a certificate of title, the Land Commission is further instructed to complete its work within one year" *Id.*

The Land Commission did not render a decision until October 30, 2003. It held that there was a house belonging to Esiron Kapas situated on Nepunuset and a graveyard belonging to Esiron Kapas on Neanenong; that Neanenong is adjacent to Nepunuset; that it would give effect only to the 1962 map because it was certified and would disregard the 1972 map; and, quoting the FSM Constitutional provision barring non-FSM citizens from acquiring title to land in the FSM, that the Mormon church should not own land in the FSM and that therefore the "party of Esiron Kapas"³ owned Nepunuset. The Land Commission held that "the Certificate of Title on Nepunuset [sic] should go [sic] to Esiron Kapas that he is the real landowner." The church sought appellate review of that decision in this court.

On December 28, 2004, the court vacated the October 30, 2003 Land Commission decision and again remanded the case to the Land Commission since its decision neither properly addressed nor resolved any of the four matters referred to it and since it misconceived the law. Church of the Latter Day Saints v. Esiron, 13 FSM Intrm. 99a (Chk. 2004) (directing how to address and resolve the matters presented). The Land Commission was instructed that it could not reopen or reconsider its April 2, 1981 Determination of Ownership of Nepunuset in the Anes brothers since that decision was final so therefore ownership of Nepunuset rested with the Anes brothers and their successors in interest. *Id.* at 99e.

On October 4, 2005, the court held a hearing on the progress of the Land Commission remand. The testimony indicated that the parties could not resolve the issue of Nepunuset's boundaries, especially its boundary with Neanenong, and that the Land Registration Team would not decide on a boundary between Nepunuset and Neanenong if the respective landowners could not agree on one. The court, in an October 10, 2005 order, informed the Land Commission that "[w]hile in the land registration process it is preferable that the landowners agree on their common boundaries, it is the Land Registration Team's responsibility, 67 TTC 108(1), or the Land Commission's responsibility, 67 TTC 108(2), to determine the boundaries even when the landowners do not agree and they are disputed." The court instructed the Land Registration Team to endeavor to determine Nepunuset's boundaries and that if it was unable to determine a boundary within four months, it should then refer the matter of Nepunuset's boundaries to the Land Commission, 67 TTC 108(2), for its determination.

The Land Commission was apparently unwilling or unable to resolve the matters presented. Its position seemed to be that if the parties did not agree on a boundary, it could not or would not establish one. Thus, the parties, by stipulated motion filed June 5, 2007, asked that the court resume jurisdiction over the matter. The motion was granted, 67 TTC 108(5), and the court ordered briefs filed. Hearings were held in 2008.

II. ANALYSIS

A. *Matter Before the Court*

The 1962 certified map only concerns the boundaries of Neuorau No. 1. The 1962 map shows

³ Konit Esiron, the current defendant, derives his claims to Neanenong from his father, the late Esiron Kapas, who died in 2001.

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Neanenong (owned by Esiron) to the west of Neuorau No. 1, but other than Neanenong's eastern boundary with Neuorau No. 1 (Neuorau No. 1's western boundary) as extended southward, it does not show any boundaries for Neanenong. The uncertified 1972 survey map concerns Nepunuset but covers a much larger area and shows most of Neuorau No. 1 as well. The 1972 map shows no common boundary between Nepunuset and Neuorau No. 1 and a large, unnamed wedge of land between the two. But there is a point (a concrete pillar set in the ground), labeled C-6 (or 6 on the 1962 map) that is the northwest boundary point for Neuorau No. 1 and that is also a northeast turning point of Nepunuset's boundaries. The two maps thus do not contradict each other and are not irreconcilable. The two maps could easily both be correct. Nepunuset does not abut Neuorau No. 1 on either map and the land directly west of Neuorau No. 1 is not Nepunuset on either map and on the 1962 map is identified as Neanenong. Moreover, point C-6 (6) is not a boundary point at issue in this case. The church does not claim any rights to any land that is near point C-6, not even the parts of Nepunuset shown on the 1972 map as adjacent to point C-6.

The appellate court, when it ordered this case remanded to the Chuuk Land Commission, asked the Land Commission to: 1) determine Nepunuset's exact boundaries; 2) determine Neanenong's location in relation to Nepunuset; 3) certify a survey map for Nepunuset and resolve the discrepancies between the 1962 and 1972 survey maps; and 4) issue a certificate of title for Nepunuset. *Kapas*, 6 FSM Intrm. at 61. The Land Commission has not done any of these. And determination of Nepunuset's exact boundaries; certification of a survey map for Nepunuset; and the issuance of a certificate of title for Nepunuset, are all acts that this court is legally unable to do in this case. In order for the court to determine Nepunuset's exact boundaries; to certify a survey map for Nepunuset; and to [order the Land Commission to] issue a certificate of title for Nepunuset, the court would need before it all the current owners of the part of Nepunuset not claimed by the church as its leasehold; all owners of all property abutting Nepunuset's purported 1972 boundaries; and any other landowners in the vicinity whose property or property lines would have to appear on a certified survey map for Nepunuset. None of these necessary parties, with the exception of the defendant Esiron, are now before the court. The court cannot make rulings that would affect or determine their rights without their presence or participation.

But the court does not need their presence to decide the limited issue raised by the plaintiff's cause of action, which is trespass, that is, whether the defendant is trespassing or occupying land to which the plaintiff church has a better right to possess or occupy. The court does not need to (and without the other necessary parties cannot) determine where all of Nepunuset's boundaries lie and Nepunuset's relation to Neuorau No. 1 and Neanenong (other than a general observation that Neuorau No. 1 may be bordered on the west by Neanenong and that Nepunuset is also to the west of Neuorau No. 1 but does not border Neuorau No. 1). The only issue properly before the court, and the only issue the court may rule upon without violating the due process rights of non-parties, is whether it is more likely than not⁴ that lot C-1 and the major part of lot C-2, which the church leased from Fujita Peter, are part of Nepunuset and not part of Neanenong. Not before the court is the determination of boundaries of any other parts of Nepunuset to which the church does not claim a leasehold through

⁴ And not whether it is certain beyond all doubt, or whether it is certain beyond a reasonable doubt, or whether it is clear and convincing that the two parcels C-1 and C-2 are part of Nepunuset and not part of Neanenong. *See In re* Attorney Disciplinary Proceeding, 9 FSM Intrm. 165, 173-74 (App. 1999) (discussing increasing degrees of proof from preponderance of the evidence, to clear and convincing evidence, to beyond a reasonable doubt; respectively defined as probably true, highly probably true, and almost certainly true). The plaintiff church only has to prove its case by a preponderance of the evidence, that is, to show that it is more likely than not that its rights are superior. *See Nimeisa v. Department of Public Works*, 6 FSM Intrm. 205, 212 (Chk. S. Ct. Tr. 1993) (plaintiff in land dispute had duty to prove her case by a preponderance of the evidence).

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Fujita Peter, or of the boundaries of any other parcels of land in Sapuk.

Put simply, the one issue before the court, and the only issue it will decide, is whether it is more likely than not that lot C-1 and the major part of lot C-2 were part of Nepunuset in 1985 when Fujita Peter purchased those lots, in which case the church would have a valid lease for them, or whether lots C-1 and C-2 were not part of Nepunuset but some other land, in which case, the church's lease would be invalid and it would have no right to possess those lots. The exact location of lots C-1 and C-2 is not at issue. Their exact location is not and cannot be reasonably disputed. If those lots, as located, are part of Nepunuset, then Nepunuset's adjudicated landowners could sell them to Fujita Peter and Peter could lease them to the church. If they are not, then those transactions will not avail the church in this case.

B. *Resolution*

The court finds that it is more likely than not that the church has a better claim to possess parcels C-1 and the major part of C-2 than does Esiron. The court finds that it is more likely than not that parcels C-1 and most of C-2 are within Nepunuset and are not part of Neanenong.

The court bases these findings on the following:

The 1962 certified map is of Neuorau No. 1 only and does not cover any of the land disputed in this case. It shows Neuorau No. 1's western boundary where it abuts Neanenong. The map does not show the boundaries of any land any further west than Neuorau No. 1's western boundary. It does not cover any of the land that the 1972 map designated as Nepunuset. It is thus of no use in determining whether lots C-1 and C-2 are (or were) part of Nepunuset.

The 1972 survey map was produced due to the cadastral program to indicate property ownership. Tr. at 18 (Dec. 17, 1991) (test. Kachuo Mefy, Survey Dep't super.). After consultation with the landowners and the adjacent landowners, the property's names were learned and boundary markers were put down on the land. *Id.* at 19-22. In August 1972, both Kintaro (Sino) Anes and Esiron [Kapas] applied to register ownership of Nepunuset, and a preliminary inquiry was held in 1973 and a formal hearing was held sometime after December 12, 1978. See In re Land known as "Nepunuset or Nepunguset", cert. of records at 1 (Aug. 26, 1981).

When considering the Anes and Kapas claims to Nepunuset and determining Nepunuset's ownership, the Land Registration Team and the Land Commission would have had the 1972 survey map before them because a sketch of the land would be put up "for the people that they will have a hearing on that land." Tr. at 19 (Dec. 17, 1991) (test. Mefy). The 1972 survey map was not certified because not enough (only four) of the lands covered by the map had had their boundaries surveyed and many more were needed, but once the survey of the lands is completed, the 1972 map would be certified and that 1972 map would be used for Nepunuset's specific description and a certificate of title would be issued based on that. *Id.* at 44 (test. Mefy). Although Esiron asserts that the 1972 map is an invalid map, he is wrong. It is not an invalid map. It is an incomplete map. More lands need to be added. Nevertheless, the 1972 map would have been the one in use for Nepunuset's determination-of-ownership process and it was adequate for that purpose.

Because of the Land Commission's 1981 determination of ownership and following dismissed appeal, Nepunuset was, as a matter of law, the Anes brothers' lawful property. Relying on Land Commission records and therefore believing that lots C-1 and C-2 were part of Nepunuset, Fujita Peter purchased those lots and then leased them to the church for 99 years, starting September 4, 1985.

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But Kapas still claimed Nepunuset was his. Even after the Land Commission determination that Nepunuset belonged to his nephews, the Anes brothers, and not him, he remained unreconciled to this and still insisted that Nepunuset was his land and any decision to the contrary was wrong. Tr. at 71 (Dec. 17, 1991) (Kapas test.); *see also* Tr. at 31-32, 47-48, 60 (Nov. 14, 2001) (Russell Tanner test.). When the 1972 survey map was first made, Esiron [Kapas] was listed as Nepunuset's owner. Tr. at 32 (Dec. 17, 1991) (test. Kachuo Mefy, Survey Dep't super.). This was before the Land Registration Team and the Land Commission had ruled in favor of the Anes claim to Nepunuset. (Other maps, copied therefrom, also show the area east of Parcel B, C-1 and C-2 in general, as "Nepunguset" Esiron [Kapas].)

But the basic outline is clear. Nepunuset lies just east of Parcel B; both Neanenong and Nepunuset lie to the west of Neuorau No. 1; Neanenong forms Neuorau No. 1's western border; Nepunuset does not border Neuorau No. 1; and Nepunuset and Neanenong lie next to each other. Contrary evidence that Nepunuset lies elsewhere, such as Puntaro Anes's assertion that Nepunuset was located where Parcel B is (land used by the church) or a 2000 "boundary compromise" between the former owner of Parcel B (who had sold it to Peter in 1987) and Kapas settling a boundary between parcel B and Neanenong at the fence line between Parcel B and Parcels C-1 and C-2, made at a meeting at which no church representative was present, is not credible. C-1 and the major part of C-2 were part of Nepunuset when bought by Peter and leased to the church.

III. CONCLUSION

Accordingly, the Church of Jesus Christ of Latter Day Saints has a valid lease to that parcel of land known as lot C-1 and the major part of lot C-2, which property is part of Lot No. 63363, also known as Nepunuset, in Nemuan, Sapuk, Weno, Chuuk and which is described as follows: beginning at the northwestern corner of lot C-1 [same as the northeastern corner of Parcel B] on Nepunuset's western boundary, thence along the western boundary S 15° 39' 52" E 8 meters, thence continuing along the western boundary S 16° 29' 30" W 48.184 meters, thence continuing along the western boundary S 32° 18' 34" E 27.729 meters, thence N 73° 15' 10" E 11.1824 meters to a point on Nepunuset's eastern boundary, thence along the eastern boundary N 18° 07' 56" E 25.1885 meters, thence N 9° 15' W 51.3913 meters, and thence N 88° W 15.23 meters to the point of the beginning.

When the appellate court vacated the trial court's January 24, 1992 judgment, the trial court injunction was also vacated. The defendant and his father (the original defendant) have continued to occupy and use parcels C-1 and C-2. (In fact, shortly before the court's April 8, 2008 site view, the disputed land had been used for another burial.) The court will not order that the Land Commission issue a certificate of title for the church's leasehold since that would require a determination of the current lessor(s), that is, who the late Fujita Peter's heirs are. *See Enengeitaw Clan v. Heirs of Shirai*, 16 FSM Intrm. 547, 555 (Chk. S. Ct. App. 2009) (Land Commission heirship proceeding needed to determine current owners before certificate of title can issue). Nor will the court order the Land Commission to certify a survey map since that would require the determination of boundary lines to properties whose owners and claimants are not before the court.

In light of this, the parties shall, within twenty-one days of entry of this order, submit their proposals for further proceedings in this matter including the nature, timing, and imposition of remedies for the plaintiff.

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