on Pohnpei even though he was resident on Guam and only occasionally traveled to Pohnpei. Sandy's "corrected fact" thus does not support his claim for his attorney's travel. MLSC maintains a law office on Chuuk. Sandy's motion to set aside this part of the June 9, 2010 order is therefore denied.

NOW THEREFORE IT IS HEREBY ORDERED that Elias Sandy's motion to set aside parts of the June 9, 2010 is denied.

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FSM SUPREME COURT TRIAL DIVISION

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| THE PEOPLE OF THE MUNICIPALITY OF GILMAN, YAP STATE, by and through CHIEF GEORGE TAMAGKEN and CHIEF OTTO BOWOO,<br><br>Plaintiffs,<br><br>vs.<br><br>WOODMAN EASTERNLINE SDN. BHD.,<br><br>Defendant. | CIVIL ACTION NO. 2007-3009 |

ORDER GRANTING MOTION TO STRIKE

Dennis K. Yamase
Associate Justice

Hearing: September 22, 2010
Decided: September 23, 2010

APPEARANCES:

For the Plaintiffs: Joseph C. Razzano, Esq.
Teker Torres & Teker, P.C.
Suite 2A, 130 Aspinall Avenue
Hagatna, Guam 96910

For the Defendant: David Ledger, Esq. (pro hac vice)
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Tamuning, Guam 96913

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HEADNOTES

Civil Procedure – Dismissal – After Plaintiff's Evidence

Rule 41(b) permits a defendant to move for judgment as a matter of law after the plaintiff has

completed the presentation of plaintiff's evidence. People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn. Bhd., 17 FSM Intrm. 247, 249 (Yap 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

Since Rule 41(b) permits a motion to dismiss – a motion for a judgment that upon the facts and the law the plaintiff has shown no right to relief – to be made after the close of the plaintiff's evidence and before the defendant's evidence, a motion for judgment as matter of law made after trial cannot be made under Rule 41(b) because, as a Rule 41(b) motion, it comes too late. People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn. Bhd., 17 FSM Intrm. 247, 250 (Yap 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence; Judgments – Alter or Amend Judgment

A Rule 52(b) motion is one that asks the court to amend the findings of fact that the court has already made as required by Rule 52(a). The Rule 52(b) term "motion for judgment," when referring to a motion made after the start of trial, refers to a Rule 41(b) motion, not to a motion made after closing arguments. People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn. Bhd., 17 FSM Intrm. 247, 250 (Yap 2010).

Judgments – Alter or Amend Judgment

A Rule 52(b) motion is timely – that is, is made at a time permitted by the rule – when it is made after the court has indicated the action it would take but has not yet entered judgment, but when the court has neither issued its written findings of fact nor indicated what those findings will be, such a motion is premature since the court's findings, when issued, may be favorable and no motion would be needed. People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn. Bhd., 17 FSM Intrm. 247, 250 (Yap 2010).

Judgments – Alter or Amend Judgment

A motion for judgment as a matter of law that is made too late to be cognizable under Rule 41(b) and that is made too early to be cognizable under Rule 52(b), will, on the opposing party's motion, be stricken, but may be renewed, if need be, after the court has entered its findings. People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn. Bhd., 17 FSM Intrm. 247, 251 (Yap 2010).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This comes before the court on the plaintiffs' Motion to Strike Defendant Woodman Easterline's [sic] Post-Trial Motion for Judgment as a Matter of Law, filed August 4, 2010, the defendant's opposition, filed August 26, 2010, and the plaintiffs' reply, filed September 21, 2010. The motion to strike was heard telephonically on September 22, 2010. The motion is granted for the reasons that follow.

I.

On July 14, 2010, the defendant, Woodman Easternline Sdn. Bhd. ("Easternline"), filed Defendant Woodman Easternline's Post Trial Motion for Judgment as a Matter of Law, asserting that it was entitled to judgment as a matter of law because, in its view, that the plaintiffs had failed, at trial, to make a sufficient showing on one or more essential element on which the plaintiffs had the burden of proof. The plaintiffs, People of Gilman, move to strike that motion on the grounds that FSM law does not permit Easternline to make that motion because summary judgment motions are solely pre-trial

motions and because, in their view, no FSM rule permits post-trial motions of the nature brought by Easternline. The People of Gilman note that Easternline relied upon U.S. Federal Civil Procedure Rule 52(c) as authority for its ability to make a motion for judgment as a matter of law and further notes that there is no corresponding FSM Civil Procedure Rule 52(c).

Easternline contends that FSM Civil Rule 52(b) permits its motion for judgment as a matter of law. It asserts that Civil Rule 52 recognizes that a motion for judgment may be made before the court makes its findings of fact. Easternline also argues that its motion is within the FSM Civil Procedure Rules' overall spirit and purpose as shown by Civil Rule 1 (the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action") as effectuated by Rule 7(b) ("application to the court for an order shall be by motion"). Easternline notes that if the court denies the motion to strike and decides its motion for judgment, juridical economy may be advanced and the time and effort expended by the court may (if Easternline's motion is granted) be conserved.

II.

Although the FSM does not have a Civil Procedure Rule 52(c), at the time the FSM civil procedure rules were adopted, neither did the U.S. What is now U.S. Federal Civil Procedure Rule 52(c) was then contained in U.S. Federal Civil Procedure Rule 41(b). It was relocated to U.S. Federal Civil Procedure Rule 52(c) in 1991. *See* Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 46 & n.3 (Chk. 2010).

The FSM equivalent of U.S. Federal Civil Procedure Rule 52(c) is retained in FSM Civil Procedure Rule 41(b), which reads in pertinent part:

> After the plaintiff has completed the presentation of plaintiff's evidence, the defendant, without waiving defendant's right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

FSM Civ. R. 41(b). This rule permits a defendant to move for judgment as a matter of law after the plaintiff has completed the presentation of plaintiff's evidence.

In this case, the plaintiffs rested their case-in-chief on December 4, 2009, with the exception of witness Ms. Meloney Verbugert's testimony, which had been taken via videotaped deposition without defense counsel's presence and for which Easternline, by agreement and court order, was entitled to cross-examine her after conducting a discovery deposition and, following Easternline's subsequent cross-examination, the People of Gilman could conduct a re-direct examination. In the end, Easternline elected to examine Verbugert as its own witness and presented her February 18, 2010 videotaped testimony on June 5, 2010, with Easternline conducting a direct examination of Verbugert and the People of Gilman having an opportunity to cross-examine her.

The People of Gilman contend that since Easternline had elected to call Verbugert as its own witness, the plaintiffs' evidence had closed on December 4, 2009, and that since Easternline did not move for a judgment as a matter of law then, it could not now move for judgment. The court concludes that if it overlooks the technicality that Easternline put Verbugert on as its own witness instead of, as originally planned, cross-examining her as part of the plaintiffs' case-in-chief, the latest Easternline could have made a Rule 41(b) motion to dismiss at the close of the plaintiff's evidence

would have been after Verbugert's testimony was presented on June 5, 2010.[1] No such motion was made and the parties proceeded to their closing arguments.

Accordingly, since Rule 41(b) permits a motion to dismiss – a motion for a judgment that upon the facts and the law the plaintiff has shown no right to relief – to be made after the close of the plaintiff's evidence and before the defendant's evidence, Easternline cannot make its present motion under Rule 41(b). As a Rule 41(b) motion it comes too late.

III.

Easternline contends that FSM Civil Rule 52(b) is sufficient authority to permit its motion. That rule provides that:

> Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. The question of the sufficiency of the evidence to support the findings may be raised whether or not the party raising the question has made an objection in the trial division to such findings or has made a motion for judgment.

FSM Civ. R. 52(b). A Rule 52(b) motion is thus one that asks the court to amend the findings of fact that the court has already made as required by Rule 52(a). The Rule 52(b) term "motion for judgment," when referring to a motion made after the start of trial, refers to a Rule 41(b) motion, not to one made after closing arguments.

In Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332 (9th Cir. 1983), the court held that a Rule 52(b) motion was timely – that is, was made at a time permitted by the rule – when it was made after the court had indicated the action it would take but had not yet entered judgment. *Id.* at 1335 (citing 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 204.12[4] (2d ed. 1983)). (This could occur when no Rule 58 judgment has yet been entered but the court has already made its findings either from the bench or in written form.)

In this case, the court has neither issued its written findings of fact nor indicated what those findings will be. Therefore, if Easternline's motion were considered one under Rule 52, it is premature. After all, the court's findings, when issued, may be favorable to Easternline and no motion would be needed. Or, if Easternline considers the court's findings, once issued, unfavorable, it may then make whatever motion seems appropriate. Easternline may question the sufficiency of the evidence to support those (as yet unissued) findings even though Easternline's present motion for judgment is stricken. FSM Civ. R. 52(b) ("question of the sufficiency of the evidence to support the findings may be raised whether or not the party raising the question . . . has made a motion for judgment").

IV.

Accordingly, the People of Gilman's motion to strike is granted. Easternline's motion for judgment as a matter of law is made too late to be cognizable under Rule 41(b) and is made too early

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[1] If asked, the court may have been willing to permit this since Easternline would have otherwise been prejudiced by its inability to cross-examine Verbugert during the December trial sitting and also because the plaintiffs' evidence technically may not have closed until Easternline called Verbugert as its own witness (by videotape) during the June trial sitting.

to be cognizable under Rule 52(b). It is therefore stricken. It may be renewed, if need be, after the court has entered its findings.

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FSM SUPREME COURT APPELLATE DIVISION

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|---|---|---|
| MARY BERMAN, | ) | APPEAL CASE NO. P5-2009 |
| | ) | Civil Action No. 2008-025 |
| Appellant, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| POHNPEI STATE GOVERNMENT, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

ORDER AND MEMORANDUM

Martin G. Yinug
Acting Chief Justice

Decided: September 27, 2010

APPEARANCE:

For the Appellant: Mary Berman, Esq. (pro se)
P.O. Box 163
Kolonia, Pohnpei FM 96941

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HEADNOTES

Appellate Review – Motions

With certain limitations, a single justice may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, and a motion for enlargement of time properly falls within such request for relief. Berman v. Pohnpei, 17 FSM Intrm. 251, 252 (App. 2010).

Appellate Review – Briefs, Record, and Oral Argument

"Service" is the key word in the Rule 26(c) provision that whenever a party is required or permitted to do an act within a prescribed period after service of a paper on that party and the paper is served by mail, six days is added to the prescribed period, but the prescribed period for filing the appellant's opening brief is not triggered by service. Berman v. Pohnpei, 17 FSM Intrm. 251, 252 (App. 2010).

Appellate Review – Briefs, Record, and Oral Argument

Rule 31(a)'s language is clear that an appellant must serve and file a brief within 40 days after the date of the Supreme Court appellate division clerk's notice that the record is ready. The appellate clerk must, on receipt of the "record ready certificate" from the clerk of the court appealed from, file