of the business to protect the employee from the hazards incident to it, and the employer is bound to exercise this degree of diligence in providing his employee with a safe working place. Amayo v. MJ Co., 10 FSM Intrm. 244, 250 (Pon. 2001). Duty of care is one of the four elements of a negligence cause of action. *See* Kileto v. Chuuk, 15 FSM Intrm. 16, 17 (Chk. S. Ct. App. 2007) (elements of actionable negligence are the breach of a duty of care on the part of one person to protect another from injury, and that breach is the proximate cause of an injury to the person to whom the duty is owed). The plaintiff's wrongful death claim is based on the employer's alleged breach of its duty of care to provide a safe workplace. Under the circumstances, the defendants did not breach their duty of care by failing to provide insulators for the CPUC electrical wires.

In Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 65 (Chk. 1997), the court held that when an employer is aware that unsafe procedures are being used and safe procedures are possible but the employer does not demand them, the employer breaches its duty of care toward its employees. That is not this case. In this case, the employer instructed the employees to use safe procedures such as pulling rebars out (or inserting them) from the oceanside and not the roadside.

Thus, since Tekson Ludwig's employer provided its employees with a safe working place and did not knowingly permit unsafe procedures to be used, it did not breach its duty of care to its employees. Accordingly, since the plaintiff has failed to prove an essential element of her wrongful death claim, she cannot prevail.

The clerk shall therefor enter judgment for the defendants. Costs are to be borne by the parties.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK, Plaintiff, vs. YALMER HELGENBERGER and MARILYN HELGENBERGER, Defendants.	)	CIVIL ACTION NO. 2002-004

ORDER DENYING STAY

Ready E. Johnny
Associate Justice

Decided: October 13, 2010

APPEARANCES:

For the Plaintiff: Michael J. Sipos, Esq.
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* * * *

HEADNOTES

Appellate Review – Stay – Civil Cases

An offer of a supersedeas bond in the amount of the consummated sale price plus projected interest and costs, might entitle the appellants to a stay of the sale since a supersedeas bond's purpose is to protect the prevailing party below pending the appeal. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 269 (Pon. 2010).

Appellate Review – Stay – Civil Cases

Generally, there are four factors to weigh before granting a stay pending an appeal in a civil case: 1) whether the appellant has made a strong showing that it is likely to prevail on the merits of the appeal; 2) whether the appellant has shown that without the stay it will be irreparably harmed; 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, and 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. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 269 (Pon. 2010).

Appellate Review – Stay – Civil Cases

Even though there might be no harm to the only other party to the appeal and the public interest may favor neither granting nor denying a stay, a stay will be denied when the appellant has not made a strong showing that it is likely to prevail on the merits and it has not shown that its injury is irreparable. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 269 (Pon. 2010).

Appellate Review – Stay – Civil Cases

A claim that if a property is worth $832,000 but being sold for $151,000, it is a serious irreparable harm that cannot be compensated or remedied, does not constitute an irreparable injury since, if it is an injury, it is an injury that can easily be compensated monetarily, and may, in this case, be accomplished more easily than is usual – by a reduction in the defendants' indebtedness to the bank, a quick and efficient remedy. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 269 (Pon. 2010).

Appellate Review – Stay – Civil Cases

The appellants' chances of success on appeal are slim when they have not put forth any basis to show that the court's reasoning for denying raising the minimum bid price from $120,000 to $832,990 was unsound or unconstitutional and when no FSM order in aid of judgment law relating to real property requires a certain minimum bid or requires that a minimum bid be set in a particular way, which is all that the court ruled on in the order appealed from. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 269-70 (Pon. 2010).

Appellate Review – Stay – Civil Cases; Federalism – Abstention and Certification

The appellants' likelihood of success on their claim that the court should have abstained or certified their "novel issues" to the state court is virtually zero when they never moved for certification or abstention and when, even if they had, the court is not required to certify or abstain from every "unsettled" state law issue. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 270 (Pon. 2010).

Appellate Review – Stay – Civil Cases

A collection case based on a defaulted loan is not a case or dispute in which an interest in land was at issue and so the FSM Constitution article XI, section 6(a) jurisdictional language is not applicable since an apartment building's sale is merely a post-judgment remedy sought by the judgment-creditor because other remedies had been ineffective. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 270 (Pon. 2010).

Appellate Review – Stay – Civil Cases

Even if the other two factors favor a stay, it would not be enough to overcome the appellants' lack of irreparable injury and of a substantial chance of a success on the merits. FSM Dev. Bank v. Helgenberger, 17 FSM Intrm. 266, 270 (Pon. 2010).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on the defendants' Motion for Stay, filed September 16, 2010, and the plaintiff's Opposition to Motion for Stay, filed September 23, 2010. The motion is denied without prejudice. The reasons follow.

I.

On October 6, 2005, the clerk entered judgment in the FSM Development Bank's favor against defendants Yalmer Helgenberger and Marilyn Helgenberger for $969,540.27. On August 18, 2009, Chief Justice Andon L. Amaraich issued an order in aid of judgment that provided that "[t]he apartment building situated on Parcel No. 018-A-17 shall be sold by auction to the highest bidder, with no reserve price." Order at 5 (Aug. 18, 2009). (This order in aid of judgment amended an earlier order in aid of judgment.) On November 16, 2009, the bank moved to amend that order in aid of judgment to include a minimum bid price of $120,000. The court's May 13, 2010 order granted that motion. On May 21, 2010, the Helgenbergers moved to set aside that order. That motion was denied on June 28, 2010.

The bank conducted the auction with a closing date of July 8, 2010. The winning bidder submitted a $151,999.99 bid and completed full payment on July 30, 2010.

On July 30, 2010, the Helgenbergers, through new counsel, moved to amend the May 13, 2010 order to raise the $120,000 reserve price to $832,990, the figure used in the October 4, 1993 mortgage for the apartment building on Parcel No. 018-A-17 as the building's estimated 1993 value. The bank opposed the motion and sought confirmation of the auction sale. On August 9, 2010, the court denied the Helgenbergers' motion because the Helgenbergers misunderstood the meaning of the $832,990 figure in the 1993 mortgage – the figure did not set a minimum sale price if the mortgagor should default and the mortgagee foreclose on the property; it was merely the parties' subjective estimate (essentially a guess) of what the mortgaged property's value was in 1993 and not an agreement that this was the minimum price at which the mortgagee could sell the property; and there was no mortgage provision that required a minimum or reserve price if the property was sold.

On August 17, 2010, the court granted the bank's request to confirm the sale and directed the bank to submit a proposed confirmation order. This was done. The Order of Confirmation was entered on August 25, 2010.

On September 6, 2010, the Helgenbergers filed a Notice of Appeal from the court's August 9, 2010 order; a Motion for Stay, with supporting memorandum and affidavit; a Notice regarding Transcripts; and a Statement of Issues (on appeal).

II.

The Helgenbergers ask the court "to stay proceedings pending appeal." Mot. at 1 (Sept. 6, 2010). They contend the court erred 1) in denying further amendment to the order in aid of judgment; 2) because the order in aid violated their constitutional due process rights since orders in aid of judgment must be constitutional; 3) because the court did not seek to certify the "novel issues" to the Pohnpei Supreme Court or to abstain; 4) because the denial failed to consider FSM order in aid of judgment law relating to real property; and 5) because the court lacked jurisdiction since the plaintiff is a national government agency and land is involved. Statement of Issues at 1-2 (Sept. 6, 2010).

As an initial matter, it is unclear exactly what the Helgenbergers seek to stay. The sale of Parcel 018-A-17 apartment building was consummated before the Helgenbergers filed their notice of appeal and motion to stay. Assuming that the Helgenbergers seek to "stay" the already consummated sale, they have not offered a supersedeas bond in the amount of the consummated sale price plus projected interest and costs, *see* Panuelo v. Amayo, 10 FSM Intrm. 558, 563 (App. 2002), which, if offered, might (the court makes no ruling here) have entitled the Helgenbergers to a stay, FSM Civ. R. 62(d) ("When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) . . . . The stay is effective when the supersedeas bond is approved by the court"). (A supersedeas bond's purpose is to protect the prevailing party below pending the appeal. Panuelo, 10 FSM Intrm. at 563.)

Generally, there are four factors to weigh before granting a stay pending an appeal in a civil case: 1) whether the appellant has made a strong showing that it is likely to prevail on the merits of the appeal; 2) whether the appellant has shown that without the stay it will be irreparably harmed; 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.* But a stay will be denied when the appellant has not made a strong showing that it is likely to prevail on the merits and it has not shown that its injury is irreparable, even though there might be no harm to the only other party to the appeal, and the public interest may favor neither granting nor denying a stay. *Id.* at 355-56.

The Helgenbergers assert that their injury is irreparable because "[i]f the property is worth $832,000 but being sold for $151,000 is a serious irreparable harm issue that cannot be compensated or remedied." Mot. to Stay at 5 (Sept. 6, 2010). This does not constitute an irreparable injury since, if it is an injury, it is an injury that can easily be compensated monetarily, GE Seaco Servs., Ltd. v. Federated Shipping Co., 14 FSM Intrm. 159, 162 (Pon. 2006) (an injury cannot accurately be deemed irreparable when money damages would fully compensate the movant for any loss it sustains), and which, in this case, could be accomplished more easily than is usual – by a reduction in the Helgenbergers' indebtedness to the bank, a quick and efficient remedy. Furthermore, the Helgenbergers have not presented any evidence that the $151,999.99 sale price, paid by a willing buyer, is not a more appropriate market value than the 1993.

And the Helgenbergers' chances of success on appeal are slim. The order appealed from denied raising the minimum bid price from $120,000 to $832,990. The Helgenbergers have not put forth any

basis to show that the court's reasoning for that denial was unsound or unconstitutional. Their likelihood of success on their claim that the court should have abstained or certified their "novel issues" to the state court is virtually zero because they never moved for certification or abstention. Kitti Mun. Gov't v. Pohnpei, 13 FSM Intrm. 503, 507 (App. 2005) (when no motion to abstain or to certify a question to the state court was made, the trial court could not abuse its discretion by not abstaining from or not certifying the question). Even if they had, the court is not required to certify or abstain from every "unsettled" state law issue. Nanpei v. Kihara, 7 FSM Intrm. 319, 322 (App. 1995) (FSM Supreme Court is not obligated to certify every unsettled issue of state law, and has a constitutional obligation to exercise its own jurisdiction). No FSM order in aid of judgment law relating to real property requires a certain minimum bid or requires that a minimum bid be set in a particular way, which is all that the court ruled on in the order appealed from. This is not a case or dispute in which an interest in land was at issue. The FSM Constitution article XI, section 6(a) jurisdictional language is thus not applicable. This is a collection case based on a defaulted loan. This was not a dispute over who owns what interest in the Parcel 018-A-017 apartment building. No interest in land was ever at issue in this case. By appealing the August 9, 2010 order, the Helgenbergers dispute only the minimum amount that the apartment building may be sold for and that sale is merely a post-judgment remedy sought by the judgment-creditor bank because other remedies had been ineffective.

The other two factors do not appear to favor a stay, but even if they did, it would not be enough to overcome the Helgenbergers' lack of irreparable injury and of a substantial chance of a success on the merits.

III.

Since the Helgenbergers have not shown any irreparable harm or that they are likely to succeed on the appeal's merits and since, in the alternative, they have not provided a supersedeas bond, their motion for a stay is denied.

* * * *