

to exonerate him. Whether or not the conviction shall be overturned, this Court cannot say. But it is manifestly clear to all that that day has yet to come.

If the Court were authorized to rule on defendant's motion, it would be hard pressed to see how he is less likely to flee the jurisdiction now that the weight of the evidence adduced at trial has demonstrated his guilt beyond reasonable doubt, and now that he faces re-instatement of a six month term of imprisonment, than he was when the conditions of his release were imposed. But the Court finds that it is no longer the proper forum to decide upon the appropriateness or necessity of the conditions of defendant's release pending appeal. The motion is dismissed.

IT IS SO ORDERED.

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FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2002-2000
)	
Plaintiff,)	
)	
vs.)	
)	
DONALD JONAH and DORINDA JONAH,)	
)	
Defendants.)	
_____)	

ORDER AND MEMORANDUM GRANTING REQUEST FOR SALE

Martin G. Yinug
Acting Chief Justice

Hearing: September 17, 2010
Decided: January 6, 2011

APPEARANCES:

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HEADNOTES

Contempt

When the court has ordered counsel to submit a brief solely on the issue of whether the defendant's parcel is exempt from attachment and execution and counsel has chosen to ignore the court's order and proceeded to relitigate the issue of her ability to pay, normally, such intentional disobedience of the court's lawful order may be sanctionable under 4 F.S.M.C. 119(1)(b). FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 323 (Kos. 2011).

Attachment and Execution; Debtors' and Creditors' Rights – Orders in Aid of Judgment

Under the FSM national law regarding enforcement of judgments, the exemption for necessities for trade or occupation is defined as tools, implements, utensils, two work animals, and equipment necessary to enable the person to carry on his usual occupation. By a plain reading of the statute's language, a rental house, and by extension, the land on which it stands, is not such a necessity. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 323 (Kos. 2011).

Debtors' and Creditors' Rights – Orders in Aid of Judgment

Under FSM law, land or an interest in land owned solely by a judgment debtor in his own right may be ordered sold or transferred under an order in aid of judgment, provided the court deems that justice so requires and finds that the debtor will have sufficient land remaining after the sale to support himself and his dependents. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 323-24 (Kos. 2011).

Evidence

A conclusory argument is not evidence. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 324 (Kos. 2011).

Domestic Relations – Probate

One does not have heirs until one has passed away. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 324 n.2, 325 (Kos. 2011).

Debtors' and Creditors' Rights – Orders in Aid of Judgment

When the judgment-creditor, by its offer to subdivide a parcel so as to ensure that the debtor's daughter and son-in-law can continue to live in the house on the parcel's back portion, has gone out of its way to accommodate not only the letter but the spirit of the law, the court concludes that a fee simple interest in land may be attached and executed under national law and that the creditor's proposal would leave the debtor with sufficient land to support her and her dependents. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 324 (Kos. 2011).

Statutes – Construction

When there is a conflict between a statute of general application and a statute specifically aimed, the more particularized provision will prevail. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 324 (Kos. 2011).

Debtors' and Creditors' Rights – Orders in Aid of Judgment

When a creditor is seeking a judicial power of sale that would subdivide a parcel, Kos. S.C. § 11.404(1)'s subdivision language is inapplicable because it applies to private powers of sale. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 324 (Kos. 2011).

Jurisdiction – Diversity; Property – Mortgages

Since national court jurisdiction is proper when the parties are diverse, a Kosrae statute that requires a foreclosure action to be filed in Kosrae State Court cannot divest the FSM Supreme Court

of its constitutionally mandated jurisdiction under the FSM Constitution. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 325 (Kos. 2011).

Civil Procedure; Choice of Law; Federalism – National/State Power

While the interplay between national and state power does mean that, in land cases, the court must apply state law, or certify unsettled questions to the state courts, when the national court has maintained jurisdiction, national rules of procedure prevail. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 325 (Kos. 2011).

Civil Procedure – Parties; Property – Mortgages

Public policy cannot abide by the perverse result that would never leave a title quiet if the court were to recognize an indefinite expectancy right for a person to inherit his living parent's land that require a complainant to name all the landowner's children. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 325 (Kos. 2011).

Property

A person may acquire a vested interest in his living parent's land in many ways, such as by a gift, by becoming a trustee, by becoming a beneficiary, or by being named in a registered or otherwise evidenced will or other testamentary device. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 325 (Kos. 2011).

Civil Procedure – Parties; Property – Mortgages

When a landowner's children do not have a vested interest in the land, the foreclosure statute does not require a judgment creditor to name them as defendants. FSM Dev. Bank v. Jonah, 17 FSM Intrm. 318, 325 (Kos. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

This matter comes before the court on the issue of an application for judicial sale of land, which plaintiff FSM Development Bank ("the Bank") resubmitted on September 17, 2010, in a hearing on the Bank's motion for an order in aid of judgment ("OIA Hearing"). The court entered judgment in favor of the Bank on January 10, 2006, in the amount of \$232,783.40, with interest thereon at 9% as provided by law. The Bank filed its original motion for an order in aid of judgment on July 4, 2006, seeking judicial sale of parcel 035-K-17 in Lelu Municipality ("the Parcel").¹ On June 30, 2010, The Bank filed another request for hearing, citing defaults on the agreed payment plan on the part of defendant Dorinda Jonah ("Mrs. Jonah") beginning in January 2010. At the OIA Hearing, the Bank again requested judicial sale of the Parcel, with the modification of subdividing the Parcel. The court grants the Bank's request.

I. BACKGROUND FACTS

Mrs. Jonah owns the Parcel in fee simple. A deed of trust bearing the date of July 29, 1991, approved by the Kosrae Attorney General and recorded with the Kosrae Land Court, pledges the Parcel

¹ "[T]he Bank requests the issuance of an order directing [the Parcel's] sale with the proceeds applied to the subject judgment." Mot. for Order in Aid of J. (July 4, 2006).

in its entirety, among others, as security to the bank for the debt that underlies this matter. The deed lists both the late Donald Jonah ("Mr. Jonah") and Mrs. Jonah as Grantors-Trustees, and the Bank as Beneficiary.

Two houses stand on the Parcel. The front house, near the road, is a rental house. Neither Mrs. Jonah nor any family member lives in the rental house. One of Mrs. Jonah's children, Hopina C. Abraham, lives in the back house with her husband. Def.'s Resp. to Pl.'s Mot. for an Order in Aid of J. (Aug. 8, 2006). For this reason, the Bank requested subdivision of the Parcel prior to sale.

At the OIA Hearing, the court noted that the parties had already agreed that Mrs. Jonah had no ability to pay, and that because Mrs. Jonah's income was insufficient, the fastest means of paying the judgment, or any part of the judgment, was through sale of the land. The court asked the parties for arguments as to whether or not the land is exempt from attachment and sale. Mrs. Jonah's counsel requested more time to respond to the Bank's request for subdivision and sale. The court granted the request.

II. ARGUMENTS

A. *Mrs. Jonah's Argument Against Sale*

Mrs. Jonah argues that the sale should not be permitted, and cites to primary grounds: (1) the Bank had not shown legal entitlement to an order for subdivision and sale of the Parcel; and (2) Mrs. Jonah's children's plan of helping Mrs. Jonah pay the judgment is a faster method of paying the judgment.

1. *Legal entitlement to order for subdivision and sale*

Kos. S.C. § 11.404(1) provides:

When a transfer in trust of any freehold or leasehold interest in real property secures the performance of an obligation or the payment of a debt, the trustee has a power of sale for exercise after a breach of the obligation for which the transfer is security. If at the time of the exercise of the power of sale, the trustee determines that there exists a separable portion of the encumbered property that is of sufficient value to pay all expenses, costs and obligations to the trustee and the beneficiary, the trustee, in the absence of prejudice to other persons holding an interest in or encumbrance on the property and by agreement with the beneficiary and the trustor, may place for sale that portion alone. The beneficiary and the trustee do not unreasonably withhold their agreement.

Mrs. Jonah argues that under Kos. S.C. § 11.404, the Bank in a private power of sale may not subdivide the Parcel and sell the subdivision unless that subdivision "is of sufficient value to pay all expenses, costs and obligations."

Mrs. Jonah further argues that the Bank is not entitled to a judicial sale, because under Kos. S.C. § 11.413, the Bank must file a complaint in Kosrae State Court, Kos. S.C. § 11.413(1), and name all those who claim an interest as defendants, Kos. S. C. § 11.413(3), which Mrs. Jonah argues includes all of her children, because of an alleged Kosraean custom and tradition that a person's land passes to his or her heirs. Mrs. Jonah argues that the Bank has done none of these things.

2. *Mrs. Jonah's ability to pay*

Mrs. Jonah here reiterates the argument that in Kosraean custom and tradition, a person's land passes to his or her heirs, and therefore her children have an interest in the Parcel. She argues that, because of their interest, they wish to help her pay off her obligations, and that because of their offer, she now has the ability to pay, which fact the court should have taken into account at the OIA Hearing, and which fact changes the analyses of ability to pay and fastest method of payment. Further, Mrs. Jonah notes that the rental house in the front of the Parcel generates \$400 a month in revenue which, combined with her children's contributions, would allow Mrs. Jonah to continue paying the informal payment agreement of \$500 a month.

Mrs. Jonah also argues that under 6 F.S.M.C. 1415, the rental house is exempt from attachment and execution, because it is necessary for Mrs. Jonah's trade or occupation of "sell[ing] living quarters" covered under 6 F.S.M.C. 1415(2), and because the front portion of the Parcel is "land or an interest in land" covered under 6 F.S.M.C. 1415(3).

B. *The Bank's Response*

The Bank requested permission on October 6, 2010, to respond to Mrs. Jonah's arguments, because Mrs. Jonah brought up new issues that the court had not asked her to brief or argue in its order at the OIA Hearing. The court granted permission on November 26, 2010. The Bank responded to three points: (1) private power of sale; (2) judicial sale; and (3) fastest method of payment.

1. *Private power of sale; Kos. S.C. § 11.404*

The Bank argues that Kos. S.C. § 11.404 is inapplicable because the Bank seeks a judicial sale, not a private power of sale. If, in the alternative, Kos. S.C. § 11.404 is applicable, the Bank argues that the subdivision language in Kos. S.C. § 11.404(1) is inapplicable because it addresses only the situation where the value of the entire pledged property exceeds the value of the debt or obligation.

2. *Judicial sale; Kos. S.C. § 11.413*

The Bank argues that Kos. S.C. § 11.413(1), which requires a foreclosure action to be filed in Kosrae State Court, cannot divest this court of its constitutionally mandated jurisdiction under the FSM Constitution, citing *Gimnang v. Yap*, 5 FSM Intrm. 13, 23 (App. 1991) ("The state law provision attempting to place 'original and exclusive jurisdiction' in the Yap State Court of course cannot divest a national court of responsibilities placed upon it by the national Constitution, which is the 'supreme law of the Federated States of Micronesia.' FSM Const. art. II.").

The Bank further argues that Kos. S.C. § 11.413(3) cannot be construed as to require the Bank to name all of Mrs. Jonah's children in the complaint. Referring to points it made earlier in its response, the Bank notes that the Certificate of Title for the Parcel lists Mrs. Jonah as the sole owner in fee simple, that no other person besides the Bank holds a registered encumbrance on the Parcel, and that any expectancy interest which Mrs. Jonah's children may claim is speculative and has no recognition under the law, including statutory law on preparation and validity of wills bequeathing real property interests. The Bank further argues that validating an expectancy interest would undermine the entire Torrens land registration system. Pl. Br. at 6-7, 11-12.

3. *Fastest method of payment*

The Bank argues that Mrs. Jonah's assertion that "making payments is a faster method of paying

the judgment" relative to subdivision and judicial sale of the Parcel is conclusory and relies upon inadmissible factual assertions which were already disallowed at the OIA Hearing. The Bank notes that Mrs. Jonah's proposed payment of \$500 a month would be insufficient, because Mrs. Jonah will have to pay for more than 36 years at that rate to satisfy the principal amount of the judgment, and because postjudgment interest alone accrues at \$1,600 a month. The Bank also points out that, although Mrs. Jonah claims she receives income from the rental house, there are no recorded lease agreements pertaining to the rental house, and that because Kosrae statutory law requires recordation of lease agreements for terms exceeding one year, there could be no enforceable lease of the rental house that would exceed a year.

Finally, the Bank argues that 6 F.S.M.C. 1415(2) is inapplicable because buildings, which are improvements on land, do not constitute "tools, implements, utensils, two work animals, or equipment" exempted thereunder, and that Kosrae's Deed of Trust Law prevails over 6 F.S.M.C. 1415(3), because it is a specific statute, while 6 F.S.M.C. 1415(3) is a general statute.

III. ANALYSIS

At the OIA Hearing, this court specifically instructed that Mrs. Jonah's inability to pay the judgment was not in question, and ordered Mrs. Jonah's counsel to submit a brief solely on the issue of whether or not the Parcel is exempt from attachment and execution. Her counsel has, it seems, chosen to ignore the court's order and proceeded to relitigate the issue of Mrs. Jonah's ability to pay. Normally, such intentional disobedience of the court's lawful order may be sanctionable under 4 F.S.M.C. 119(1)(b); however, as the New Year draws nigh, the court is inclined to afford Mrs. Jonah's counsel leniency in the expectation that he will comport himself more appropriately in the future.

The question of whether or not the Parcel is exempt from attachment and execution appears to rest on questions of both national and state law. The court will address each in its turn.

A. *National Law: 6 F.S.M.C. 1415*

FSM national law regarding enforcement of judgments provides for certain exemptions under § 1415.

1. *Personal and household goods.*

Neither party argues that either the Parcel or the rental house on the front portion of the Parcel are personal or household goods.

2. *Necessities for trade or occupation.*

Necessities for trade or occupation are defined as "tools, implements, utensils, two work animals, and equipment necessary to enable the person . . . to carry on his usual occupation." 6 F.S.M.C. 1415(2). Mrs. Jonah argues that the rental house, and by extension, the land on which it stands, is such a necessity, for her occupation of "sell[ing] living quarters." Def.'s Br. at 10. That argument fails on a plain reading of the language of the statute. Because of such failure, the court will not reach the issue of whether or not the business of renting apartments is an "occupation" within the meaning of § 1415(2).

3. *Land and interests in land.*

Under FSM law, land or an interest in land owned solely by a judgment debtor in his own right

may be ordered sold or transferred under an order in aid of judgment, provided the court deems that justice so requires and finds that the debtor will have sufficient land remaining to support himself and his dependents after the sale. 6 F.S.M.C. 1415(3). Mrs. Jonah states that the Parcel should be exempt because it is "the sufficient land remaining to [Mrs. Jonah] to support herself and those persons directly dependent on her according to recognized local custom and the law of the FSM." Mrs. Jonah is so enamored of this argument that she repeats it in the next sentence. Mrs. Jonah does not cite which local custom and what FSM law stands for her obligations and which local custom and what FSM law defines her dependents. Her argument is conclusory; argument is not evidence. Livaie v. Weilbacher, 13 FSM Intrm. 139, 144 (App. 2005). Indeed, taken together with the argument that her children² wish to help her pay the judgment against her, it seems that it is not so much her daughter but Mrs. Jonah herself who is the dependent here.

Further, Mrs. Jonah ignores the Bank's offer to subdivide the Parcel so as to ensure that her daughter, Hopina C. Abraham, and her son-in-law can continue to live in the house on the back portion of the Parcel. By so doing, the Bank has gone out of its way to accommodate not only the letter but the spirit of the law. Mrs. Jonah's argument that sale of the entire Parcel would leave her with nothing not only misstates the facts³ but is eviscerated by the Bank's proposal to leave her with *something*—namely, the back portion of the parcel, which more than the entirety of the Parcel is the "sufficient land" within the meaning of § 1415(3).

4. *Conclusion as to national law.* The court concludes that a fee simple interest in land may be attached and executed under national law, and finds that the Bank's modified proposal would leave Mrs. Jonah with "sufficient land" to support her and her dependents.

B. *Kosrae state law: Title 11 Chapter 4*

Even though national law allows attachment and execution of land owned in fee simple, the national court has held generally that where there is a conflict between a statute of general application and a statute specifically aimed, the more particularized provision will prevail. Olter v. National Election Comm'r, 3 FSM Intrm. 123, 129 (1987). Here, the State of Kosrae has enacted its own statutes with regard to secured transactions in land and interests in land, enacted in Title 11, Chapter 4.

1. *Private power of sale: Kos. S.C. § 11.404*

Mrs. Jonah argues that severability is permissible in a private power of sale only where the value of the encumbered land exceeds that of the judgment. The Bank responds that it is seeking a judicial power of sale, and that therefore the subdivision language in Kos. S.C. § 11.404(1) is inapplicable. The court agrees with the Bank on both arguments.⁴

² The court notes that Mrs. Jonah continually refers to her children as her heirs. One does not have heirs until one has passed away; the court presumes Mrs. Jonah meant to refer to her children.

³ She continues to hold interests in lands also entitled to the late Mr. Jonah.

⁴ Indeed, the language seems to be permissive rather than mandatory. As the Bank argues, this provision seems to exist to protect the trustor/landowner when the outstanding debt is small. The judgment in this matter is not small. Nonetheless, if protecting the judgment debtor is the intent of the statute, then it stands to reason that the statute does not prohibit subdivision or severance even where the value of the judgment far exceeds the value of the land, particularly where that severance is requested to protect the judgment debtor's livelihood. Nevertheless, that is a question of interpreting state law, and as this court has

2. *Judicial sale: Kos. S.C. § 11.413*

Mrs. Jonah argues that the Bank is not entitled to a judicial sale because it did not follow the letter of the statutory law as set out in Kos. S.C. § 11.413. In particular, she argues that (a) the action should have been brought in state court and (b) the Bank should have named all of Mrs. Jonah's children as defendants, because they all claim an interest in the Parcel.

Under Kos. S.C. § 11.413(1), a judicial sale of land must be brought by a complaint in the Kosrae State Court. On its face, this seems to strip jurisdiction from the national court. However, national court jurisdiction is proper where the parties are diverse, as they are here. FSM Const. art. XI, § 6(b). The court agrees with the Bank's argument, that Kos. S.C. § 11.413(1), which requires a foreclosure action to be filed in Kosrae State Court, cannot divest this court of its constitutionally mandated jurisdiction under the FSM Constitution. Gimnang v. Yap, 5 FSM Intrm. 13, 23 (App. 1991). While the interplay between national and state power does mean that, in land cases, the court must apply state law, or certify unsettled questions to the state courts, *see generally* Bank of Guam v. Semes, 3 FSM Intrm. 370 (Pon. 1988), where the national court has maintained jurisdiction, national rules of procedure prevail.

Under Kos. S.C. § 11.413(3), the complainant must name all parties with a claim on the land as defendants. Mrs. Jonah argues that her children have a claim on the land, because they have an interest "based on Kosrae custom and tradition." Def.'s Br. at 8. Mrs. Jonah characterizes that custom thus: "After death of a parent the parent's land passed to the heirs." *Id.* As this court wrote in note 2, *supra*, a person does not have an heir until he dies. Thus, even if heirs have an interest, children may not have an interest. Were the court to recognize an indefinite expectancy right for a person to inherit his living parent's land, no title can ever be quiet. Public policy cannot abide by this perverse result.

This is not to say that children *cannot* have an interest: a person may acquire a *vested* interest in his living parent's land in many ways, such as by a gift, by becoming a trustee, by becoming a beneficiary, or by being named in a registered or otherwise evidenced will or other testamentary device. Mrs. Jonah has provided no evidence to support her claim that her children have a vested interest in the Parcel. The court sees no evidence of any encumbrance upon the Parcel other than the deed of trust naming the Bank as Beneficiary. Because Mrs. Jonah's children do not have a vested interest, Kos. S.C. § 11.413(3) does not require the Bank to name Mrs. Jonah's children as defendants.

IV. CONCLUSION

The Bank made its presentation concerning its request for subdivision and judicial sale of the front portion of the Parcel. The court has given Mrs. Jonah a chance to respond to the Bank's request. Mrs. Jonah has responded, while adding new arguments on issues that the court specifically ruled out. The court has reviewed Mrs. Jonah's response, and does not find her arguments persuasive.

The court hereby grants the Bank's request for subdivision and judicial sale of parcel no. 035-K-017 in Lelu Municipality, State of Kosrae. The court further orders that the new border shall be equidistant between the rental house in the front and the residential house in the back of the Parcel. The Bank shall bear the costs of conducting the survey.

agreed with the Bank that Kos. S.C. § 11.404 is inapplicable because the pending motion is one for a judicial sale, this court need not answer that question.