

FSM SUPREME COURT TRIAL DIVISION

YALMER HELGENBERGER d/b/a FSM RECYCLING CORPORATION,)	CIVIL ACTION NO. 2008-011
)	
Plaintiff,)	
)	
vs.)	
)	
MAI XIONG PACIFIC INTERNATIONAL, INC.,)	
WEIGANG XIONG, SHANG GUAN MAI,)	
JACKSON ARDOS, and ANDRES WILLIAM,)	
)	
Defendants.)	
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ORDER DENYING MOTIONS IN PART AND SETTING TRIAL

Ready E. Johnny
Associate Justice

Hearing: January 17, 2011
Decided: February 3, 2011

APPEARANCES:

For the Plaintiff: Joseph S. Phillip, Esq.
P.O. Box 464
Kolonias, Pohnpei FM 96941

For the Defendants: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonias, Pohnpei FM 96941

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HEADNOTES

Business Organizations – Corporations; Civil Procedure – Parties

A d/b/a is not a party because a d/b/a is just another name under which a person operates a business or by which the person or business is known. A corporation, however, is a juridical person separate from its owner and would therefore be a separate party. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 329 n.1 (Pon. 2011).

Civil Procedure – Dismissal; Civil Procedure – Service; Jurisdiction – Personal

When the court file does not contain a return of service for a summons and for either the original complaint or the first amended complaint on two named defendants, the court has nothing before it from which it can conclude that the court has personal jurisdiction over either of them. The court will therefore give the plaintiff time to show that the court has personal jurisdiction over those two defendants; otherwise, they may be subject, under Civil Procedure Rule 4(j), to dismissal for lack of service of process on them. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 329

(Pon. 2011).

Civil Procedure – Motions

Failure to file an opposition 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, especially when the non-movants were permitted, without objection, to orally oppose the motion. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 330 (Pon. 2011).

Civil Procedure – Admissions

The late filing of responses to requests for admission is treated as a Rule 36(b) motion to withdraw or amend admissions. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 330 (Pon. 2011).

Civil Procedure – Admissions

Under Rule 36(b), "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits," and this test for withdrawal of admissions is more precisely tailored to Rule 36's general purpose than the test generally appropriate under Rule 6(b)(2) for enlargement of time after the period has expired, so that the admission that otherwise would result from the failure to make timely answer should be avoided when to do so will aid in the presentation of the action's merits and will not prejudice the requesting party. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 330 (Pon. 2011).

Civil Procedure

Although the court must first consult FSM sources of law rather than start with a review of other courts' cases, when the court has not previously construed certain aspects of an FSM civil procedure rule that is identical or similar to a U.S. counterpart, the court may consult U.S. sources for guidance. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 330 n.2 (Pon. 2011).

Civil Procedure – Admissions

Since Rule 36's purpose is to expedite trial by removing uncontested issues, an admission in the case of an untimely reply should not be automatic. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 330 (Pon. 2011).

Civil Procedure – Admissions

Allowing withdrawal of admissions made by the defendants' untimely response would facilitate the normal, orderly presentation of the case on its merits, which is precisely the objective of Rule 36(b); while denying withdrawal would result in a final judgment for plaintiff without a hearing as to the merits. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 331 (Pon. 2011).

Civil Procedure – Admissions

When the movant has not shown that a nineteen-day delay in responding to his requests for admission would prejudice him in any manner and when allowing the withdrawal of admissions made by an untimely response would facilitate the normal, orderly presentation of the case on its merits, the requests for admission deemed admitted because the responses were not filed by September 30, 2010, would be deemed withdrawn and amended by the October 19, 2010 response. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 331 (Pon. 2011).

Civil Procedure – Interrogatories

Each interrogatory must be answered separately and fully in writing under oath, unless it is

objected to. The answers must be signed by the person making them, and the objections must be signed by the attorney or trial counselor making them. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 331 (Pon. 2011).

Business Organizations – Corporations

A corporation, a juridical person, must act through a natural person. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 331 (Pon. 2011).

Civil Procedure – Interrogatories

When a corporation is answering interrogatories, the person answering for it must be either an officer or an agent of the corporation. The corporation's agent answering interrogatories and signing the answers may be the corporation's attorney. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 331 (Pon. 2011).

Civil Procedure – Interrogatories

While counsel was a proper person to sign the answers to interrogatories on the corporate defendant's behalf, she could not sign the answers on behalf of either of the parties who are natural persons. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 331-32 (Pon. 2011).

Civil Procedure – Interrogatories

In order for the interrogatory answers to be the answers of natural persons, those persons must sign the answers to interrogatories and they must sign them under oath. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 332 (Pon. 2011).

Civil Procedure – Interrogatories

A court may, in its discretion, order that unverified interrogatory answers be refiled under oath or that an affidavit be filed to verify previous answers. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 332 (Pon. 2011).

Civil Procedure – Service; Jurisdiction – Personal

No ruling can be made against persons over whom the court does not have personal jurisdiction. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 332 (Pon. 2011).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When requests deemed admitted by the defendants because their response was not filed by September 30, 2010 are later deemed withdrawn and when the plaintiff's partial summary judgment motion now lacks a factual basis upon which the court could grant it because it was based on those deemed admissions, genuine issues of material fact remain and the court must deny the motion for partial summary judgment. Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 332 (Pon. 2011).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On January 17, 2011, the court heard the plaintiff's motions 1) to strike the answers to his discovery requests, 2) for leave to file a pretrial motion out of time, and 3) for partial summary

judgment. The plaintiff, Yalmer Helgenberger d/b/a FSM Recycling Corporation,¹ asks that the court strike the discovery response filed on October 19, 2010, to his November 6, 2009 discovery requests and, based on that response having been stricken, that the court enter a partial summary judgment that all five defendants are liable to him, leaving only the damages issue for trial.

I. SERVICE OF PROCESS ON DEFENDANTS

A careful review of the case file shows that defense counsel has, throughout this litigation and on all her filings, appeared only on behalf of three defendants: Mai Xiong Pacific International, Inc., Weigang Xiong, and Shang Guan Mai (collectively the "Mai Xiong" defendants). A further careful review of the file does not reveal that the other two defendants, Jackson Ardos and Andres William, have ever appeared in this action or, more importantly, that either was ever subjected to service of process – that is, were ever served a summons and the first amended complaint. A June 4, 2008 certificate indicates that Andres William was never served with the original complaint (filed in the Pohnpei Supreme Court before this case was removed) but that Jackson Ardos might have been.

Since the court file does not contain a return of service for a summons and for either the original complaint or the first amended complaint on either Jackson Ardos or Andres William, the court has nothing before it from which it can conclude that the court has personal jurisdiction over either Ardos or William. Helgenberger will therefore have 30 days from the entry of this order to show that the court has personal jurisdiction over Jackson Ardos and Andres William. Otherwise, those two defendants may be subject to dismissal from this case under Civil Procedure Rule 4(j) for lack of service of process on them.

II. THE MOTIONS

The Mai Xiong defendants' discovery response was due September 30, 2010. It was filed and served on October 19, 2010. It consisted of answers to 24 interrogatories, objections to seven other interrogatories, five admissions and four denials to nine requests for admission, and nine documents attached in response to Helgenberger's request for the production of documents used in preparing the discovery responses. The discovery response was signed only by defense counsel. (She also specifically signed each objection.) The response was not sworn or verified. No motion to enlarge time to provide discovery responses was attached or filed contemporaneously.

On November 12, 2010, Helgenberger moved to strike the response because it had been filed and served nineteen days after the September 30, 2010 deadline and because it had not been signed by the defendants under oath. Helgenberger also filed a motion for leave to file a pretrial motion out of time and a motion for partial summary judgment because, once the responses to the requests for admission were not filed by September 30, 2010, they were deemed admitted.

¹ A d/b/a is not a party, *Jackson v. Pacific Pattern, Inc.*, 12 FSM Intrm. 18, 20 (Pon. 2003), because a d/b/a is just another name under which a person operates a business or by which the person or business is known. *Albatross Trading Co. v. Aizawa*, 13 FSM Intrm. 380, 381 (Chk. 2005). A corporation, however, is a juridical person separate from its owner and would therefore be a separate party. *Carlos Etscheit Soap Co. v. McVey*, 17 FSM Intrm. 102, 112 (Pon. 2010). The plaintiff styles FSM Recycling Corporation as a d/b/a and not as a separate, distinct plaintiff. If, in fact, FSM Recycling Corporation is not a corporation but just a business name, the name is misleading. Some of the paperwork provided in discovery refers to the d/b/a as "FSM Recycling Company." It thus seems most likely that it is only a d/b/a, but if, in fact, FSM Recycling Corporation is a corporation, it would appear from the pleadings that it, and not Yalmer Helgenberger, would be the proper party plaintiff. If true, the court would appreciate clarification on this point.

The Mai Xiong defendants did not file an opposition to the motion to strike or to the motion for leave or the motion for partial summary judgment. Failure to file an opposition is generally deemed a consent to the motion, FSM Civ. R. 6(d); Actouka v. Etpison, 1 FSM Intrm. 275, 276 (Pon. 1983), but even when 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). During the January 17, 2011 hearing, defense counsel, without objection from Helgenberger's counsel, orally opposed the pending motions and explained that the tardiness in filing the discovery responses was due to the difficulties she had communicating with her clients, who were Guam residents.

III. DISCOVERY

A. Admissions

Discovery requests for admissions are governed by Civil Procedure Rule 36. There is no requirement in Rule 36 that the responding party personally sign the response to the requests for admission or that the response be under oath or verified. The Mai Xiong defendants' response to the admissions requests is not defective in that regard.

It was, however, provided nineteen days late. The late filing of responses to requests for admission is treated as a Rule 36(b) motion to withdraw or amend admissions. Eko v. Bank of Guam, 7 FSM Intrm. 164, 165-66 (Chk. 1995) (relying on Bowers v. E.F. Rose Mfg. Co., 149 F.2d 612, 615 (9th Cir.) (abuse of discretion to strike late answers to request for admission and grant summary judgment based in part on failure to answer), *cert. denied*, 326 U.S. 753 (1945); Countee v. United States, 112 F.2d 447, 451 (7th Cir. 1940) (denial of plaintiff's motion to strike late answer to request for admissions upheld because no indication of lack of good faith and no prejudice to plaintiff)). The Mai Xiong defendants' late filing of its responses to Helgenberger's requests for admissions is therefore considered a Rule 36(b) motion to withdraw and amend its admissions.

Under Rule 36(b), "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." The Rule 36(b) test for withdrawal of admissions is more precisely tailored to the general purpose of Rule 36 than the test generally appropriate under Rule 6(b)(2) for enlargement of time after the period has expired, so "that the admission that otherwise would result from the failure to make timely answer should be avoided when to do so will aid in the presentation of the merits of the action and will not prejudice the party who made the request." 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2257, at 542-43 (2d ed. 1994).² Since the purpose of Rule 36 is to expedite trial by removing uncontested issues, an admission in the case of an untimely reply should not be automatic. Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686, 688 (2d Cir. 1966).

Helgenberger has not shown that a nineteen-day delay in responding to his requests for admission would prejudice him in any manner. He has not shown that he incurred any additional

² Although the court must first consult FSM sources of law rather than start with a review of other courts' cases, FSM Const. art. XI, § 11, when the court has not previously construed certain aspects of an FSM civil procedure rule that is identical or similar to a U.S. counterpart, the court may consult U.S. sources for guidance. *See, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008); Arthur v. FSM Dev. Bank, 14 FSM Intrm. 390, 394 n.1 (App. 2006). Some of Rule 36(b)'s application has not previously been considered.

expense because of the nineteen-day delay. Nor has he shown that the nineteen-day delay somehow made it more difficult to maintain his action – he was as capable of maintaining his action on October 19, 2010, as he was on September 30, 2010. See St. Regis Paper Co. v. Upgrade Corp., 86 F.R.D. 355, 356-57 (W.D. Mich. 1980) (although requests for admissions were filed four years earlier, when only the last 44 days before the responses were filed were unexcused, the plaintiff could not show any prejudice from those 44 days, so the withdrawal and amendment of admissions was allowed; and, since there were now genuine issues of material fact, the plaintiff's summary judgment was denied).

If all of Helgenberger's requests were deemed admitted, the Mai Xiong defendants would have admitted that they bought scrap metal from Ardos and William that they knew that Ardos and William had illegally removed that scrap from Helgenberger's container. This "admission," which appears to be the central fact in this dispute and which "fact" the Mai Xiong defendants have consistently denied, would not subserve the presentation of the action on its merits. Allowing withdrawal of admissions made by an untimely response "would facilitate the normal, orderly presentation of the case on its merits—precisely the objective of Rule 36(b)—while denying [withdrawal] would result in a final judgment for plaintiff without a hearing as to the merits." St. Regis Paper Co., 86 F.R.D. at 357; see also Pleasant Hill Bank v. United States, 60 F.R.D. 1, 3-4 (W.D. Mo. 1973) (late responses to admission requests allowed because to exclude defendant's denial that it converted and sold all nursing home furnishings in which plaintiff had security interest would be an "unjustified suppression of the merits" and that was unacceptable).

Accordingly, the requests for admission deemed admitted because the responses were not filed by September 30, 2010, are now deemed withdrawn and amended by the Mai Xiong defendants' October 19, 2010 response.

B. *Answers to Interrogatories*

Helgenberger also moves to strike the Mai Xiong defendants' answers to interrogatories. Unlike requests for admissions, Rule 33, which governs interrogatories, does require that each interrogatory "be answered separately and fully in writing under oath, unless it is objected to" and that the "answers are to be signed by the person making them, and the objections signed by the attorney or trial counselor making them." FSM Civ. R. 33(a). Only the defense counsel signed the interrogatory answers (and the objections).

Defendant Mai Xiong Pacific International, Inc. is a corporation. As a corporation (a juridical person), it must act through a natural person. Kosrae v. Worswick, 10 FSM Intrm. 288, 292 (Kos. 2001). In answering interrogatories, this person must be either an officer or an agent of the corporation. FSM Civ. R. 33(a) ("to be answered by the party served or, if the party served is a public or private corporation . . . by any officer or agent"). The corporation's agent answering interrogatories and signing the answers may be the corporation's attorney. *E.g.*, United States v. 42 Jars of Bee Royale Capsules, 264 F.2d 666, 670 (3d Cir. 1959); Fernades v. United Fruit Co., 50 F.R.D. 82, 85-86 (D. Md. 1970); Jones v. Goldstein, 42 F.R.D. 271, 274 (D. Md. 1966); Segarra v. Waterman S.S. Corp., 41 F.R.D. 245, 248 (D.P.R. 1966) (attorney is proper person to answer on a corporation's behalf and his duty is to furnish the sum total of corporate information, not just the information within his own knowledge).³

While defense counsel was a proper person to sign the answers to Helgenberger's interrogatories

³ The court has not previously construed whether Rule 33 allows attorneys to sign interrogatory answers or what steps to take when answers are not signed under oath.

on the corporate defendant's behalf, she did not sign the answers under oath. But she could not sign the answers on behalf of either of the parties who are natural persons. See Jones, 42 F.R.D. at 274. Thus, in order for the interrogatory answers to be the answers of the two Mai Xiong natural person defendants, those two persons must sign the answers to interrogatories and they must sign them under oath. FSM Civ. R. 33(a).

A court may, in its discretion, order that unverified interrogatory answers be refiled under oath or that an affidavit be filed to verify previous answers. See, e.g., Fernades, 50 F.R.D. at 86 (attorney signing for corporation ordered to provide affidavit); United States v. 58.16 Acres of Land, 66 F.R.D. 570, 572 (E.D. Ill. 1975) (answers ordered refiled under oath). Accordingly, the answers to interrogatories will be stricken as to any defendant has not, within 30 days of entry of this order, signed the answers under oath. Defense counsel (who has already signed the answers) may, if she is signing on the corporate defendant's behalf, submit an affidavit in order to verify the corporation's answers.

IV. PARTIAL SUMMARY JUDGMENT

Helgenberger's motion for leave to file pretrial motion out of time is granted. The court will therefore consider his motion for partial summary judgment. That motion asks the court, based on the defendants' deemed admissions for failure to respond by September 30, 2010, to find all five defendants liable to Helgenberger, leaving for trial only the issue of damages owed.

As noted above, it appears that the court may not have personal jurisdiction over two of the defendants – Jackson Ardos and Andres William. Certainly the requests for admission and the November 12, 2010 motions were never served on either of them. No ruling can be made against persons over whom the court does not have personal jurisdiction. And, since the requests deemed admitted by the Mai Xiong defendants when their response was not filed by September 30, 2010 are now deemed withdrawn, the partial summary judgment motion lacks a factual basis upon which the court could grant it. Genuine issues of material fact remain about the Mai Xiong defendants' liability to Helgenberger. The court must therefore deny Helgenberger's motion for partial summary judgment.

V. TRIAL SETTING

This matter is ready for trial. NOW THEREFORE IT IS HEREBY ORDERED that the parties shall, no later than June 20, 2011, file and serve:

1) a list of the witnesses each expects to call with a short concise statement of what the witness is expected to testify to, and

2) a trial brief containing:

- a) a statement of facts not in dispute,
- b) a statement of facts in dispute, and
- c) a statement of the law and the expected evidence that will support the party's position;

3) any joint stipulation of undisputed facts;

IT IS FURTHER ORDERED that parties' counsel shall, no later than 10:00 a.m., Tuesday, July 5, 2011,

1) meet at the FSM Supreme Court's clerk's office to identify and mark all the exhibits that each

party expects to introduce, and also

2) to the extent practicable, to stipulate to exhibits' authenticity;

AND IT IS FURTHER ORDERED that trial shall start on Thursday, July 7, 2011, at 9:30 a.m.

VI. CONCLUSION

Yalmer Helgenberger has 30 days from entry of this order to establish that the court has personal jurisdiction over defendants Jackson Ardos and Andres William or they will be dismissed from this action.

The admissions deemed made by defendants Mai Xiong Pacific International, Inc., Weigang Xiong, and Shang Guan Mai because they had not responded by September 30, 2010, are deemed withdrawn and their October 19, 2010 response replaces or amends the deemed admissions.

If, within 30 days of this order's entry defense counsel swears to or verifies the interrogatory responses, defendant Mai Xiong Pacific International, Inc. will be considered to have responded to Helgenberger's interrogatories; otherwise they will be considered stricken. The interrogatory responses of any natural person Mai Xiong defendant who has not signed and verified the interrogatory answers within 30 days will be stricken as to that defendant.

Pretrial briefs are due June 20, 2011. Exhibits will be marked by July 5, 2011, and trial will start at 9:30 a.m., July 7, 2011.

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FSM SUPREME COURT TRIAL DIVISION

GORDON SMITH,)	CIVIL ACTION NO. 2005-004
)	
Plaintiff,)	
)	
vs.)	
)	
FABIAN NIMEA, individually and d/b/a FSN)	
FINANCIAL GROUP, INC., d/b/a FFGI)	
CONSULTING GROUP,)	
)	
Defendants.)	
)	

ORDER AND MEMORANDUM DENYING FOURTH AND FIFTH MOTIONS TO RECONSIDER AND
MOTION TO RECONSIDER EXCLUSION ORDER

Martin G. Yinug
Acting Chief Justice

Decided: February 14, 2011