

FSM SUPREME COURT TRIAL DIVISION

FSM TELECOMMUNICATIONS CORPORATION,)	CIVIL ACTION NO. 2010-035
)	
Plaintiff,)	
)	
vs.)	
)	
BELLARMINE HELGENBERGER and BERNIE)	
HELGENBERGER, individually d/b/a BERNARDS,)	
ISLAND CABLE TV POHNPEI, INC., CENTRAL)	
MICRONESIA COMMUNICATIONS, INC., and)	
BERNARD'S ENTERPRISES, INC.,)	
)	
Defendants.)	
)	

ORDER CONCERNING REPRESENTATION

Ready E. Johnny
Associate Justice

Decided: March 9, 2011

APPEARANCE:

For the Plaintiff:	Fredrick L. Ramp, Esq. Ramp & Mida Law Firm P.O. Box 1480 Kolonia, Pohnpei FM 96941
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HEADNOTES

Civil Procedure – Motions

Failure to oppose a motion 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. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 409 (Pon. 2011).

Attorney and Client – Appearance; Civil Procedure – Parties

In the trial court, a party has the right to appear pro se. To appear "pro se" means to appear on one's own behalf; without a lawyer. A person appearing pro se thus appears only for himself and does not represent any other person or anyone else. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Sole Proprietorship; Civil Procedure – Parties

A pro se party can, of course, represent his own business when that business is merely a d/b/a because a "d/b/a" is not a separate person or party since a d/b/a is just another name under which a person operates the business or by which the person or business is known. FSM Telecomm. Corp. v.

Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011).

Business Organizations – Sole Proprietorship; Civil Procedure – Parties

A person operating as a d/b/a is a sole proprietorship that has no legal existence separate from that of its owner and its acts and liabilities are those of its owner and its owner's acts and liabilities are those of the sole proprietorship. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011).

Attorney and Client – Appearance; Civil Procedure – Parties

A party appearing pro se cannot represent anyone else. That would be the unauthorized practice of law. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011).

Business Organizations – Corporations; Civil Procedure – Parties

A corporation is not a d/b/a, even if it is wholly owned by one person. It is an artificial, juridical person separate from its owner and is therefore a different person and thus a separate party. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

A corporation is not a human being but a creature created by the government and subject to its regulation and control, including the rule that in court proceedings a corporation must be represented by a licensed attorney. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011).

Attorney and Client – Appearance; Common Law

In instances where there is no FSM precedent, such as whether to require an attorney to appear for a corporation (although it has been a rather long-standing practice in the FSM Supreme Court), the court may consider cases from other jurisdictions in the common law tradition. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 n.2 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations; Civil Procedure – Parties

Just as natural persons, appearing pro se, are not permitted to act as "attorneys" and represent other natural persons, by the same token, non-attorney agents are not allowed to represent corporations in litigation, for a wholly unintended exception to the rules against unauthorized practice of law would otherwise result. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 411 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

A corporation obviously cannot appear pro se and represent itself since it is not a natural person and it cannot physically appear in court or draft pleadings or the like. Someone must appear for the corporation. Corporations of necessity must always act through their agents. In a court case, that someone would ordinarily be an attorney admitted to appear before the court. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 411 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

The widely-recognized general rule is that a corporation can only appear through an attorney and that a corporation may not represent itself through nonlawyer employees, officers, or shareholders. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 411 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

When a business accepts the advantages of incorporation, it must also bear the burdens, including the need to hire counsel to sue or defend in court. Corporations are required to appear through attorneys because a corporation is a hydra-headed entity and its shareholders are insulated from personal responsibility. There must therefore be a designated spokesman accountable to the

court. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 411 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

Unlike lay agents of corporations, attorneys are subject to professional rules of conduct and are amenable to disciplinary action by the courts for violations of ethical standards. Therefore, attorneys, being fully accountable to the courts, are properly designated to act as the representatives of corporations. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 411 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

A corporation cannot appear in the FSM Supreme Court and represent itself either "pro se" or by its nonlawyer officers or employees. It can only appear through an attorney licensed to practice law. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 411 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

Often when a shareholder files a derivative action against a corporation, the corporation's regular attorney may defend it as he would an other suit. But when a corporation does not have a regular corporate counsel and neither the plaintiff nor a defendant corporation control the majority of the corporation's shares (each owning 50%) and because they are adverse to each other, neither the plaintiff nor the defendant should choose and hire an attorney to represent that corporation since its corporate interests would likely differ from those of both of its two shareholders. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 412 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

An attorney that represents a corporation represents the organization itself, and does not represent the organization's constituents such as its shareholders or its officers. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 412 (Pon. 2011).

Attorney and Client – Appearance; Business Organizations – Corporations

It is extremely rare that the court will assign counsel in a civil case. It may be worth a try when the plaintiff and an adverse defendant each own 50% of a corporation that needs representation. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 412 (Pon. 2011).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on the plaintiff's Motion to Quash Answer to the Complaint Filed on Behalf of Bernie Helgenberger, Island Cable TV Pohnpei, Inc., Central Micronesia Communications, Inc. and Bernards Enterprises, Inc., filed January 26, 2011. No party has filed a response to the motion. Failure to oppose a motion 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).

The plaintiff, FSM Telecommunications Corporation ("Telecom"), asks that the court "quash" the answer filed on behalf of all other named defendants by defendant Bellarmine Helgenberger, pro se, and that the court require that an attorney appear on behalf of the defendant corporations, Island Cable TV Pohnpei, Inc. ("Island Cable"), Central Micronesia Communications, Inc. ("Central Micronesia"), and Bernard's Enterprises, Inc. Telecom further asks, since this is a shareholder derivative action, that

defendants Bellarmine and Bernie Helgenberger be prohibited from choosing or hiring an attorney to represent defendant Island Cable and that the court appoint an entirely neutral attorney to represent Island Cable because plaintiff Telecom and defendant Central Micronesia each own 50% of Island Cable and Central Micronesia is controlled by Bellarmine Helgenberger and Bernie Helgenberger. Thus, since neither Telecom nor Central Micronesia has a majority share of Island Cable, Telecom contends that neither should act in its name or select an attorney to represent it.

I. PRO SE APPEARANCES

On December 17, 2010, Bellarmine Helgenberger filed a paper, styled "Defendants' Answer," which appeared to answer, on behalf of all the defendants, Telecom's November 30, 2010 Complaint. The answer was signed "Bellarmine Helgenberger, Defendant, Pro Se."

In the trial court, a party has the right to appear pro se. See Wiliander v. National Election Dir., 13 FSM Intrm. 199, 204 n.4 (App. 2005). To appear "pro se" means to appear "on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY 1341 (9th ed. 2009). A person appearing pro se thus appears only for himself and does not represent any other person or anyone else. The court thus considers the December 17, 2010 answer to be Bellarmine Helgenberger's answer only and no one else's.¹ Accordingly, to the extent that the December 17, 2010 "Defendants' Answer" purports to be the answer of any defendant other than Bellarmine Helgenberger, the motion to quash it is granted.

A pro se party can, of course, represent his own business when that business is merely a d/b/a because a "d/b/a" is not a separate person or party, Jackson v. Pacific Pattern, Inc., 12 FSM Intrm. 18, 20 (Pon. 2003), since a d/b/a is just another name under which a person operates the business or by which the person or business is known. Albatross Trading Co. v. Aizawa, 13 FSM Intrm. 380, 381 (Chk. 2005). A person operating as a d/b/a is a sole proprietorship that has no legal existence separate from that of its owner and its acts and liabilities are those of its owner and its owner's acts and liabilities are those of the sole proprietorship. FSM v. Webster George & Co., 7 FSM Intrm. 437, 441 (Kos. 1996). So, Bernie Helgenberger, if he were to appear pro se, could represent himself and his d/b/a of "Bernards" (but not Bernard's Enterprises, Inc.) Thus, Bellarmine Helgenberger, appearing pro se, cannot (and the court does not consider him to) represent either Bernie Helgenberger or Bernards or anyone else. That would be the unauthorized practice of law.

II. APPEARANCES ON BEHALF OF CORPORATIONS

A corporation is not a d/b/a, even if it is wholly owned by one person. It is an artificial, juridical person separate from its owner and is therefore a different person and thus a separate party. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010). A corporation is not a human being, but a creature created by the government and subject to its regulation and control, including the rule that in court proceedings a corporation must be represented by a licensed attorney. In re Las Colinas Dev. Corp., 585 F.2d 7, 13 (1st Cir. 1978)² (a time-hallowed restriction on corporations is

¹ That is why the court's January 13, 2011 Scheduling Order starts: "Defendant Bellarmine Helgenberger having answered, this case is now at issue as to him. NOW THEREFORE IT IS HEREBY ORDERED that the following schedule is hereby set: 1) the appearing parties shall . . ."

² In instances where there is no FSM precedent, the court may consider cases from other jurisdictions in the common law tradition. Walter v. FSM, 15 FSM Intrm. 130, 131 (App. 2007); Phillip v. Kosrae, 15 FSM Intrm. 116, 119 (App. 2007). The court notes, however, that requiring a licensed attorney to appear for a corporation has been a rather long-standing practice in the FSM Supreme Court. Evidently, the court has never

representation only by licensed attorneys). Just as natural persons, appearing pro se, "are not permitted to act as 'attorneys' and represent other natural persons . . . [b]y the same token, non-attorney agents are not allowed to represent corporations in litigation, for a wholly unintended exception to the rules against unauthorized practice of law would otherwise result." Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 590 P.2d 570, 573-74 (Haw. 1979).

A corporation obviously cannot appear pro se and represent itself since it is not a natural person and it cannot physically appear in court or draft pleadings or the like. Someone must appear for the corporation. Corporations of necessity must always act through their agents. Kosrae v. Worswick, 10 FSM Intrm. 288, 292 (Kos. 2001). In a court case, that someone would ordinarily be an attorney admitted to appear before the court. The widely-recognized general rule is that a corporation can only appear through an attorney, *see, e.g.*, Taylor v. Knapp, 871 F.2d 803, 806 (9th Cir. 1989), and "that a corporation may not represent itself through nonlawyer employees, officers, or shareholders," Hawkeye Bank & Trust, N.A. v. Baugh, 463 N.W.2d 22, 25, 8 A.L.R.5th 991, 998 (Iowa 1990) (requiring corporation to appear through counsel does not deprive it of due process).

Besides the already-discussed reasons and the fact that corporations are persons separate from their owners and this separate identity should be respected, there are other sound reasons for this general rule. "When a business accepts the advantages of incorporation, it must also bear the burdens, including the need to hire counsel to sue or defend in court." Woodford Mfg. Co. v. A.O.Q., 772 P.2d 652, 654 (Colo. Ct. App. 1988). Corporations are required to appear through attorneys because "a corporation is a hydra-headed entity and its shareholders are insulated from personal responsibility. There must therefore be a designated spokesman accountable to the Court." Austrian, Lance & Stewart, P.C. v. Hastings Props., Inc., 385 N.Y.S.2d 466, 467 (N.Y. Sup. Ct. 1976). "Unlike lay agents of corporations, attorneys are subject to professional rules of conduct and are amenable to disciplinary action by the courts for violations of ethical standards. Therefore, attorneys, being fully accountable to the courts, are properly designated to act as the representatives of corporations." Oahu Plumbing & Sheet Metal, 590 P.2d at 574 (citation omitted). The court is aware that when a corporation with a single shareholder and the corporation's sole shareholder both have insufficient resources to retain counsel some (but not all) courts have made an exception to the general rule.³ *See Taylor*, 871 F.2d at 806. There is no indication that that situation exists for any of the three corporate defendants in this case since the court can infer from the pleadings that both Island Cable and Central Micronesia have substantial assets and that Bernard's Enterprises, Inc. appears to be a going concern.

Accordingly, the court concludes that a corporation cannot appear in the FSM Supreme Court and represent itself either "pro se" or by its nonlawyer officers or employees. It can only appear through an attorney licensed to practice law.

III. MULTIPLE REPRESENTATION

Defendants Island Cable TV Pohnpei, Inc., Central Micronesia Communications, Inc. and Bernard's Enterprises, Inc. are all corporations and must therefore appear through an attorney admitted

before been put in the position of having to make a definitive ruling on point.

³ Also, it is not unusual for a statute to allow a nonlawyer officer to appear for a corporation in a small claims court. This case does not involve a small claim. For those instances where exceptions have been allowed by some courts (and denied by other in similar situations), *see generally* Jay M. Zitter, Annotation, *Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not Attorney*, 8 A.L.R.5th 653 (1992).

to practice before the FSM Supreme Court or admitted pro hac vice. The court makes no ruling on whether Central Micronesia Communications, Inc. and Bernard's Enterprises, Inc. would need separate attorneys. Nor does the court rule on, if an attorney appears for one or both of those two corporations, whether that attorney could also appear for Bellarmine Helgenberger or Bernie Helgenberger or both. See Nix v. Etscheit, 10 FSM Intrm. 391, 397-98 (Pon. 2001). But it is entirely likely that an attorney could represent two or more defendants in this matter although Bellarmine Helgenberger cannot represent anyone except himself.

IV. ISLAND CABLE TV POHNPEI, INC. REPRESENTATION

An attorney's appearance on behalf of Island Cable TV Pohnpei, Inc., however, presents a different problem. Often when a shareholder files a derivative action against a corporation, the corporation's regular attorney may defend it as he would an other suit. Nix, 10 FSM Intrm. at 398. Island Cable TV Pohnpei, Inc. does not appear to have a regular corporate counsel. Because neither the plaintiff Telecom nor the defendant Central Micronesia control the majority of the shares in Island Cable and because they are adverse to each other, neither should choose and hire an attorney to represent Island Cable TV Pohnpei, Inc. since Island Cable's corporate interests would likely differ from those of both of its two shareholders. An attorney that represents a corporation represents the organization itself, and does not represent the organization's constituents such as its shareholders or its officers. See FSM MRPC R. 1.13 & cmt.

It is extremely rare that the court will assign counsel in a civil case. It may be worth a try in this instance.

V. CONCLUSION AND SCHEDULING ORDER

Accordingly, the motion to quash is granted for all defendants except Bellarmine Helgenberger, who signed and filed the answer pro se. Since the defendants other than Bellarmine Helgenberger may have been misled to believe that Bellarmine Helgenberger's answer would also suffice as their answer and that they would not need to do anything further, the court will give defendants Bernie Helgenberger, Central Micronesia Communications, Inc., and Bernard's Enterprises, Inc. until April 1, 2011, to answer or otherwise defend Telecom's Complaint.

The motion to bar the other defendants from selecting an attorney to represent Island Cable TV Pohnpei, Inc. is also granted. The court will order the private bar canvassed for neutral, disinterested counsel who may be able and willing to represent Island Cable TV Pohnpei, Inc. The date by which Island Cable TV Pohnpei, Inc. should answer or otherwise defend will be set after the results of that process is known.

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