

fee awards when in-house counsel were employed. There is thus no reason to consider this point further.

III. CONCLUSION

Accordingly, the movants' motion to intervene is denied, and since they are not, and have not become, parties to this action, they can seek no other relief from the court.

* * * *

FSM SUPREME COURT TRIAL DIVISION

DAVID WELLE,)	CIVIL ACTION NO. 2011-1001
)	
Plaintiff,)	
)	
vs.)	
)	
CHUUK PUBLIC UTILITY CORPORATION)	
(CPUC) and CHUUK STATE GOVERNMENT,)	
)	
Defendants.)	
_____)	

ORDER GRANTING SUMMARY JUDGMENT

Martin G. Yinug
Chief Justice

Decided: August 10, 2011

APPEARANCE:

For the Defendant:	Joses R. Gallen, Esq.
(State of Chuuk)	Attorney General
	Office of the Chuuk Attorney General
	P.O. Box 1050
	Weno, Chuuk FM 96942

* * * *

HEADNOTES

Civil Procedure – Summary Judgment – Procedure

Since failure to oppose a motion is generally deemed a consent to the motion when a party has not filed a response to a summary judgment motion, that party is deemed to have consented to the granting of the motion, but even then, the court still needs good grounds before it can grant the motion. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 610 (Chk. 2011).

Jurisdiction – Arising under National Law

When a plaintiff clearly bases his cause of action on 11 F.S.M.C. 701, the national civil rights

statute, it is obvious that he is invoking the FSM Supreme Court's jurisdiction over the case as one arising under FSM national law. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 611 (Chk. 2011).

Contracts – Novation

Parties to a contract may agree to replace an existing contract with a new and different contract before the original contract's term has expired. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 611 (Chk. 2011).

Contracts – Novation

The general rule is that parties to a contract may rescind it by making a new contract that is inconsistent with the original contract. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 611 (Chk. 2011).

Judgments – Stipulated

A stipulated judgment may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 611 (Chk. 2011).

Judgments – Stipulated

A stipulated judgment is a contract between the parties entering into the stipulation that has been approved by the court. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 611 (Chk. 2011).

Contracts – Novation; Judgments – Stipulated

The parties' stipulated judgment in a state court action for breach of an easement agreement constituted a new contract – a new easement agreement – between the parties because it was a contract or agreement that was inconsistent with the original contract or agreement, especially when the amount stipulated to, \$50,000, greatly exceeded the value of the undelivered 40 cubic yards of sand and 40 cubic yards of aggregates that constituted the breach. Welle v. Chuuk Public Utility Corp., 17 FSM Intrm. 609, 611-12 (Chk. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

On March 23, 2011, defendant Chuuk State Government filed its Motion to Dismiss with supporting exhibits. On April 6, 2011, the plaintiff asked for more time to review and respond to the motion. The court, in its May 18, 2011 Order Setting Response Dates, stated that since the defendant had presented "matters outside the pleading" with its motion the court would consider the motion to be one for summary judgment, FSM Civ. R. 12(b)(6), and gave the plaintiff until May 30, 2011 to file a response. No response has been filed.

Failure to oppose a motion is generally deemed a consent to the motion. FSM Civ. R. 6(d). When a party has not filed a response to a summary judgment motion, that party is deemed to have consented to the granting of the motion. Actouka v. Kolonia Town, 5 FSM Intrm. 121, 123 (Pon. 1991). But even then, 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).

David Welle's complaint alleges that, on February 21, 1990, he and his brothers and sisters

Welle v. Chuuk Public Utility Corp.
17 FSM Intrm. 609 (Chk. 2011)

granted the State an easement across their property in Sapuk for public road improvements and for the installation of public utilities and that in return the State agreed to supply, among other things, free electricity for the life of the easement, but that on December 4, 2008, it disconnected the electrical power from Welle's residence in place of cash-power and, despite repeated demands that the State honor the agreement, power has not been reconnected thus depriving him of the benefit of his contract and constituting the taking of his property without just compensation. Welle seeks \$20,000 in damages (the maximum allowed by the Chuuk Sovereign Immunity Act of 2000 for due process violations).

Chuuk contends that the FSM Supreme Court lacks subject-matter jurisdiction over this case because 1) Welle pled that the court had jurisdiction over his civil rights claim under FSM Constitution Article XI, section 6(a) and this case is not one affecting officials of foreign governments, not a dispute between states, not an admiralty or maritime case, and the national government is not a party; because 2) the 1990 easement was impliedly abrogated or expressly superseded by the stipulated judgment in a 2000 Chuuk State Supreme Court civil case; because 3) the Chuuk State Supreme Court stipulated judgment terminated all of Welle's rights as part of the easement grant except for those rights contained in the stipulation; and because 4) the filing of this case is an example of forum shopping when the Chuuk State Supreme Court could undoubtedly exercise jurisdiction over this case since it involves a contractual obligation that can be resolved (and was previously made) in that court.

Since the text of Welle's complaint clearly bases his cause of action on 11 F.S.M.C. 701, the national civil rights statute, Complaint ¶¶ 24, 6[2d] (Feb. 22, 2011), it is obvious that Welle is invoking the FSM Supreme Court's jurisdiction over this case as one arising under FSM national law. The Constitution's jurisdictional grant for such cases is found in Article XI, section 6(b) (not section 6(a) as pled). The court will not dismiss this case based on such an obvious and minor typographical error that does not prejudice the defendants. The Civil Procedure Rules are to be "construed to secure the just, speedy, and inexpensive determination of every action." FSM Civ. R. 1.

In the Chuuk State Supreme Court Civil Action No. 188-2000, Welle sued the State and various public officials for breach of the February 21, 1990 easement agreement because among the provisions of that agreement the State was supposed to deliver 90 cubic yards of dredged sand and 90 cubic yards of crushed and manufactured aggregates to him but had, by October 1999, delivered only 50 cubic yards of sand and 50 cubic yards of aggregates. In December 2005, the parties stipulated to the entry of a \$50,000 judgment in Welle's favor against the State. The Chuuk State Supreme Court entered the stipulated judgment on January 17, 2006.

The State contends that this stipulation between the parties for the payment of \$50,000 either impliedly abrogated or expressly superseded the February 21, 1990 easement agreement and replaced it with a new easement agreement for which the consideration was \$50,000. "Parties to a contract may agree to replace an existing contract with a new and different contract before the original contract's term has expired." Uehara v. Chuuk, 14 FSM Intrm. 221, 226 (Chk. 2006). "The general rule is that parties to a contract may rescind it by making a new contract that is inconsistent with the original contract." *Id.*

A stipulated judgment "may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction." Mailo v. Chuuk, 13 FSM Intrm. 462, 467-68 (Chk. 2005). A stipulated judgment is a contract between the parties entering into the stipulation that has been approved by the court. *Id.* at 468 & n.4. The parties' stipulated judgment therefore constituted a contract between Welle and the State. It was a new contract – a new easement agreement – between the parties because it was a contract or agreement that was inconsistent with

the original contract or agreement.¹ Further support for this is that the amount stipulated to, \$50,000, greatly exceeded the value of the undelivered 40 cubic yards of sand and 40 cubic yards of aggregates and was thus not just compensation for the undelivered sand and aggregate. (The court takes judicial notice that in 2004, the Receiver in FSM Civil Action Nos. 1994-1002 and 1994-1008 sold aggregate at the retail price of \$30 a cubic yard.)

The State having shown good grounds, its unopposed summary judgment motion is accordingly granted. This case is closed. The clerk shall enter judgment for the defendants.

* * * *

¹ The Chuuk Public Utility Corporation ("CPUC") was not a party to the original agreement because it had not yet been created, and it was not a named party to the 2005 stipulation since it had not been named a party in the law suit. But the easement agreement was not divisible and it is not uncommon for the State to be a litigant or a party when CPUC could also be named or made a party. *See, e.g.*, Kileto v. Chuuk, 15 FSM Intrm. 16 (Chk. S. Ct. App. 2007) (State was only defendant named in suit involving injuries caused by power surge on CPUC lines). That CPUC was not a party to the 2005 stipulation should not change the analysis or the result.