A review of the billing attachment reveals that 0.4 hour was spent drafting correspondence before a decision was made to bring the motion to compel, and that 1.8 hours were spent on related matters after the order to compel was obtained. These (2.2) hours will be disallowed. That leaves 3.6 hours at $125 an hour for a total of $450.

The plaintiffs also seek $43.42 as a "GRT Equivalent." The court understands GRT to mean the "gross revenue tax" or "gross receipts tax" that is levied on businesses on Guam by the Guam government. The Guam gross receipts tax "differs from a sales tax insofar as it is levied on the seller rather than the consumer." Quichocho v. Macy's Dep't Stores, Inc., 2008 Guam 9, ¶ 2. In other words, it is an income tax levied on the seller [attorney] and not a sales tax charged to or levied on the consumer [client]. It thus "cannot be taxed as a cost, or [as] an increase in or part of the attorney's hourly rate" since it is already part of the attorney's fee. Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 467, 471 (Chk. 2009). Since it is levied on the attorney and not on the client, it is thus already included in an attorney's hourly charge. Therefore no "GRT Equivalent" will be allowed as an "expense" or a "fee."

Accordingly, the plaintiffs are awarded sanctions in the amount of $450.

* * * *

FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHEIT SOAP COMPANY, Plaintiff/Counterdefendant, vs. ERINE McVEY and DO IT BEST HARDWARE, a business organization, Defendants/Counterclaimants/ Cross-Claimants, vs. BOARD OF TRUSTEES OF THE POHNPEI STATE PUBLIC LANDS TRUST, Defendant/Cross-Defendant.	CIVIL ACTION NO. 2005-007

ORDER GRANTING JUDGMENT

Ready E. Johnny
Associate Justice

Hearing: March 18, 2010
Decided: April 16, 2010

EARANCES:

For the Plaintiff: Stephen V. Finnen, Esq.
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For the Defendant: Monaliza Abello-Pangelinan, Esq.
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* * * *

HEADNOTES

vil Procedure – Pleadings

Regardless of whether the pleadings have labeled them correctly, claims against an opposing rty are counterclaims and claims against a co-party are cross-claims. Carlos Etscheit Soap Co. v. Vey, 17 FSM Intrm. 102, 107 n.3 (Pon. 2010).

vil Procedure – Summary Judgment; Civil Procedure – Summary Judgment – Grounds

A trial court judgment issued without a trial or an evidentiary hearing is a summary judgment to ich the trial court should apply the summary judgment standard – that summary judgment is proper y when, viewing the facts in the light most favorable to the party against whom judgment is sought, ere is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. rlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 108 (Pon. 2010).

vil Procedure – Summary Judgment – Grounds

When no defendant opposed the plaintiff's motion in writing and although the failure to file an position is deemed to be a consent to a motion, the court cannot automatically grant the summary dgment motion since there must still be a sound basis in law and in fact upon which to grant the otion. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 108 (Pon. 2010).

vil Procedure – Summary Judgment – Procedure

In order to succeed on a summary judgment motion, the movant must also overcome all the non-ovant's affirmative defenses. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 108 (Pon. 010).

operty – Public Lands

Since in 2004 the plaintiff held an unexpired, recorded lease to Lot No. 014-A-08 for which the se payments were current and up to date, it was entitled to notice and an opportunity to be heard fore the Board of Trustees could disregard or void that lease and advertise Lot No. 014-A-08 for mediate lease or could lease Lot No. 014-A-08 to another. This is true even if the Board considered lease "illegal" due to omissions in the approval process. Carlos Etscheit Soap Co. v. McVey, 17 M Intrm. 102, 109 (Pon. 2010).

Constitutional Law – Due Process – Notice and Hearing; Property – Public Lands

When the plaintiff's lease had not been voided after notice and an opportunity to be heard before its leased lot was advertised for immediate commercial lease, the Board violated the plaintiff's civil rights because it denied the plaintiff the due process of law when it did not give the plaintiff prior notice and an opportunity to be heard on the validity of its lease. This is because notice and an opportunity to be heard are the essence of due process of law. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 (Pon. 2010).

Civil Rights; Constitutional Law – Due Process – Notice and Hearing

Defendants did not violate the plaintiff's civil rights when neither defendant was a government agency or was claiming to act under color of law or injured, oppressed, threatened, or intimidated the plaintiff's exercise or enjoyment of its civil rights and when neither was responsible for giving the plaintiff notice and an opportunity to be heard; neither prevented the plaintiff from being given notice; and neither injured, oppressed, threatened, or intimidated the plaintiff to prevent it from having an opportunity to be heard. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 (Pon. 2010).

Civil Rights

When a defendant is not a governmental entity, is not someone alleged to have acted under color of law, and is not a private person (not acting under color of law) who injures, oppresses, threatens, or intimidates another in exercising or enjoying or having exercised or enjoyed one's civil rights, the claim against that defendant is not a civil rights claim. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 (Pon. 2010).

Civil Procedure – Summary Judgment – For Nonmovant

When summary judgment has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that its nonmoving opponent is not entitled to judgment as a matter of law. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 n.5 (Pon. 2010).

Property – Public Lands

A public land lease is void when it was issued without any prior notice to the then current lessee of record and without any opportunity for the current lessee to be heard and when it was issued without any prior notice to the then current lessee during the term of the lease held by the then current lessee and since it was set to start on a date during the term of the lease held by the then current lessee. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 (Pon. 2010).

Attorney's Fees – Court-Awarded – Statutory; Civil Rights

When a plaintiff has prevailed on its civil rights claim, the court may award it costs and reasonable attorney's fees. Since any attorney's fees award must be based upon a showing and a judicial finding that the amount of fees requested is reasonable, the plaintiff may file and serve detailed supporting documentation showing the date, the work done, and the amount of time spent on each service for which it makes a compensation claim so that the defendant may have notice and an opportunity to challenge the reasonableness of the fees and costs sought by the plaintiff. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 111 (Pon. 2010).

Property – Public Lands

When no one holds a valid lease for a lot, no one owes any lease payments for the lot. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 111 (Pon. 2010).

Property – Public Lands

A public land lease that has a provision that a holdover by a lessee does not give rise to any right to a renewal of the lease by the holdover lessee, indicates that any right to renew would not be automatic. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 111 (Pon. 2010).

Property – Public Lands

Since one of the Board's purposes is to administer, manage and regulate the use of public lands for the people of Pohnpei, this purpose is not served by leaving a lot without a lessee and not in productive use, especially when, the Pohnpei Legislature has directed that public lands in the cadastral plat including that lot be leased in an expeditious manner with the intent that all public land within that plat should be fully leased. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 111 (Pon. 2010).

Property – Public Lands; Torts – Trespass

When a plaintiff, based on its paid-up and unexpired prior lease, had a right superior to a later lessee to possess or occupy a public land lot No. 014-A-08, when the later lessees occupied that lot, they were trespassing. This is because the issue in a trespass action is who among the parties has the superior right to possession. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010).

Torts – Damages – Nominal; Torts – Trespass

If a defendant trespasses on a plaintiff's land but no actual damages can be proven, the plaintiff is entitled to nominal damages ($1). Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010).

Business Organizations – Corporations; Civil Procedure – Parties

A corporation is a juridical person separate from its owner. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010).

Civil Procedure – Dismissal; Contracts – Third-Party Beneficiary

A corporation has no valid cross-claim against a co-party and its cross-claims will be dismissed when it was not a party to the lease upon which the cross-claims are based and was not named as an intended third-party beneficiary in the lease. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010).

Contracts – Indemnification; Torts – Contribution

Although the FSM Supreme Court has recognized indemnity claims based on the parties' contractual provisions and has required precise clarity in the indemnification clause language, it has not been prepared to create a common law indemnity claim. Thus, when, even assuming the court were to find a defendant liable, there is no contractual provision for the plaintiff's indemnification by a defendant, a plaintiff's indemnity claim fails. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010).

Contracts – Indemnification

When a lease's only indemnification provision is one by which the lessee is required, under certain circumstances, to indemnify the lessor, the lessee's indemnification cross-claim against the lessor accordingly fails and is dismissed. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This came before the court on March 18, 2010, for a status conference and for hearing pending motions. The plaintiff, the Carlos Etscheit Soap Company ("Soap Company") is granted judgment, in the manner which and for the reasons that are explained below, and the Board of Trustees of the Pohnpei State Public Lands Trust ("Board") is granted judgment on a cross-claim against it. One cross-claim remains. The reasons follow.

I. CHRONOLOGY AND THE PARTIES' CLAIMS

A lease for Kolonia Town Lot No. 014-A-08 was granted on June 16, 1976, to Carlos Etscheit, who assigned it to another lessee in 1979, who then assigned it to the Carlos Etscheit Soap Company on March 14, 1995. In 1998, the Board issued the (assigned) lease to the Soap Company (duly recorded at the State Land Registry on April 13, 1998) and took the Soap Company's annual lease payments every year up to and including a January, 2005 lease payment. The lease's expiration date was July 1, 2005.

In July 2004, the Board advertised to the general public the immediate availability of Lot No. 014-A-08 for commercial lease. No notice was given specifically to the Soap Company. In January 2005, the Board executed a lease of Lot No. 014-A-08 to Erine McVey for a twenty-five year term running from October 7, 2004 to October 7, 2029. This lease was duly recorded on February 3, 2005. McVey occupied the lot in March 2005. At some point, relying on a March 14, 2005 Pohnpei Attorney General legal opinion, the Board deemed the Soap Company lease invalid.[1]

On March 18, 2005, the Soap Company filed a complaint alleging due process and civil rights violations by the Board and alleging trespass on Lot No. 014-A-08 by Do it Best Hardware and by Erine McVey, who had by then occupied it. The Soap Company's suit was docketed as Civil Action No. 2005-007. On April 8, 2005, it was consolidated with Civil Action No. 2005-008, in which McVey and Do it Best Hardware sued the Soap Company alleging interference with property rights and tortious interference with contract. All parties then executed a stipulation, approved by the court on April 14, 2005, that referred the matter to the Board of Trustees for it to conduct its own fact-finding hearing about the issuance of two different leases (the 1998 Soap Company lease and the 2004/05 McVey lease) for the same lot, and stayed further proceedings until that process was complete.

By its terms, the Soap Company's 1998 lease expired on July 1, 2005.

On October 28, 2005, the Board decided that McVey's lease of Lot No. 014-A-08 was valid and that the Soap Company's earlier lease had been invalid. On November 4, 2005, the Soap Company

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[1] The stated reason was that, although all of the proper signatures were on the Soap Company lease, not all of the formalities may have been complied with or approvals obtained before the 1998 recording and that therefore the lease to the Soap Company was illegal and could be disregarded if the Soap Company's lease payments were refunded. (The refund was to have been paid through a lien on Lot No. 014-A-08, that McVey, as lessee was expected to "resolve.") Later, McVey contended that when the assignment was made the assignor no longer had the legal capacity to assign its lease.

filed a motion for a temporary restraining order and a preliminary injunction and a "notice of appeal"[2] or an alternative motion to resume jurisdiction. On November 18, 2005, the court granted the temporary restraining order. Various separate and joint motions to dismiss the "appeal" or to oppose the court's "resumption" of jurisdiction or for the court to abstain were filed by the Board and McVey and Do It Best Hardware. The Soap Company opposed them all. On March 16, 2006, the court denied all those motions, holding that since the case had originally been filed in the FSM Supreme Court, the remand or reference to the Board had not divested the court of jurisdiction because the reference to the Board was, in effect, a reference to a court-designated fact-finder or a special master while the court retained overall jurisdiction. Carlos Etscheit Soap Co. v. Do It Best Hardware, 14 FSM Intrm. 152, 157 (Pon. 2006).

After consolidation, the plaintiff(s) in each case filed an amended complaint styling themselves as plaintiffs, which made the consolidated case's pleadings unwieldy and confusing. The court thus realigned the parties and ordered that the pleadings be simplified by having the Soap Company file, as plaintiff, a "second" amended complaint (which could be identical to its first amended complaint) against Erine McVey and Do It Best Hardware and against the Board of Trustees of Pohnpei State Public Land Trust, and then by having those defendants file answers to the second amended complaint and raise as counterclaims any claims they had against the Soap Company. This was done.

In its Second Amended Complaint, the Soap Company alleged that its civil rights and right to due process were violated by the lease to McVey, that the defendants trespassed on its leasehold (Lot No. 014-A-08), and that the Board's October 28, 2005 decision was unlawful. The Soap Company seeks as relief a declaratory judgment that its lease was valid and that the McVey lease was invalid; a declaratory judgment that the Board's actions in executing a lease to McVey and its decision upholding that lease were unlawful; damages for the defendants' trespass on Lot No. 014-A-08; and its attorney's fees and costs.

The Board did not counterclaim against the Soap Company but raised as affirmative defenses that the Soap Company failed to state a claim upon which relief could be granted, the court lacked jurisdiction, mootness and non-justiciability, mistake, and illegal contract void as against public policy. In their Amended Answer to Second Amended Complaint; Counterclaims, McVey and Do It Best Hardware raised much the same affirmative defenses and added ones of limitation of remedy, failure to exhaust administrative remedies, lack of standing, and the assignor's legal incapacity to assign the lease to the Soap Company. McVey and Do It Best Hardware counterclaimed against the Soap Company, alleging that the Soap Company interfered with its property rights in the leased lot and with its contract (the McVey lease) with the State of Pohnpei.

McVey and Do It Best Hardware also "counterclaimed," actually cross-claimed,[3] against the Board for breach of contract on the ground that the Board had warranted that it had the authority to lease Lot No.014-A-08 to McVey and, if the Soap Company lease turned out to be valid, for indemnification from the Board. The Board raised as an affirmative defense that Do It Best Hardware failed to state a claim and had no standing since it is not a party to the McVey lease. The Board also

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[2] On November 2, 2005, the Soap Company had filed, pursuant to the Board's rules, a Protest and Appeal of Award before the Board, which the Board denied.

[3] Regardless of whether the pleadings have labeled them correctly, claims against an opposing party are counterclaims and claims against a co-party are cross-claims. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 625 n.1 (App. 2003). Since the claims of Do It Best Hardware and Erine McVey against the Board of Trustees are claims against a co-party, they are cross-claims. *See* FSM Civ. R. 13(g).

raised mistake, waiver and equitable estoppel and the doctrine of unclean hands as affirmative defenses against all the cross-claims.

On October 18, 2006, the court ruled that, even if the Board were correct that the 1998 Soap Company lease was not valid, the Board was estopped from asserting that the Soap Company had no interest or right in Lot No. 014 A 08 since the lease was duly recorded with the proper signatures and since the Soap Company's lease payments had been accepted up through January 2005, and that, because the Soap Company had some interest in that lot, it had been entitled to notice and an opportunity to heard. Carlos Etscheit Soap Co. v. McVey, 14 FSM Intrm. 458, 462 (Pon. 2006). The court concluded that since no notice had been given the Soap Company, the February 3, 2005 lease to McVey would be invalid. *Id.* Since this made "the Soap Company's likelihood of success on the merits of the due process claim . . . almost certain," *id.*, the court issued the preliminary injunction sought by the Soap Company, thereby maintaining the status quo. *Id.* at 462-63.

Although the court fully expected that the parties would take further action to pursue their respective claims or to come to a mutual resolution of the matter, they did not until the court held a status conference in October 2009. Thereafter, on November 17, 2009, the Soap Company filed and served its Motion to Determine Appeal; Request for Further Proceedings. No opposition was filed. McVey and Do It Best Hardware filed a Motion to Set Scheduling Hearing. Nothing else was filed. All pending matters were heard on March 18, 2010, and all parties made oral presentations.

II. Standard of Review

The Soap Company asks that the court, based on the papers on file and the March 18, 2010 hearing arguments and thus without a trial or further evidentiary hearing,[4] determine the merits of its "appeal" from the Board's October 18, 2006 decision; decide the merits in Soap Company's favor; enter as a judgment the court's prior ruling that the Soap Company's due process rights were violated and hold McVey's lease void; and order, based on what the Soap Company represents as the Board's usual past practice, the Board to renew the Soap Company's lease of Lot No. 014-A-08. A trial court judgment issued without a trial or an evidentiary hearing is a summary judgment to which the trial court should apply the summary judgment standard – that summary judgment is proper only when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Albert v. George, 15 FSM Intrm. 574, 579 (App. 2008). This will therefore be treated as before the court for summary judgment.

Although no defendant opposed the Soap Company's November 17, 2009 motion in writing and although the failure to file an opposition is deemed to be a consent to a motion, FSM Civ. R. 6(d), the court cannot automatically grant the summary judgment motion since there must still be a sound basis in law and in fact upon which to grant the motion. *E.g.*, American Trading Int'l, Inc. v. Helgenberger, 15 FSM Intrm. 50, 52 (Pon. 2007); Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 95 (Pon. 1995); *see also* Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994). And, in order to succeed on a summary judgment motion, the movant must also overcome all the non-movant's affirmative defenses. *See, e.g.*, Lee v. Lee, 13 FSM Intrm. 68, 71 (Chk. 2004); Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 284 (Pon. 2001); FSM Dev. Bank v. Rodriguez Corp., 2 FSM Intrm. 128, 130 (Pon. 1985). Nonetheless, the court has also considered, where applicable, the various filed answers to interrogatories and affidavits, to the extent they could be considered opposition to the declaratory relief sought by the Soap Company.

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[4] Some previous motion hearings were evidentiary in nature.

III. ANALYSIS

A. *Undisputed Material Facts*

Based on the parties' filings and on prior evidentiary hearings, the following material facts are not in dispute:

1. Although the Soap Company had a duly recorded lease to Lot No. 014-A-08 with the proper signatures, the Board did not give the Soap Company any notice or an opportunity to be heard before it made Lot No. 014-A-08 available for immediate lease or before it granted McVey a lease to that lot or before it disregarded or revoked the Soap Company's existing 1998 lease to the same lot.

2. By its terms, the Soap Company's 1998 lease did not expire until July 1, 2005.

3. The Soap Company had not developed Lot No. 014 A 08 although it had obtained landfill and earthmoving permits for that lot.

4. In January 2005, the Board executed a lease for Lot No. 014-A-08 with McVey as the only named lessee. The McVey lease was duly recorded on February 3, 2005.

5. After McVey received the lease, McVey and Do It Best Hardware occupied Lot No. 014-A-08.

6. McVey has not developed Lot No. 014-A-08 in such a way that would prevent or hinder any other person from commercially developing the lot (and since April 14, 2005, McVey has, along with the Soap Company, been restrained from further development).

B. *Conclusions of Law and Application*

The court makes the following conclusions of law and the following applications of those conclusions:

1. When the court held on March 16, 2006, that it had subject-matter jurisdiction, the court disposed of the defendants' affirmative defenses of the Soap Company's failure to state a claim upon which relief could be granted, of the court's lack of jurisdiction, of failure to exhaust administrative remedies, and of lack of standing. Carlos Etscheit Soap Co. v. Do It Best Hardware, 14 FSM Intrm. 152, 156-58 (Pon. 2006). By implication, that ruling also disposed of the affirmative defense of mootness and non-justiciability since that defense, as pled, had the same grounds as the other defenses rejected by the court on March 16, 2006.

2. Since in 2004 the Soap Company held an unexpired, recorded lease to Lot No. 014-A-08 for which the lease payments were current and up to date, the Soap Company was entitled to notice and an opportunity to be heard before the Board could disregard or void that lease and advertise Lot No. 014-A-08 for immediate lease or could lease Lot No. 014-A-08 to another. This is true even if the Board considered the Soap Company's lease "illegal" due to omissions in the approval process. The duly-recorded Soap Company lease was valid on its face since it had all of the proper signatures on it before it was recorded, and, as such, the Soap Company had a right to rely on the lease. Since it was duly recorded and the payments were current, the Soap Company lease, if all of the correct procedures, approvals, and formalities had not been done for it to have been properly assigned to the Soap Company, was, at most, only defective and voidable. Because of the Board's prior conduct, the Soap Company held a lease to Lot No. 014-A-08 that was valid unless voided only after notice to, and an opportunity for, the Soap Company lessee to be heard. Since those steps were not taken, the Soap

Company has, accordingly, overcome the defendants' affirmative defense of an illegal contract contrary to public policy.

This follows the court's earlier ruling in Carlos Etscheit Soap Co. v. McVey, 14 FSM Intrm. 458 (Pon. 2006). That ruling, by necessary implication, also disposed of the affirmative defenses of lack of capacity by the assignor because the Board's conduct estopped the Board from asserting that the Soap Company had no rights whatsoever to Lot No. 014-A-08 and therefore from asserting that the Soap Company was not entitled to prior notice and an opportunity to be heard. The Soap Company lease had not been voided after notice and an opportunity to be heard before Lot No. 014-A-08 was advertised for immediate commercial lease. The Board violated the Soap Company's civil rights because it denied the Soap Company the due process of law when it did not give the Soap Company prior notice and an opportunity to be heard on the validity of its lease. This is because "[n]otice and an opportunity to be heard are the essence of due process of law." Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004); In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997); In re Extradition of Jano, 6 FSM Intrm. 93, 99 (App. 1993).

Accordingly, the Soap Company is, as a matter of law, entitled to a declaratory judgment that, even if its lease could have been voided, it had not been, and thus the Board's 2004 attempt to lease Lot No. 014-A-08 was improper. Since the Soap Company lease expired on July 1, 2005, the court does not need to consider whether the Board's later October 2005 decision could have then revoked the 1998 lease agreement.

3. As a matter of law, McVey and Do It Best Hardware did not violate the Soap Company's civil rights because neither defendant was a government agency or was claiming to act under color of law or injured, oppressed, threatened, or intimidated the Soap Company's exercise or enjoyment of its civil rights. Neither was responsible for giving the Soap Company notice and an opportunity to be heard; neither prevented the Soap Company from being given notice; and neither injured, oppressed, threatened, or intimidated the Soap Company to prevent it from having an opportunity to be heard. When a defendant is not a governmental entity, is not someone alleged to have acted under color of law, and is not a private person (not acting under color of law) who injures, oppresses, threatens, or intimidates another in exercising or enjoying or having exercised or enjoyed one's civil rights, the claim against that defendant is not a civil rights claim. Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998). The Soap Company's civil rights and due process claims against McVey and Do It Best Hardware are therefore dismissed and judgment granted in their favor on these claims.[5]

4. The McVey lease, recorded February 3, 2005, is void since it was issued without any prior notice to the then current lessee of record – the Soap Company – and without any opportunity for the Soap Company to be heard. It is also void since it was issued without any prior notice to the then current lessee during the term of the lease held by the then current lessee and since it was set to start on a date during the term of the lease held by the then current lessee. Accordingly, the counterclaims of McVey and Do It Best Hardware against the Soap Company are, as a matter of law, dismissed on the merits since those counterclaims rely on the McVey lease being valid and on the premise that the

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[5] When summary judgment has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that its nonmoving opponent is not entitled to judgment as a matter of law. *E.g.*, Alokoa v. FSM Social Sec. Admin., 16 FSM Intrm. 271, 277 (Kos. 2009); Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004); Truk Continental Hotel, Inc. v. Chuuk, 6 FSM Intrm. 310, 311 (Chk. 1994), *rev'd on other grounds*, 7 FSM Intrm. 117 (App. 1995). That is the situation here.

Soap Company lease was void.

Only if the Board had given the Soap Company prior notice that it might have made a mistake in executing the lease assignment for Lot No. 014-A-08 to the Soap Company and in accepting its lease payments and then given the Soap Company an opportunity to be heard[6] and if it was thereafter legally determined[7] that the Soap Company lease assignment was invalid and the Soap Company lease payments refunded, could the Board have then advertised Lot No. 014 A-08 as available for immediate commercial lease. If that had occurred before the Board granted McVey her lease, her lease could then have been valid. Accordingly, the Soap Company is entitled to, as a matter of law, a declaratory judgment that the McVey lease is invalid and to an order vacating the Board's issuance of that lease.

5. The Soap Company has therefore prevailed on its civil rights claim against the Board. Under 11 F.S.M.C. 701(3), "the court may award costs and reasonable attorney's fees to the prevailing party" in a civil rights case. Since any attorney's fees award must be based upon a showing and a judicial finding that the amount of fees requested is reasonable, Bank of the FSM v. Bartolome, 4 FSM Intrm. 182, 184 (Pon. 1990), the Soap Company may file and serve, within fourteen days of entry of this order, detailed supporting documentation showing the date, the work done, and the amount of time spent on each service for which it makes a compensation claim, Bank of Hawaii v. Jack, 4 FSM Intrm. 216, 219 (Pon. 1990); Salik v. U Corp., 4 FSM Intrm. 48, 50-51 (Pon. 1989), so that the Board may have notice and an opportunity to challenge the reasonableness of the fees and costs sought by the Soap Company. The Board will then have ten days to file and serve its response to the Soap Company's fees and costs request.

6. Once the Soap Company's lease expired on July 1, 2005, no one held a valid lease for Lot No. 014-A-08. Consequently, no one (neither the Soap Company nor McVey) owes any lease payments for Lot No. 014-A-08 for time since then.

7. The Soap Company lease agreement did not have a provision entitling the lessee to an automatic renewal. (Neither did the McVey lease.) The Soap Company (and also the McVey) lease has a provision that a holdover by a lessee does not give rise to any right to a renewal of the lease by the holdover lessee, thus indicating that any right to renew would not be automatic. No statute or regulation has been cited to the court as authority for, or as requiring that, a lessee can have its lease renewed solely upon request. Nor has the court's own research revealed any. Counsel's representation is not an adequate basis on which to order the Soap Company lease renewed. A "limitation of remedy" defense was raised by McVey and Do It Best Hardware solely against the Soap Company's claim that it was entitled to an automatic renewal of its Lot No. 014-A-08 lease. The Soap Company cannot overcome it. The request for an order renewing the Soap Company lease must be denied.

One of the Board's purposes is "[t]o administer, manage and regulate the use of [public] lands . . . for the people of Pohnpei . . . ." Pon. S.L. No. 1L-155-87, § 11(3) (now codified at 42 Pon. Code § 1-111(3)). This purpose is not served by leaving Lot No. 014-A-08 without a lessee and not in productive use. In fact, the Pohnpei Legislature has directed that public lands in Cadastral Plat No. 014-A-00 (of which Lot. No. 014 A 08 is a part) be leased "in an expeditious manner," with the intent that all public land within that plat should "be fully leased." Pon. S.L. No. 4L-79-98, § 2 (now codified at 42 Pon. Code § 10-136(2)).

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[6] The Pohnpei Public Land Regulations appear to contain provisions and procedures applicable to exactly this eventuality. *See* Pon. Pub. Land Regs. §§ 147-150.

[7] This legal determination may include the resolution of any timely appeal.

Since, as noted above, there is currently no valid lease for Lot No. 014-A-08, the Board shall, within 90 days of entry of this order, make Lot No. 014-A-08 available for immediate commercial lease, either by bid or by auction, conforming to all of its mandated and required practice and procedures for advertising to the general public the availability of lots for commercial lease. The Board shall also give both Erine McVey and the Carlos Etscheit Soap Company direct notice of the lot's availability and the procedure that will be followed.

8. The Soap Company, based on its paid-up and unexpired prior lease, had, before July 2005, a right superior to McVey and Do It Best Hardware to possess or occupy Lot No. 014-A-08. When, in March 2005, McVey and Do It Best Hardware occupied that lot, they were trespassing. This is because the issue in a trespass action is who among the parties has the superior right to possession. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 359 (App. 2003). Since the lot was not altered in such a way that it would prevent the Soap Company (or anyone else) from commercially developing the lot and since the Soap Company's lease expired only three and a half months later, the Soap Company cannot prove compensatory damages for trespass. If a defendant trespasses on a plaintiff's land but no actual damages can be proven, the plaintiff is entitled to nominal damages ($1). Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 50 (Chk. 2010). Accordingly, the Soap Company is granted, as a matter of law, judgment on its trespass claim against McVey and Do It Best Hardware for the sum of $1. Since the Board did not occupy or possess Lot No. 014-A-08, the Soap Company's trespass claim against the Board is hereby dismissed.

9. Do It Best Hardware is a corporation and thus a juridical person separate from McVey, its owner. Albatross Trading Co. v. Aizawa, 13 FSM Intrm. 380, 382 (Chk. 2005) (if a business enterprise is a corporation, it is a different person than the owner). It thus has no valid cross-claim against the Board since it was not a party to the (McVey) lease upon which the Do It Best Hardware cross-claims are based. Nor was it named as an intended third-party beneficiary in the McVey lease. The Do It Best Hardware cross-claims against the Board are therefore dismissed.

10. McVey cannot maintain an indemnification cross-claim against the Board. She asks that the Board, for its negligence in leasing her Lot No. 024-A-08, indemnify her for her costs of defending this action, her costs of improvements to the lot, and her lost revenue and profits. Although the FSM Supreme Court has recognized indemnity claims based on the parties' contractual provisions and has required precise clarity in the indemnification clause language, it has not been prepared to create a common law indemnity claim, so that when, even assuming the court were to find a defendant liable, there is no contractual provision for the plaintiff's indemnification by a defendant, a plaintiff's indemnity claim fails. Ehsa v. Kinkatsukyo, 16 FSM Intrm. 450, 458 (Pon. 2009); Joy Enterprises, Inc. v. Pohnpei Utilities Corp., 8 FSM Intrm. 306, 311 (Pon. 1998). The McVey lease's only indemnification provision is one by which the lessee (McVey) is required, under certain circumstances, to indemnify the Board. McVey's indemnification cross-claim against the Board accordingly fails and is dismissed.

11. Since McVey's breach of contract cross claim against the Board may not be resolved based on what is now before the court, the court therefore declines to rule on this cross-claim. Since there is no just cause for delay, the court hereby orders that judgment be entered on all other claims. The court will also order that if McVey does not take any steps to further prosecute her breach of contract cross-claim against the Board within sixty days of entry of this order, the court will deem that cross-claim abandoned and dismiss it.

IV. Order and Judgment to Be Entered

Accordingly, the court grants judgment in favor of the Carlos Etscheit Soap Company against the Board of Trustees of the Pohnpei State Public Lands Trust on the Soap Company's civil rights and

due process claims and dismisses those claims against Erine McVey and Do It Best Hardware. The Soap Company may file and serve, within fourteen days of entry of this order, its request for attorney's fees and costs under 11 F.S.M.C. 701(3), and the Board may file a response to the Soap Company's request within ten days thereafter. The Board's October 28, 2005 decision is vacated. The 2004/05 McVey lease issuance is vacated and no lease payments are due on that lease and no lease payments are due after January 2005 on the 1998 Soap Company lease.

The Board of Trustees of the Pohnpei State Public Lands Trust shall, within 90 days of entry of this order, make Lot No. 014-A-08 available for immediate commercial lease. The Board must give Erine McVey and the Carlos Etscheit Soap Company direct notice of this availability and must conform to all of its usual practice and procedure for advertising to the general public the availability of lots for commercial lease.

The court also grants judgment in favor of the Carlos Etscheit Soap Company against Erine McVey and Do It Best Hardware in the sum of $1 for the Soap Company's trespass claim. The Soap Company's trespass claim against the Board is dismissed.

Furthermore, the counterclaims of Erine McVey and Do It Best Hardware against the Carlos Etscheit Soap Company are dismissed and Do It Best Hardware's cross-claims and Erine McVey's indemnification cross-claim against the Board of Trustees of the Pohnpei State Public Lands Trust are dismissed.

There being no just reason for delay, the court expressly directs the clerk to enter judgment in conformity with the above rulings. FSM Civ. R. 54(b).

McVey may, within sixty days of entry of this order, take any further steps as she deems advisable to prosecute her breach of contract cross-claim against the Board. If she does not, the court will deem that cross-claim abandoned and dismiss it.

The preliminary injunction has outlived its usefulness in maintaining the status quo and is hereby dissolved. The clerk shall, within thirty days of entry of this order refund the restraining order/preliminary injunction bond.

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