FSM SUPREME COURT APPELLATE DIVISION

KADALINO DAMARLANE, MARGARET DAMARLANE, and MARY BERMAN, Appellants, vs. BRIAN DAMARLANE and PAULINO DAMARLANE, Appellees.	)	APPEAL CASE NO. P4-2012 (Civil Action No. 2011-004)

OPINION

Argued: June 28, 2013
Decided: August 8, 2013

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Temporary Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

APPEARANCE:

For the Appellants: Mary Berman, Esq.
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HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo; Civil Procedure – Default and Default Judgments – Sum Certain

Whether the damages sought in a default judgment constitute a sum certain is a matter of law which is reviewed de novo. Damarlane v. Damarlane, 19 FSM R. 97, 104 (App. 2013).

Civil Procedure – Default and Default Judgments – Sum Certain

A claim is not for a "sum certain" merely because the claim is stated as a specific dollar amount in a complaint, verified complaint, or affidavit. Damarlane v. Damarlane, 19 FSM R. 97, 104 (App. 2013).

Civil Procedure – Default and Default Judgments – Sum Certain

The Rule 55(b)(1) term "sum certain" contemplates a situation in which, once liability has been established, there can be no doubt as to the amount due, as in actions on money judgments and negotiable instruments, or similar actions where damages can be determined without resort to extrinsic

proof, that is, it contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, and is either ascertained and agreed upon by the parties or fixed by operation of law. Damarlane v. Damarlane, 19 FSM R. 97, 104 (App. 2013).

Civil Procedure – Default and Default Judgments – Sum Certain

When the asserted damages were not agreed upon by the parties or fixed by operation of law and when they can reasonably be disputed, not only in amount but also whether any of these "estimated costs" are for items that could properly be used as a measure of damages in the case, the clerk had no power to enter a default judgment since there was no sum certain. Damarlane v. Damarlane, 19 FSM R. 97, 104 (App. 2013).

Attorney and Client – Discipline and Sanctions

Counsel is disingenuous and lacks candor toward the appellate tribunal when the trial court correctly cited and relied on a controlling appellate division decision but she chose to ignore this authority and deliberately failed to address it in either the brief or during oral argument even though that decision was known to counsel because the trial court cited it and relied on it when it denied the motion for a default judgment. Damarlane v. Damarlane, 19 FSM R. 97, 104 & n.1 (App. 2013).

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Civil Procedure – Default and Default Judgments – Entry of Default – Setting Aside

Since the standard of review of a trial court's ruling on a motion for relief from judgment is whether the trial court has abused its discretion, the standard of review for a relief from an entry of default logically should also be abuse of discretion. Damarlane v. Damarlane, 19 FSM R. 97, 104 (App. 2013).

Civil Procedure – Default and Default Judgments – Entry of Default – Setting Aside

The standard for setting aside an entry of default under Rule 55(c) is the liberal and less rigorous "good cause" standard rather than the more restrictive excusable neglect standard used for setting aside a default judgment under Rule 60(b). "Good cause" is a broader and more liberal standard that frees the court from some of the restraints imposed by the excusable neglect requirement. Damarlane v. Damarlane, 19 FSM R. 97, 104-05 (App. 2013).

Civil Procedure – Default and Default Judgments – Entry of Default – Setting Aside

In determining whether good cause to vacate an entry of default exists, a court evaluates whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented and the court may also examine such things as the proffered explanation for the default, the good faith of the parties, the amount of money involved, and the motion's timing. Damarlane v. Damarlane, 19 FSM R. 97, 105 (App. 2013).

Civil Procedure – Default and Default Judgments – Entry of Default – Setting Aside

For the purpose of a Rule 55(c) motion to vacate an entry of default, the meritorious defense factor has a low threshold of adequacy and may be met even though a court finds a defendant's meritorious defense argument tenuous. Damarlane v. Damarlane, 19 FSM R. 97, 105 (App. 2013).

Civil Procedure – Default and Default Judgments – Entry of Default – Setting Aside

When, since the plaintiffs' claims were not for a sum certain, the clerk very properly did not enter a default judgment against either defendant and since only an entry of default was in place, the trial court properly used the lenient good cause standard to consider and grant the motion to set aside the entry of default because the movant did present tenuous but meritorious defenses and because his default was not willful and the five-month delay did not prejudice the plaintiffs. Damarlane v. Damarlane, 19 FSM R. 97, 105 (App. 2013).

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Civil Procedure – Injunctions

The appellate court reviews the issue of whether a trial court erred in issuing, modifying, or denying an injunction by using the abuse of discretion standard. Damarlane v. Damarlane, 19 FSM R. 97, 105 (App. 2013).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

A court may abuse its discretion by an unexplained, lengthy delay or by the failure to exercise its discretion within a reasonable time because the failure to exercise discretion is an abuse of the discretion. Damarlane v. Damarlane, 19 FSM R. 97, 105 (App. 2013).

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Civil Procedure – Consolidation

Since the grant of a motion to consolidate rests with the trial court's broad judicial discretion, an appellate court will review the trial court's denial of consolidation on an abuse of discretion standard. Damarlane v. Damarlane, 19 FSM R. 97, 106 (App. 2013).

Civil Procedure – Consolidation

Although a person must be joined as a party if in the person's absence complete relief cannot be accorded among those already parties, the trial court did not abuse its discretion by refusing to consolidate the case with another when the court can accord complete relief between the parties in the case without consolidation with another case because the plaintiffs' allegations set out facts, which, if proven, state causes of action for the common law torts of nuisance and trespass against the two operators of a private business plus a common law breach of contract claim and none of the defendants in the other case are parties in this case and other than the FSM national police holding a party one night, the plaintiffs' claims in the other case are otherwise unrelated to the claims in this case. Damarlane v. Damarlane, 19 FSM R. 97, 106 (App. 2013).

Appellate Review – Standard – Civil Cases – De Novo; Federalism – Abstention and Certification

An appellate court reviews an abstention order on an abuse of discretion standard. A trial court abuses its discretion when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence on which the court could rationally have based its decision. Damarlane v. Damarlane, 19 FSM R. 97, 106 (App. 2013).

Federalism – Abstention and Certification

While a plaintiff's lawyer may misconceive the proper legal theory of the claim but the complaint shows that the plaintiff is entitled to some relief which the court can grant, regardless of whether it asks for the proper relief, the complaint is sufficient and will not be dismissed. This same principle applies to abstention – even if the plaintiff's lawyer has misconceived the legal theory as one under the environmental regulations rather than a common law tort, that misconception should not be the basis for a dismissal on abstention grounds. The court must consider the actual nature of the case pled. Damarlane v. Damarlane, 19 FSM R. 97, 107 (App. 2013).

Federalism – Abstention and Certification

The major rationale for abstention is that the state court is the better court to decide an issue which involves state powers and particularly strong, identifiable state interests. Certain circumstances give rise to an inclination in favor of abstention, such as a state request for abstention where there are identifiable, particularly strong state interests such as monetary claims against the state or questions concerning ownership of land, but national courts still have the obligation to carry out their own jurisdictional responsibilities. Damarlane v. Damarlane, 19 FSM R. 97, 107 (App. 2013).

Federalism – Abstention and Certification

When unsettled areas of state law are the key to the case's resolution, abstention may also be

appropriate if it would avoid unsettling a delicate balance in national-state relationships and would avoid threatening the state's fiscal autonomy. Damarlane v. Damarlane, 19 FSM R. 97, 107 (App. 2013).

Federalism – Abstention and Certification

None of the circumstances favoring abstention applies in a case where there is no state request for abstention; the state is not even a party; and none of its agencies or regulations is involved and the plaintiffs' factual allegations set forth an action between private parties based on two common law torts, nuisance and trespass, plus a breach of contract claim, none of which involves unsettled areas of state law. Damarlane v. Damarlane, 19 FSM R. 97, 107 (App. 2013).

Torts – Nuisance

A nuisance is generally regarded as a substantial interference with the use and enjoyment of another's land caused by intentional and unreasonable conduct, or caused unintentionally by negligent or reckless conduct, or the performance of an abnormally dangerous activity. A substantial interference is actual, material, physical discomfort, material annoyance, inconvenience, discomfort, or hurt, or significant harm, that affects the health, comfort, or property of those who live nearby. Damarlane v. Damarlane, 19 FSM R. 97, 108 (App. 2013).

Environmental Protection; Torts – Nuisance

Defendants may be liable for nuisance regardless of whether they violated any environmental regulations and regardless of and without reference to any environmental regulations or laws. Violation of any such regulations might be used as evidence that a nuisance exists. A plaintiffs' nuisance cause of action is not and cannot be based on statutes or regulations when the complaint would state a common law cause of action for nuisance even if there were no environmental laws. Damarlane v. Damarlane, 19 FSM R. 97, 108 (App. 2013).

Federalism – Abstention and Certification; Jurisdiction – Diversity

Parties to a dispute within the scope of article XI, section 6(b) diversity jurisdiction have a constitutional right to invoke the FSM Supreme Court's jurisdiction and it is the solemn obligation of the court and all others within the Federated States of Micronesia to uphold the constitutional right to invoke national court jurisdiction under article XI, section 6(b). Damarlane v. Damarlane, 19 FSM R. 97, 108 (App. 2013).

Federalism – Abstention and Certification

While, when issues of national law are involved there is a particularly strong presumption against abstention, there is still a presumption against abstention when the court's jurisdiction is based solely on diversity of citizenship. As a general rule, the FSM Supreme Court trial division is obliged to exercise its jurisdiction and may not abstain simply because unsettled state law issues are presented. Damarlane v. Damarlane, 19 FSM R. 97, 108 (App. 2013).

Federalism – Abstention and Certification; Jurisdiction – Diversity

The FSM Supreme Court's solemn obligation to consider the interests and protect the rights of those who wish to invoke its constitutional jurisdiction counsels against the unfettered use of abstention. The benefit the Constitution secures to diverse parties is the right to litigate in national court. Damarlane v. Damarlane, 19 FSM R. 97, 108 (App. 2013).

Federalism – Abstention and Certification; Jurisdiction – Diversity

A diverse party's constitutional right to litigate in the FSM Supreme Court should not lightly be disregarded, and the FSM Supreme Court's discretionary power to abstain must be exercised carefully and sparingly. Damarlane v. Damarlane, 19 FSM R. 97, 108 (App. 2013).

Federalism – Abstention and Certification

When evaluating a motion to abstain, the FSM Supreme Court must recall its responsibility to exercise its jurisdiction under article xi, section 6 of the Constitution, and a judge must not undertake the decision to abstain lightly, since the national courts do have responsibility to exercise their own jurisdiction under article XI, section 6 of the Constitution. The FSM court cannot foist off on the state courts difficult state law questions presented in cases within the FSM Supreme Court's jurisdiction. Damarlane v. Damarlane, 19 FSM R. 97, 108-09 (App. 2013).

Federalism – Abstention and Certification; Jurisdiction – Diversity

Diversity cases where the causes of action are state law are not subject to abstention and dismissal at a judge's whim. That would make the constitutional right for diverse parties to litigate in the FSM Supreme Court an empty one. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Federalism – Abstention and Certification

The presumption is always that the FSM Supreme Court will exercise its constitutionally-defined jurisdiction. For the trial court to abstain, this presumption must be overcome. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Environmental Protection; Torts – Nuisance

National or state environmental laws and regulations are relevant to a nuisance claim only to the extent that failure to comply with those laws and regulations that apply to the defendants, may be evidence that the defendants' conduct is unreasonable, negligent, or reckless. However, reference to those laws is not necessary for the plaintiffs to prevail on a nuisance cause of action. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Torts – Nuisance

Nuisances are classified as either permanent, continuing, recurring or temporary in nature – a permanent nuisance is one which may be expected to continue indefinitely, and is generally caused by a single act that permanently affects the property's value while a temporary, recurring or continuing nuisance is one which is intermittent or periodic and can be abated, such as an ongoing or repeated disturbance caused by noise, vibration, or a foul odor. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Torts – Nuisance

Nuisances that affect the public at large are classified as public nuisances, while those that affect an individual or a small number of individuals are classified as private nuisances. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Environmental Protection; Torts – Nuisance

Nuisance law is frequently used to address liability in environmental contamination cases. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Torts – Nuisance

The first step in evaluating nuisance liability is to determine whether there has been substantial interference with plaintiffs' use and enjoyment of their land. The second step is to determine whether the harm caused by the defendant was intentional or unintentional. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013).

Torts – Nuisance

When harm is intentionally caused, liability attaches if the harm is unreasonable. Under the definition of nuisance, interference is unreasonable if the gravity of the harm outweighs the utility of

the conduct, or the harm is serious and the financial burden of compensating for it and similar harm to others would not force the defendant out of business. Damarlane v. Damarlane, 19 FSM R. 97, 109-10 (App. 2013).

Torts – Nuisance

If harm is unintentionally caused, nuisance liability will attach when it is the result of negligent or reckless conduct, or the result of an abnormally dangerous activity. Damarlane v. Damarlane, 19 FSM R. 97, 110 (App. 2013).

Torts – Nuisance

Once liability has attached (that is, if the nuisance claims are proven), the remedies that the plaintiffs can seek are money damages for past interference and, when it is a recurring or continuing nuisance, an abatement of the nuisance – an injunction ordering those causing the nuisance to cease certain activities. Damarlane v. Damarlane, 19 FSM R. 97, 110 (App. 2013).

Civil Procedure – Injunctions; Torts – Nuisance

An evidentiary hearing must be conducted before the abatement of a nuisance or injunction can issue (or be denied). This evidentiary hearing may be consolidated with the trial on the merits if the trial is advanced, but one must be held on the application for an injunction. Damarlane v. Damarlane, 19 FSM R. 97, 110 (App. 2013).

Civil Procedure – Dismissal

When the appellate court vacates a trial court dismissal, the case will be returned to the trial court in the same posture it was in when the trial court dismissed it. Damarlane v. Damarlane, 19 FSM R. 97, 110 (App. 2013).

Civil Procedure – Default and Default Judgments; Judgments

As a general rule, when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted. This principle guards against inconsistent judgments when the relationship between the parties requires joint and several liability. Damarlane v. Damarlane, 19 FSM R. 97, 110 (App. 2013).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This appeal is from a February 9, 2012 trial court order denying consolidation with another case; denying reconsideration of the denial of a request for an injunction; and abstaining from and dismissing a lawsuit by a family residing in Awak, U, Pohnpei against the owners of a neighboring business that dispenses alcohol and whose uncontrolled customers allegedly disturb the plaintiffs' enjoyment of their residence. We affirm the denial of a default judgment and the denial of consolidation, but reverse the order of abstention and the dismissal. Our reasons follow.

I. BACKGROUND

Brian Damarlane and Paulino Damarlane operate a business that is apparently a party place on an artificial berm or causeway in Mesenpal, Awak, U, Pohnpei. Nearby residents, Kadalino Damarlane, Mary Berman, and their daughter Margaret Damarlane assert that the business's operation on the berm

has substantially interfered with their use and enjoyment of their residence. That causeway or berm was the subject of litigation in Civil Action No. 1990-075 (Damarlane v. Pohnpei Transportation Authority), in which both the plaintiffs sued to halt Pohnpei's dredging construction materials from the Lagoon and to require the berm's removal.

The nearby residents, Kadalino Damarlane, Mary Berman, and Margaret Damarlane filed suit on January 10, 2011, against Brian Damarlane and Paulino Damarlane for operating a business on that berm that allegedly without a state liquor license dispenses alcoholic drinks to customers, that has unsanitary toilet facilities, and that frequently allows their customers to play loud music. The plaintiffs also allege that to access that berm the defendants and their customers cross and trespass on land filled in by and owned by plaintiff Kadalino Damarlane. And plaintiff Mary Berman alleges that defendant Paulino Damarlane also owes her $5,000 for his share of the costs of suit when she represented him (and others) in Civil Action No. 1990-075.

Brian and Paulino Damarlane were served the complaint and summons but did not answer or otherwise defend. The clerk, on request, entered their default on March 14, 2011. On August 10, 2011, Brian Damarlane filed a motion for relief from the entry of default. On October 13, 2011, the plaintiffs filed a motion for an injunction.

The trial court, on December 21, 2011, granted the motion to set aside Brian Damarlane's default; denied the plaintiffs' motion for a default judgment; and sua sponte moved to abstain from the case, noting that it was more likely to abstain when only state law causes of action were involved. On January 13, 2012, the plaintiffs filed their opposition to the court's motion to abstain and moved to consolidate this case, Civil Action No. 2011-004, with Berman v. FSM National Police, Civil Action No. 2011-007.

On February 9, 2012, the trial court denied the motion to consolidate and granted its own motion to abstain and dismissed the case. Damarlane v. Damarlane, 18 FSM Intrm. 177 (Pon. 2012). The plaintiffs timely appealed.

II. Issues Presented

The appellants assert that the trial court erred 1) by refusing to consolidate this case with Berman v. FSM National Police, Civil Action No. 2011-007; 2) by abstaining from and dismissing this case; 3) by refusing to grant them an injunction; 4) by granting the defendants relief from their default; and 5) by denying their motion for a default judgment.

III. Analysis

We will address the appellants' default judgment and entry of default issues first because if a default judgment had been entered in the trial court, the other trial court actions would not have occurred.

A. *Default Judgment*

The appellants contend that they should have been granted a default judgment against the defendants. They sought judgment for $10,005,000 – $5,000 for Paulino Damarlane's share of the costs of suit owed to plaintiff Mary Berman and $10 million for the plaintiffs' claims against Brian and Paulino Damarlane for the business those two run on the Mesenpal berm. They assert that once they supported those figures by affidavit, the court clerk had a duty to enter a default judgment in their favor because under Rule 55(b)(1) the clerk must enter a default judgment on request when a default has

been entered and the plaintiffs' claim is for a sum certain. The affidavit arrives at the $10 million sum by estimating the cost of a two-bedroom house in Hawaii, the cost of moving the plaintiffs' household to Hawaii, and the maximum fines the FSM might get if it could impose on and collect civil penalties from environmental protection law violators.

Whether the damages sought in a default judgment constitute a sum certain is a matter of law. We review matters of law de novo. *E.g.*, Narruhn v. Chuuk, 17 FSM Intrm. 289, 293 (App. 2010); Simina v. Kimeuo, 16 FSM Intrm. 616, 619 (App. 2009). We conclude that the appellants fundamentally misunderstand the meaning of the term "sum certain." As we clearly stated in George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010), a claim is not for a "sum certain" merely because the claim is stated as a specific dollar amount in a complaint, verified complaint, or affidavit. The Rule 55(b)(1) term "sum certain" contemplates a situation in which, once liability has been established, there can be no doubt as to the amount due, as in actions on money judgments and negotiable instruments, or similar actions where damages can be determined without resort to extrinsic proof, that is, it contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, is either ascertained and agreed upon by the parties or fixed by operation of law. *Id.*

The asserted damages were not agreed upon by the parties or fixed by operation of law. They can reasonably be disputed, not only in amount but also whether any of these "estimated costs" are for items that could properly be used as a measure of damages in this case. The clerk thus had no power to enter a default judgment since there was never a sum certain in this case. We therefore affirm the trial court's denial of a default judgment.

The trial court correctly cited and relied on our ruling in George v. Albert, but the appellants chose to ignore this controlling appellate division decision explaining the meaning of the term "sum certain" and deliberately failed to address it in either their brief or oral argument. This was disingenuous and lacks candor toward this tribunal. Appellants' counsel is warned that she ignores controlling precedent at her own peril.[1]

B. *Relief from Entry of Default*

The appellants contend that the trial court erred in granting relief from the entry of default. Since our standard of review of a trial court's ruling on a motion for relief from judgment is whether the trial court has abused its discretion, Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004); Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 445 (App. 1994), our standard of review for a relief from an entry of default logically should also be abuse of discretion.

The trial court granted Brian Damarlane's relief from the entry of default because he presented meritorious defenses on the trespass and nuisance claims; because no prejudice to the plaintiffs was apparent; because his delay in responding was not willful since he had difficulty finding an attorney and since the attorney had difficulty communicating with him as he had no telephone and the attorney was often off-island. Order at 2-4 (Dec. 21, 2011). Paulino Damarlane did not appear or move for relief from his default.

The standard for setting aside an entry of default under Rule 55(c) is the liberal and less rigorous

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[1] *See* FSM MRPC R. 3.3(a)(3) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"). Our George v. Albert decision was known to appellants' counsel because the trial court cited it and relied on it when it denied the appellants' motion for a default judgment.

"good cause" standard rather than the more restrictive standard of excusable neglect for setting aside a default judgment under Rule 60(b). FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 377-78 (Chk. 2000). "Good cause" is a broader and more liberal standard that frees the court from some of the restraints imposed by the excusable neglect requirement. *Id.* at 378. A Rule 55(c) motion for relief must be liberally construed because the Rule 55(c) standard is lenient. Gouland, 9 FSM Intrm. at 378. In determining whether good cause to vacate an entry of default exists, a court evaluates whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented and the court may also examine such things as the proffered explanation for the default, the good faith of the parties, the amount of money involved, and the motion's timing. *Id.* For the purpose of a Rule 55(c) motion to vacate an entry of default, the meritorious defense factor has a low threshold of adequacy and may be met even though a court finds a defendant's meritorious defense argument tenuous. FSM Social Sec. Admin. v. Chuuk Public Utility Corp., 16 FSM Intrm. 333, 334 (Chk. 2009). We conclude, and the appellants apparently do not dispute, that the trial court considered all these factors and correctly found that there was good cause for relief from the entry of default.

The appellants, however, contend that it was "fundamentally unfair that the court clerk could control the applicable standard for relief by neglecting to perform his duty under FSM Civ. R. 55(b)." Appellants' Br. at 16. The gist of this argument is that since a default judgment should have been entered, thus requiring the higher excusable neglect standard for relief, the trial court should not have been able to use the more lenient good cause standard and that the reasons given by the trial court for finding good cause were insufficient to overcome the excusable neglect standard for relief from a default judgment. By this argument, the appellants concede that, if the good cause standard is used, relief from the entry of default would be granted.

However, as seen above, since the plaintiffs' claims were not for a sum certain, the clerk therefore very properly did not enter a default judgment against either defendant. Since only an entry of default was in place, the trial court properly used the lenient good cause standard to consider and grant the motion to set aside the entry of default because Brian Damarlane did present tenuous but meritorious defenses and because his default was not willful and the five-month delay did not prejudice the plaintiffs.

The trial court did not abuse its discretion when it granted Brian Damarlane relief from an entry of default. We affirm the trial court's grant of Rule 55(c) relief.

C. *Injunction*

The appellants contend that the trial court erred by ignoring their request for an injunction. The trial court never ruled one way or the other on the plaintiffs' motion for an injunction.

We review the issue of whether a trial court erred in issuing, modifying, or denying an injunction by using the abuse of discretion standard. *See* FSM v. Udot Municipality, 12 FSM Intrm. 29, 52 (App. 2003). We note that a court may abuse its discretion by an unexplained, lengthy delay or by the failure to exercise its discretion within a reasonable time. Bualuay v. Rano, 11 FSM Intrm. 139, 147 (App. 2002). "The failure to exercise discretion is an abuse of the discretion." In re Certification of Belgrove, 8 FSM Intrm. 74, 78 (App. 1997). The trial court may have abused its discretion by never hearing and ruling on the motion but this abuse would be harmless if the case were dismissed and we affirmed the dismissal. But since we are vacating the dismissal, the trial court, on remand, will need to hold an evidentiary hearing on the injunctive relief motion and rule one way or the other.

D. *Consolidation with Civil Action No. 2011-007*

The appellants contend that the trial court should have granted their motion to consolidate this case with Berman v. FSM National Police, Civil Action No. 2011-007 because only then could the trial court grant complete relief between the parties since without the FSM as a defendant the court would be unable to order the FSM to remove the Mesenpal berm. They argue that this is a necessary joinder.

The trial court denied the motion because the FSM Secretary of Human Resources, the official the plaintiffs' sought to have order the berm's removal, was not a defendant in either of the two cases; because the plaintiffs' grievances against Brian and Paulino Damarlane were based in state law and related to but independent of the claims in Civil Action No. 2011-007; and because the plaintiffs' claims in this case are independent of the rights and responsibilities stemming from the creation of the berm. Damarlane v. Damarlane, 18 FSM Intrm. 177, 181 (Pon. 2012).

Since the grant of a motion to consolidate rests with the trial court's broad judicial discretion, Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 463, 464 (Pon. 2001); FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 295 (Pon. 2001), we review the trial court's denial of consolidation on an abuse of discretion standard.

A person must be joined as a party if "in the person's absence complete relief cannot be accorded among those already parties . . . ." FSM Civ. R. 19(a)(1). However, complete relief can be accorded between the parties in this case without consolidation with another case. The plaintiffs' allegations set out facts, which, if proven, state causes of action for the common law torts of nuisance and trespass against the two operators of a private business plus a common law breach of contract claim – the $5,000 in litigation costs Mary Berman alleges that Paulino Damarlane owes her. Other than the FSM national police holding a party on the berm one night, which the appellants allege disturbed them that night, the plaintiffs' claims in Civil Action No. 2011-007 are otherwise unrelated to the claims in this case and none of the defendants in 2011-007 are parties in this case.

The trial court's denial of the motion to consolidate was not an abuse of discretion. We affirm that denial.

E. *Abstention*

1. *Merits*

The appellants contend that the trial court should not have abstained from this case. They contend that national law is the basis for the court's jurisdiction because the FSM Environmental Policy Act and the regulations enacted thereunder form the basis of their complaint that the business on the berm pollutes the immediate vicinity. The trial court rejected this argument and the argument that those laws or the Compact of Free Association created a private right of action. Damarlane v. Damarlane, 18 FSM Intrm. 177, 179-80 (Pon. 2012). The trial court then granted its own motion to abstain and dismissed the case. *Id.* at 181.

We review an abstention order on an abuse of discretion standard. Narruhn, 17 FSM Intrm. at 293. A trial court abuses its discretion when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence on which the court could rationally have based its decision. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 246 (App. 2006); Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001); Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992).

The trial court's statement when making its sua sponte motion to abstain that it was less likely to grant abstention if issues of national law were involved may have caused the plaintiffs and the trial court to wander astray. The plaintiffs focused on trying to assert that their claims arose solely under national law, including various environmental protection regulations. The trial court concluded that since neither the national environmental statutes and regulations nor the Compact of Free Association created a private cause of action, the plaintiffs' case did not arise under national law and that it should therefore abstain. While the trial court was correct that those laws do not create private causes of action and that this case therefore does not arise under national law, that conclusion is of little or no relevance to the question of whether the trial court should abstain.

Although the complaint mentioned "national law" and nothing more, we conclude that the FSM Supreme Court's jurisdiction over this case is based solely on the diversity of citizenship.[2] The trial court was correct that this is a diversity case.

While a plaintiff's lawyer may misconceive the proper legal theory of the claim but the complaint shows that the plaintiff is entitled to some relief which the court can grant, regardless of whether it asks for the proper relief, the complaint is sufficient and will not be dismissed. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 114 (Chk. 1995). This same principle applies to abstention – even if the plaintiff's lawyer has misconceived the legal theory as one under the environmental regulations rather than a common law tort, that misconception should not be the basis for a dismissal on abstention grounds. The court must consider the actual nature of the case pled.

We have held that the major rationale for abstention is that the state court is the better court to decide an issue which involves state powers and particularly strong, identifiable state interests. Gilmete v. Carlos Etscheit Soap Co., 13 FSM Intrm. 145, 148 (App. 2005). We note that certain circumstances give rise to an inclination in favor of abstention, such as a state request for abstention where there are identifiable, particularly strong state interests such as monetary claims against the state or questions concerning ownership of land, but national courts still have the obligation to carry out their own jurisdictional responsibilities. Nanpei v. Kihara, 7 FSM Intrm. 319, 322 (App. 1995). And when unsettled areas of state law are the key to the case's resolution, abstention may also be appropriate if it would avoid unsettling a delicate balance in national-state relationships and would avoid threatening the state's fiscal autonomy. Narruhn v. Chuuk, 16 FSM Intrm. 558, 563 (Chk. 2009), *aff'd*, 17 FSM Intrm. 289 (App. 2010).

None of these circumstances applies in this case. There is no state request for abstention. The State of Pohnpei is not even a party. None of its agencies or regulations is involved. The plaintiffs' factual allegations set forth an action between private parties based on two common law torts, nuisance and trespass, plus a breach of contract claim.

The common law tort of nuisance is not an unsettled area of state law. *See, e.g.*, Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206 (Pon. 2003); Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a (Pon. 2002); Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM Intrm. 528 (Pon. 1998). Nor is the tort of trespass. *E.g.*, Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010); Ambros & Co., 12 FSM Intrm. at 212-13; Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 99-100 (Pon. 2002); College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 185 (Pon. 2001); Nelper, 8 FSM Intrm. at 533-34; Ponape Enterprises Co. v. Soumwei, 6 FSM Intrm. 341, 345 (Pon. 1994); In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 155 (Pon. 1993). And the $5,000 breach of contract claim does not involve unsettled state law either. *E.g.*, Phillip v. Aldis, 3 FSM Intrm. 33, 36

[2] Two of the three plaintiffs are United States citizens. The other parties are Pohnpei citizens.

(Pon. S. Ct. Tr. 1987). While there may be a presumption favoring abstention in claims involving unsettled state law and money damages against the state that touch on the particularly strong state interest of fiscal autonomy and federalism, Conrad v. Kolonia Town, 7 FSM Intrm. 97, 100 (Pon. 1995), money damages are not sought against the state in this case. Money damages are sought only from private parties. The state's fiscal autonomy is not threatened or even implicated. None of the factors that usually favor abstention are present in this case. There are no state powers involved. Nor are any particularly strong, identifiable state interests involved. And, despite the appellants' and the trial court's mentions of environmental regulations, no state regulations form the basis of this action.

A nuisance is generally regarded as a substantial interference with the use and enjoyment of another's land caused by intentional and unreasonable conduct, or caused unintentionally by negligent or reckless conduct, or the performance of an abnormally dangerous activity. Ambros & Co., 11 FSM Intrm. 262a, 262h (Pon. 2002); Nelper, 8 FSM Intrm. at 534. A substantial interference is actual, material, physical discomfort, material annoyance, inconvenience, discomfort, or hurt, or significant harm, that affects the health, comfort, or property of those who live nearby. Ambros & Co., 12 FSM Intrm. at 214; Ambros & Co., 11 FSM Intrm. at 262h; Nelper, 8 FSM Intrm. at 534.

The factual allegations in the plaintiffs' complaint state a claim for nuisance whether that cause of action is explicitly named or not. Thus, Brian and Paulino Damarlane may be liable for nuisance regardless of whether they violated any environmental regulations and regardless of and without reference to any environmental regulations or laws. Violation of any such regulations might be used as evidence that a nuisance might exist. But the plaintiffs' nuisance cause of action is not and cannot be based on statutes or regulations because the complaint would state a common law cause of action for nuisance even if there were no environmental laws. This is also true for the trespass and breach of contract causes of action. This is a private lawsuit between private parties. State interests are not implicated and do not predominate.

Parties to a dispute within the scope of article XI, section 6(b) diversity jurisdiction have a constitutional right to invoke the FSM Supreme Court's jurisdiction and it is the solemn obligation of the court and all others within the Federated States of Micronesia to uphold the constitutional right to invoke national court jurisdiction under article XI, section 6(b). Gilmete, 13 FSM Intrm. at 150. While when issues of national law are involved there is a particularly strong presumption against abstention, Naoro v. Walter, 11 FSM Intrm. 619, 621 (Chk. 2003), there is still a presumption against abstention when the court's jurisdiction is based solely on diversity of citizenship. As a general rule, the FSM Supreme Court trial division is obliged to exercise its jurisdiction and may not abstain simply because unsettled state law issues are presented. Edwards v. Pohnpei, 3 FSM Intrm. 350, 360 (Pon. 1988). The FSM Supreme Court's solemn obligation to consider the interests and protect the rights of those who wish to invoke its constitutional jurisdiction counsels against the unfettered use of abstention. Conrad, 7 FSM Intrm. at 99. The benefit the Constitution secures to diverse parties is the right to litigate in national court. Pernet v. Woodruff, 10 FSM Intrm. 239, 243 (App. 2001).

A diverse party's constitutional right to litigate in the FSM Supreme Court should not lightly be disregarded. The FSM Supreme Court's discretionary power to abstain "must be exercised carefully and sparingly." Gimnang v. Yap, 5 FSM Intrm. 13, 19 (App. 1991). When evaluating a motion to abstain, the FSM Supreme Court must recall its responsibility to exercise its jurisdiction under Article XI, Section 6 of the Constitution, Panuelo v. Pohnpei (I), 2 FSM Intrm. 150, 153 (Pon. 1986), a "judge must not undertake [the decision to abstain] lightly," Pryor v. Moses, 4 FSM Intrm. 138, 141 (Pon. 1989), since "[t]he national courts do have responsibility to exercise their own jurisdiction under article XI, section 6 of the Constitution," Panuelo (I), 2 FSM Intrm. at 153. The court cannot foist off on the state courts difficult state law questions presented in cases within the FSM Supreme Court's jurisdiction. *Id.*

No difficult state law questions are presented in this case. Diversity cases where the causes of action are state law are not subject to abstention and dismissal at a judge's whim. That would make the constitutional right for diverse parties to litigate in the FSM Supreme Court an empty one. In light of the factors usually considered in the rare cases when abstention is warranted, the trial court's decision to abstain was arbitrary and based on the erroneous conclusion of law that, in diversity cases, the presumption is that the court will abstain. That is false. The presumption is always that the FSM Supreme Court will exercise its constitutionally-defined jurisdiction. For the trial court to abstain, this presumption must be overcome. The trial court erroneously concluded that state environmental regulations would provide rules of decision in this case or that the case would turn on their application and that this regulatory scheme was the state interest involved. The trial court erroneously concluded or presumed that these state regulations and interests would be predominant in this case. This is a common law tort action between private parties. These erroneous conclusions amount to an abuse of the trial court's discretion.

The trial court's order of abstention is therefore vacated and the case remanded for further proceedings.

2. *On Remand*

On remand, the plaintiffs shall confine their litigation in this case to only those claims they have against Brian and Paulino Damarlane – nuisance, trespass, and breach of contract. While the plaintiffs may seek removal of the business run by Brian and Paulino Damarlane, they cannot, in this case, seek removal of the berm. The plaintiffs may introduce evidence that the defendants' intentional and unreasonable conduct or the defendants' unintentionally negligent or reckless conduct substantially interferes with the plaintiffs' use and enjoyment of their land. Ambros & Co., 11 FSM Intrm. at 262h; Nelper, 8 FSM Intrm. at 534. National or state environmental laws and regulations are relevant only to the extent that failure to comply with those laws and regulations that apply to the defendants, may be evidence that the defendants' conduct is unreasonable, negligent, or reckless. However, reference to those laws is not necessary for the plaintiffs to prevail on a nuisance cause of action.

Nuisances are classified as either permanent, continuing, recurring or temporary in nature – a permanent nuisance is one which may be expected to continue indefinitely, and is generally caused by a single act that permanently affects the property's value while a temporary, recurring or continuing nuisance is one which is intermittent or periodic and can be abated, such as an ongoing or repeated disturbance caused by noise, vibration or a foul odor. Nelper, 8 FSM Intrm. at 534. The nuisance the appellants complain of here is a recurring or continuing nuisance because it manifests itself, according to the plaintiffs, periodically whenever the defendants operate their party place business on over 200 days each year. Nuisances that affect the public at large are classified as public nuisances, while those that affect an individual or a small number of individuals are classified as private nuisances. Nelper, 8 FSM Intrm. at 534. We note that nuisance law is frequently used to address liability in environmental contamination cases. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 416 (Yap 2006).

The first step in evaluating nuisance liability is to determine whether there has been substantial interference with plaintiffs' use and enjoyment of their land. The second step is to determine whether the harm caused by the defendant was intentional or unintentional. Nelper, 8 FSM Intrm. at 540. When harm is intentionally caused, liability attaches if the harm is unreasonable. Under the definition of nuisance, interference is unreasonable if the gravity of the harm outweighs the utility of the conduct, or the harm is serious and the financial burden of compensating for it and similar harm to others would not force the defendant out of business. Nelper, 8 FSM Intrm. at 540-41 (Pon. 1998). If harm is unintentionally caused, nuisance liability will attach when it is the result of negligent or reckless

conduct, or the result of an abnormally dangerous activity. Nelper, 8 FSM Intrm. at 540-41 n.2.

Once liability has attached (that is, if the nuisance claims against Brian and Paulino Damarlane are proven), the remedies that the plaintiffs can seek are money damages for past interference and, when it is a recurring or continuing nuisance, an abatement of the nuisance – an injunction ordering those causing the nuisance to cease certain activities. *See* 58 AM. JUR. 2D *Nuisances* § 229, at 843 (rev. ed. 1989). An evidentiary hearing must be conducted before the abatement or injunction can issue (or be denied). This evidentiary hearing may be consolidated with the trial on the merits if the trial is advanced, FSM Civ. R. 65(a)(2), but one must be held on the application for an injunction.

This case will be returned to the trial court in the same posture it was in when the trial court dismissed it. Brian Damarlane's default has been vacated but he has yet to file an answer. The trial court should therefore set a deadline for him to answer. Paulino Damarlane's default is still in place. However, except for Berman's breach of contract claim against Paulino, Paulino's liability for a money judgment would seem to be joint and several with Brian Damarlane. "As a general rule then, when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted." 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2690, at 73 (3d ed. 1998). This principle guards against inconsistent judgments when the relationship between the parties requires joint and several liability. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 412, 417 (Yap 2012). The trial court should follow this principle here.

IV. CONCLUSION

Accordingly, we affirm 1) the trial court on its denial of a default judgment; 2) on its grant of relief from an entry of default; and 3) on its denial of the motion to consolidate. We reverse the trial court's abstention from the case; we remand the case to the trial court; and we instruct the trial court to set a deadline for Brian Damarlane to file and serve his answer and to proceed on to the motion for injunction. The trial court may then take such further action as is consistent with this opinion.

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