

FSM SUPREME COURT APPELLATE DIVISION

GORDON SMITH,)	APPEAL CASE NO. P8-2011
)	(Civil Action No. 2005-004)
Appellant/Cross-Appellee,)	
)	
vs.)	
)	
FABIAN NIMEA, individually and "FSN FINANCIAL)	
GROUP, INC., d/b/a FFGI CONSULTING GROUP,)	
)	
Appellees/Cross-Appellants.)	
)	

OPINION

Argued: June 27, 2013
Decided: September 18, 2013

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Bealeen Carl-Worswick, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Civil Procedure – Pleadings – Amendment; Civil Procedure – Pleadings – Supplemental

An amended pleading, FSM Civ. R. 15(a), is designed to include matters occurring before the complaint was filed but either overlooked or not known at the time, while a supplemental pleading, FSM Civ. R. 15(d), is designed to cover matters occurring later but pertaining to the original cause. Smith v. Nimea, 19 FSM R. 163, 167 n.1 (App. 2013).

Appellate Review – Standard – Civil Cases – De Novo; Civil Procedure – Summary Judgment – Grounds

In reviewing a grant or denial of summary judgment, an appellate court uses the same standard that the trial court initially used under Rule 56(c) in its determination of the summary judgment motion, which the court applies de novo to determine whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Smith v. Nimea, 19 FSM R. 163, 168-69 (App. 2013).

Appellate Review – Standard – Civil Cases – De Novo; Contracts – Interpretation

Interpretation of contract provisions is a matter of law to be determined by the court, and an appellate court reviews issues of law de novo. Smith v. Nimea, 19 FSM R. 163, 169 (App. 2013).

Appellate Review – Standard – Civil Cases – Factual Findings

The standard of review of trial court findings of fact is whether those findings are clearly erroneous. A trial court's findings are presumptively correct. When trial court findings are alleged to be clearly erroneous, an appellate court can find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, it is left with a definite and firm conviction that a mistake has been made. Smith v. Nimea, 19 FSM R. 163, 169 (App. 2013).

Appellate Review – Standard – Civil Cases – Factual Findings

An appellate court cannot substitute its judgment for that of the trial court. Smith v. Nimea, 19 FSM R. 163, 169 (App. 2013).

Administrative Law – Judicial Review; Civil Procedure – Summary Judgment – Grounds – Particular Cases

When the matter was already in the FSM Supreme Court before the employee-plaintiff sought a stay of the FSM court proceeding so that he could pursue state administrative relief, the employee-plaintiff could have appealed the adverse state administrative decision back to the FSM Supreme Court from the state administrative proceeding. But since he sought such relief and sought the court's permission, he should abide by the state administrative result when he did not appeal the administrative decision to either the Pohnpei Supreme Court or (back) to the FSM Supreme Court. His employer thus has the right to raise as a defense that the administrative decision is final on the issues it covered and that those issues can no longer be litigated in the FSM Supreme Court. Smith v. Nimea, 19 FSM R. 163, 170 (App. 2013).

Administrative Law – Judicial Review

Failure to timely appeal an agency decision is either jurisdictional or may be raised as an affirmative defense depending on the statute. Smith v. Nimea, 19 FSM R. 163, 170 (App. 2013).

Appellate Review – Standard – Civil Cases – De Novo; Contracts – Interpretation

Appellate courts interpret contract language de novo. Smith v. Nimea, 19 FSM R. 163, 171 (App. 2013).

Appellate Review – Standard – Civil Cases – De Novo; Contracts – Interpretation

When the contract language is clear and the record is clear, the appellate court may, on an alternate ground, affirm the trial court's decision denying an employee's claims for wages and overtime claims when the state administrative decision found as fact that he worked only on the projects for which he was paid a commission and when that decision was necessarily before the trial court when it was asked to grant partial summary judgment. Smith v. Nimea, 19 FSM R. 163, 171 (App. 2013).

Business Organizations

Business expenses (such as rent, utilities, or support-staff salaries) that cannot be allocated to a particular product or service; fixed or ordinary operating costs are considered overhead. Smith v. Nimea, 19 FSM R. 163, 171 n.4 (App. 2013).

Contracts – Interpretation; Employer-Employee

When, under the employment contract, compensation is to be figured on the "net total amount

for the specific job" not on the net total amount for only a part of the contract job, the employee's commission compensation must be figured on a contract job by contract job basis, not on a task-by-task basis within the contract job. Smith v. Nimea, 19 FSM R. 163, 172 (App. 2013).

Contracts; Remedies – Quantum Meruit

As a matter of law, the presence of an express written contract, which clearly sets forth the parties' obligations, precludes a party from bringing a claim in equity under quantum meruit. Smith v. Nimea, 19 FSM R. 163, 172 (App. 2013).

Contracts

A court will enforce a contract's unambiguous terms. Smith v. Nimea, 19 FSM R. 163, 172 (App. 2013).

Contracts – Interpretation

A court will enforce a contract as written. Contracts are not interpreted and enforced on the basis of one party's subjective views or secret hopes but on an objective basis based upon the meaning of the contract's words rather than on what a signatory later says. Smith v. Nimea, 19 FSM R. 163, 172 (App. 2013).

Contracts – Interpretation

When the contract's words mean that the employee's compensation must be based on a prorated share of the time spent on the project, the trial court did not err by concluding that the employee's compensation was based on the proportion of the time spent since that is what the contract required. Smith v. Nimea, 19 FSM R. 163, 172 (App. 2013).

Appellate Review – Standard – Civil Cases – Factual Findings

A trial court's "findings" are the facts as found. To be clearly erroneous, a decision must strike the appellate court as more than just maybe or probably wrong; it must strike the appellate court as wrong with the force of a five-week-old unrefrigerated dead fish. Smith v. Nimea, 19 FSM R. 163, 173 (App. 2013).

Civil Procedure – Parties; Civil Procedure – Pleading

When a complaint is against an individual d/b/a as a corporation, despite any indications to the contrary, there are, as a matter of law, two defendants in the trial court case and two cross-appellants in this appeal – the individual and the corporation. Smith v. Nimea, 19 FSM R. 163, 173 (App. 2013).

Business Organizations – Corporations; Civil Procedure – Parties

Even if it is wholly owned by one person, a corporation is not and cannot be a d/b/a because a corporation is an artificial, juridical person separate from its owner(s) and is thus a separate party. Smith v. Nimea, 19 FSM R. 163, 173 (App. 2013).

Civil Procedure – Pleadings – Amendment

Civil Procedure Rule 15(b) permits issues tried by implied consent to be considered as amendments to the pleadings. Smith v. Nimea, 19 FSM R. 163, 174 n.5 (App. 2013).

Business Organizations – Corporations – Liability; Civil Procedure – Parties

The alter ego doctrine treats two entities that are nominally separate as the same when one corporation has acted unjustly or fraudulently and specific factors which are determinative on this point include substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. Smith v. Nimea, 19 FSM R. 163, 174 (App. 2013).

Business Organizations – Corporations – Liability; Civil Procedure – Parties

When no clear answer to the alter ego question can be determined from the record before the appellate court, it will remand the matter to the trial court for it to determine whether the trial court judgment is against the individual defendant and the corporate defendant, jointly and severally, or just against the corporate defendant and why. Then, if the trial court decides that the judgment was or should now be entered only against the corporation, the plaintiff must be given the opportunity to try to pierce the corporate veil, especially if the corporation is an empty shell, and proceed against the individual personally as the corporation's alter ego. Smith v. Nimea, 19 FSM R. 163, 174 (App. 2013).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This appeal and cross-appeal concern an employment pay dispute. The employee, Gordon Smith, contends that the trial court should have awarded him his wages and overtime claim in addition to the \$8,674.79 commission it did award. The employer claims that the trial court award was excessive and should not exceed \$3,251.47. We affirm the trial court's decision that \$8,674.79 is the only amount owed to Smith but remand the case for the trial court to determine the party or parties liable to pay Smith. Our reasons follow.

I. BACKGROUND

On April 5, 2004, Smith, a Scottish national, executed a two-year employment contract with FSN Financial Group, Inc. ("FSN"), a corporation run by Fabian Nimea, whereby Smith would provide software programming for FSN's clients and would be paid commissions of 70% of the net contract amounts of the projects he worked on and \$15 an hour if assigned other duties. Smith worked on two projects: a \$7,500 contract to provide a loan management system for the Mesenieng Credit Union ("MCU") and a \$50,000 contract for an Integrated School Information Management System ("ISIMS") for the Pohnpei State Department of Education. By July 2004, Nimea felt that Smith did not have the needed skills to complete the ISIMS project and sought someone else to finish it. On November 1, 2004, Nimea hired Arnold Canete, who ended up working on both projects. Nimea terminated Smith on November 15, 2004. Nimea sent Smith's ISIMS project code to Canete, who began working on the ISIMS project once he received Smith's code. He completed the coding in January 2005, at which point he executed a two-year employment contract with Nimea. He was later responsible for testing and installing the ISIMS project.

Smith applied to the FSM Division of Immigration and Labor for relief. Its February 1, 2005 decision determined that the reasons for terminating Smith were reasonable and denied any further relief. That denial was appealed. On February 22, 2005, the FSM affirmed the administrative decision and ruled that Smith had exhausted his FSM national government administrative remedies.

On February 21, 2005, Smith filed suit in the FSM Supreme Court against "Fabian Nimea, individually and d/b/a FSN Financial Group, Inc. d/b/a FFGI Consulting Group," seeking \$47,835 in unpaid wages, overtime, post-termination pay, and commissions owed; the same amount for statutory damages under the Pohnpei State Wage Law; \$600 weekly for the rest of the contract; 9% prejudgment interest; punitive damages; damages for a defamatory statement made by Nimea; attorney's fees; injunctive relief under 51 F.S.M.C. 166; criminal penalties under 51 F.S.M.C. 167(1); and unspecified further relief. Compl. at 4 (Feb. 21, 2005). The defendants raised the affirmative defenses of failure to state a claim; truth as a defense; failure to mitigate damages; unclean hands;

estoppel; fulfillment of contract and payment; good faith effort to protect a legally cognizable interest; inapplicability of cited law; and offset.

Smith also presented his claims to the Pohnpei Division of Personnel, Labor and Manpower Development. On September 14, 2005, he asked the FSM court to stay proceedings while he pursued this administrative relief. On April 6, 2006, the Director of the Pohnpei Department of Treasury and Administration heard Smith's claims for unpaid wages, overtime, and wrongful termination. The Director's April 17, 2006 decision stated that "[t]his matter first came before the PL&MD sometime in November 2004 when Mr. Smith presented oral complaint alleging unlawful termination of employment and nonpayment of wages," but that the 2004 proceeding had been informal and all parties were not present so the 2006 hearing "was conducted as if no hearing was ever held by the State." Labor Matter 001-2006, Decision at 3 (Apr. 17, 2006). The Director denied Smith's claims. He also noted that under Pohnpei S.L. No. 2L-204-91, §18, Smith had 15 days to appeal the decision to the Pohnpei Supreme Court. Labor Matter 001-2006, Decision at 10 (Apr. 17, 2006). Smith twice sought reconsideration of the decision and was denied on May 2, 2006, and again on June 21, 2006. Smith did not appeal the Director's decision to any court.

On March 12, 2007, the defendants moved to amend the answer to add the affirmative defenses of statute of limitations, bar of failure to appeal an administrative decision, collateral estoppel, and res judicata, arguing that the April 17, 2006 administrative decision had conclusively adjudicated certain issues in Smith's employment action and that the defendants could not have included these defenses in their March 7, 2005 answer since the April 17, 2006 administrative decision had not yet been made. The trial court allowed the amendment under the liberal Rule 15(a) standard.¹ Smith v. Nimea, 16 FSM Intrm. 186, 189 (Pon. 2008).

On November 17, 2008, the trial court denied Smith's summary judgment motion and granted the defendants' summary judgment motion in part. *Id.* at 190. It dismissed Smith's claims for unpaid wages, overtime, wrongful termination, and the criminal penalty for non-payment of wages. *Id.* It also denied the defendants' summary judgment motion on Smith's claims for unpaid commissions and for business libel/interference with business opportunities. *Id.* at 191. Smith moved for reconsideration. On December 22, 2008, the trial court denied that motion.² The trial court also denied Smith's second motion for reconsideration of the partial summary judgment against him, Smith v. Nimea, 17 FSM Intrm. 125 (Pon. 2010), and his third motion for reconsideration, Smith v. Nimea, 17 FSM Intrm. 284 (Pon. 2010). And, on February 14, 2011, the trial court denied Smith's fourth and fifth motions for reconsideration. Trial was on March 17-18, 2011.

The trial court concluded that the employment contract was valid and enforceable; that clause

¹ The trial court erred by allowing the motion under Rule 15(a) because a pleading cannot be amended under Rule 15(a) to include events that occurred after the complaint is filed. An amended pleading, FSM Civ. R. 15(a), is designed to include matters occurring before the complaint was filed but either overlooked or not known at the time, while a supplemental pleading, FSM Civ. R. 15(d), is designed to cover matters occurring later but pertaining to the original cause. Herman v. Municipality of Patta, 16 FSM Intrm. 167, 170 (Chk. 2008). The trial court's error was harmless since if it had used the correct Rule 15(d) supplemental pleading standard, the defendants would still have been allowed to supplement their answer with the new defenses.

² On December 29, 2008, Smith filed his notice of appeal from both the November 17, 2008 and December 22, 2008 orders. The defendants moved to dismiss the appeal. On March 6, 2009, we granted the motion and dismissed the appeal because we lacked jurisdiction since the appeal was not from a final decision. Smith v. Nimea, 16 FSM Intrm. 346, 349 (App. 2009).

b of the contract's Addendum A, provided the allocation of compensation formula when more than one employee worked on the same project; that none of Smith's work was used in the finished MCU project so he was not entitled to any further compensation for the MCU project beyond the \$4,087.52 he had already been paid; that under clause b, once costs were deducted, the ISIMS project had a net value of \$20,694.05; and that Smith worked 54% of the hours spent on the ISIMS project was thus entitled to \$11,174.79 minus the \$2,500 he had already been paid, equaling \$8,674.79. Smith v. Nimea, 18 FSM Intrm. 36, 42-44 (Pon. 2011). The trial court also ruled that Fabian Nimea had not interfered with Smith's business opportunities or committed business libel when he filed comments about Smith's November 2004 application for a Pohnpei foreign investment permit. *Id.* at 45-48. Smith was thus awarded a judgment for \$8,674.79. *Id.* at 48.

The defendants timely moved to alter or amend the judgment, arguing that, even if Smith spent 54% of the hours worked on the ISIMS project, since only 15% of the finished product was code that Smith wrote, Smith's prorated compensation should have been 15%. The trial court denied the motion because the contract allocated compensation based on the proportion of time spent on the project and not on the portion of the finished product that the employee directly contributed. Order Denying Motions at 2 (Nov. 4, 2011). Smith timely appealed and the defendants timely cross-appealed.

II. ISSUES PRESENTED

A. *By Appellant*

Appellant Smith contends that the trial court erred by 1) denying his wages and overtime claims and other benefits under his FSM Non-Resident Worker Employment Contract because he had exhausted his administrative procedures under the FSM Administrative Procedures Act before filing this suit and because FSM law does not require that he also take further steps under state administrative procedures in order to establish FSM Supreme Court jurisdiction; and 2) improperly dismissing his claims.

B. *By Cross-Appellants*

The cross-appellants contend that 1) the trial court's factual findings in its October 5, 2011, and November 4, 2011 decisions were clearly erroneous; 2) the trial court's conclusions of law in its October 5, 2011, and November 4, 2011 decisions were clearly erroneous; 3) the damages awarded were not supported by equity, fact, or law and were an abuse of discretion; 4) awarding Smith compensation for work that was never used in the ISIMS project was an erroneous conclusion of fact and law; 5) awarding Smith compensation for work when he was unqualified and did not create any of the web-based applications for the ISIMS program, which was 85% of the project was an erroneous conclusion of fact and law; 6) awarding Smith compensation for 54% of the time compensable under Clause b of the Contract and 54% of the leftover compensation after overhead costs was an erroneous conclusion of fact and law; 7) disallowing apportionment of compensation to the work of Nimea, Canete, and others on the costs of training, testing, installation, and configuration, either as overhead or as apportionable time under the Contract; 8) disallowing overhead under the Contract for the costs of training, testing, installation, and configuration; and 9) awarding damages against Fabian Nimea for breach of contract when the contract was between FSN Financial Group, Inc. and Gordon Smith was an erroneous conclusion of fact and law.

III. STANDARDS OF REVIEW

In reviewing a grant or denial of summary judgment, we use the same standard that the trial court initially used under Rule 56(c) in its determination of the summary judgment motion, which we

apply *de novo* to determine whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Allen v. Allen, 17 FSM Intrm. 35, 39 (App. 2010); Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 590 (App. 2008); Albert v. George, 15 FSM Intrm. 574, 579 (App. 2008); Allen v. Kosrae, 15 FSM Intrm. 18, 21 (App. 2007). Interpretation of contract provisions is a matter of law to be determined by the court. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 621 (App. 1996); Nanpei v. Kihara, 7 FSM Intrm. 319, 323 (App. 1995). We review issues of law *de novo*. *E.g.*, Simina v. Kimeuo, 16 FSM Intrm. 616, 619 (App. 2009).

Our standard of review of trial court findings of fact is whether those findings are clearly erroneous, *e.g.*, George v. George, 17 FSM Intrm. 8, 9 (App. 2010). A trial court's findings are presumptively correct. *Id.* at 10; George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010). When trial court findings are alleged to be clearly erroneous, we can find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, we are left with a definite and firm conviction that a mistake has been made. George, 17 FSM Intrm. at 9-10; Albert, 17 FSM Intrm. at 30. But we cannot substitute our judgment for that of the trial court. Simina, 16 FSM Intrm. at 620, 624.

IV. ANALYSIS

A. *Smith's Assignments of Error*

The only issue that Smith has appealed is the trial court's grant of summary judgment denying his wage and overtime claims and a return airfare benefit under the FSM Non-Resident Worker Employment Contract.³ Smith contends that the trial court based that summary judgment on a clearly erroneous fact – that Smith had filed his claims with the Pohnpei State Division of Personnel, Labor and Manpower Development in November 2004. He asserts that he filed claims with the FSM Division of Immigration and Labor in November 2004 but did not file any claims then with the Pohnpei State Division of Personnel, Labor and Manpower Development until later (apparently 2006 after he moved in 2005 to stay the court proceedings to pursue Pohnpei administrative claims).

Smith contends that the November 17, 2008 partial summary judgment dismissing his wage and overtime claims and his wrongful dismissal claim because he failed to appeal those claims to the Pohnpei Supreme Court is erroneous because he had exhausted his administrative remedies with the FSM Division of Immigration and Labor before he filed his suit in the FSM Supreme Court and FSM law did not require that he also pursue and exhaust state administrative remedies in order to establish FSM Supreme Court jurisdiction over his claims.

The cross-appellants contend that since Smith affirmatively sought relief from the Pohnpei Division of Personnel, Labor and Manpower Development he must be bound by the adverse decision because he did not appeal it. Smith responds that when two or more tribunals have jurisdiction over the same matter, the one that first assumes jurisdiction retains it to the exclusion of the other and that since Smith first sought relief from the FSM Division of Immigration and Labor and then appealed to the FSM Supreme Court, those tribunals had jurisdiction over Smith's claims to the exclusion of the later Pohnpei state administrative proceedings and thus the Pohnpei proceedings were void and a nullity and

³ This is the order that Smith tried to appeal in late 2008 but that appeal was dismissed for lack of jurisdiction because it was not from a final order or judgment. *See supra* note 2.

therefore could not be used as a ground to grant partial summary judgment and dismiss his wage and overtime claims and his benefit claim. He asserts that he filed claims with the FSM Division of Immigration and Labor in November 2004 but did not file any claims then with the Pohnpei State Division of Personnel, Labor and Manpower Development until later.

The February 1, 2005 decision by the FSM Immigration and Labor states at the bottom of page one that the matter had been "first brought to the attention of the Pohnpei State Labor Office," and the April 17, 2006 state administrative decision says on page 3, "[t]his matter first came before the PL&MD sometime in November 2004 when Mr. Smith presented oral complaint alleging unlawful termination of employment and nonpayment of wages." But the April 17, 2006 decision also stated that the 2004 proceeding was informal and all parties were not present so the 2006 hearing "was conducted as if no hearing was ever held by the State." Labor Matter 001-2006, Decision at 3 (Apr. 17, 2006). Thus, the trial court factual finding was not clearly erroneous.

Although Smith is correct that FSM law does not require him to take further steps under state administrative procedures in order to establish FSM Supreme Court jurisdiction, he asked the court to stay its proceedings while he sought affirmative relief through the state administrative proceedings. Having sought such relief and having sought the court's permission, Smith should abide by the result. Since, according to Smith, the matter was already in the FSM Supreme Court before he sought state administrative relief, he could have appealed to the FSM Supreme Court from the state administrative proceeding. See Carlos Etscheit Soap Co. v. Do It Best Hardware, 14 FSM Intrm. 152, 157 (Pon. 2006) (when matter stayed in FSM Supreme Court so it could be referred to the Pohnpei State Board of Trustees the case could be "appealed" back to, or referred back to, the FSM Supreme Court trial division when the administrative proceedings were completed because when the FSM Supreme Court had subject-matter jurisdiction over the complaint's allegations when it was filed, and the court still retained that jurisdiction during the remand or reference); Church of the Latter Day Saints v. Esiron, 12 FSM Intrm. 473 (Chk. 2004); Kiniol v. Kansou, 12 FSM Intrm. 335 (Chk. 2004); Wito Clan v. United Church of Christ, 8 FSM Intrm. 116 (Chk. 1997); Small v. Roosevelt, Innocenti, Bruce & Crisostomo, 10 FSM Intrm. 367 (Chk. 2001).

At any rate, since Smith did not appeal the April 17, 2006 decision to either the Pohnpei Supreme Court or (back) to the FSM Supreme Court, the cross-appellants had the right to raise as a defense that the April 17, 2006 decision is final on the issues it covered and that those issues can no longer be litigated in the FSM Supreme Court. Failure to timely appeal an agency decision is either jurisdictional or may be raised as an affirmative defense depending on the statute. Anton v. Heirs of Shrew, 12 FSM Intrm. 274, 278 (App. 2003); Wiliander v. Mallarme, 7 FSM Intrm. 152, 158 (App. 1995); Andrew v. FSM Social Sec. Admin., 12 FSM Intrm. 78, 80 (Kos. 2003); Kinemary v. Siver, 16 FSM Intrm. 201, 206 (Chk. S. Ct. App. 2008); Charley v. Cornelius, 5 FSM Intrm. 316, 318 (Kos. S. Ct. Tr. 1992).

Although there was never a formal trial court order actually staying the case and permitting Smith to pursue the state administrative remedies and the parties acted as if a stay were in place. We will treat the matter as if a formal stay had been entered. The trial court therefore lacked the jurisdiction to consider the matters covered by the April 17, 2006 state administrative decision. We thus affirm the trial court summary judgment that it lacked the jurisdiction to consider the matters covered by the April 17, 2006 state administrative decision.

Nevertheless, having been decided on the merits, the record indicates that Smith worked only on the MCU and ISIMS projects. Smith has not shown that this factual finding is clearly erroneous. It therefore must stand. As such, as a matter of law, under his contract, Smith was never entitled to wages (\$15 an hour) or overtime claims (overtime is dependant on there being wages). All of his

compensation for the MCU and ISIMS projects were commissions calculated by the formula in clause b, Addendum A. The \$15 hourly wage provided for in clause 2, Addendum A, was in effect only "[i]f and when Employer shall assign Employee to perform any other jobs, duties, responsibilities, or assignments and Employee has performed such tasks required by Employer, and that job is not by contract with Employer's client." Employment Contract Addendum A, cl. 2. We interpret contract language de novo.

The contract language is clear. Since the record is clear, we hereby affirm the trial court's decision denying Smith's claims for wages and overtime claims. The state administrative decision found as fact that Smith worked only on the MCU and ISIMS projects for the cross-appellants. Labor Matter 001-2006, Decision at 4, ¶ 5 (Apr. 17, 2006). That decision was necessarily before the trial court when it was asked to grant partial summary judgment. We affirm the trial court on this alternate ground as well.

B. The Cross-Appellants's Assignments of Error

Fabian Nimea contends that he cannot be held personally liable on the judgment because Smith's contract was with the FSN Financial Group, Inc., not him. The cross-appellants contend that the \$8,674.79 damages were not supported by equity, fact, or law because Smith should not have been awarded compensation for work he performed but which was not used in the ISIMS project; because he was unqualified and did not create any of the web-based applications in the ISIMS project; because it was an erroneous fact that Smith spent 54% of the compensable time on the ISIMS contract; and because the trial court erred by not deducting certain sums from the contract price before calculating Smith's compensation. The applicable contract clause states:

Employee [Smith] shall be compensated based on an allocation formula, which would prorate the amount of time required from each team member for that particular contract and assessed against the net contract amount deduction of all applicable taxes and overhead costs relating to the implementation of the job have been deducted from the total gross contract amount.

Employment Contract Addendum A, clause b.

1. Overhead

The cross-appellants contend that more "overhead costs"⁴ should have been deducted from the ISIMS project amount before figuring Smith's commissions. They seek to deduct \$5,150 in "overhead costs" allocated for ISIMS testing, installation, and network configuration since Smith was not involved in those parts of the ISIMS project because he had been fired before then. This would reduce the \$20,694.05 net contract amount to \$15,544.05 and thus reduce Smith's compensation.

The \$5,150 that the cross-appellants seek to deduct was part of the total project. The trial court found that these "costs" were only costs for accounting purposes and not actual costs because they "contemplate[d] simply skilled labor applied toward the contracted-for services." Smith, 18 FSM Intrm.

⁴ The word "overhead" appears to be misused here. "Business expenses (such as rent, utilities, or support-staff salaries) that cannot be allocated to a particular product or service; fixed or ordinary operating costs" are considered overhead. BLACK'S LAW DICTIONARY 1213 (9th ed. 2009). The "overhead" claimed here is either real or accounting expenses or costs that were specifically allocated and only accounted for because of the existence of the ISIMS project. They were not overhead as that term is usually defined.

at 44. The skilled labor was supplied by Smith or later Canete who were to be compensated for it through the prorated 70% commission. The trial court correctly found that they were not "overhead costs" to be deducted before figuring the skilled labor's compensation.

Under the employment contract, compensation is to be figured on the "net total amount for the specific job" not on the net total amount for only a part of the contract job. Smith's commission compensation must be figured on a contract job by contract job basis, not on a task-by-task basis within the contract job. Even though Smith was terminated before these tasks were performed, they were part of the overall contract job. We therefore must reject this assignment of error.

2. Worth of Contribution

The cross-appellants also contend that, since only 15% of the coding ultimately used in ISIMS project was Smith's, his compensation should have only been 15%. They assert that equity and law require that Smith's commissions be based on the worth of his contribution to the final work product on the ISIMS project.

If Smith's compensation claims were based in equity – on a quantum meruit claim – this argument would bear weight. However, no quantum meruit recovery could be had here because there is a valid and enforceable contract between the parties. As a matter of law, the presence of an express written contract, which clearly sets forth the parties' obligations, precludes a party from bringing a claim in equity under quantum meruit. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 9 FSM Intrm. 551, 558 (Pon. 2000); Esau v. Malem Mun. Gov't, 12 FSM Intrm. 433, 436 (Kos. S. Ct. Tr. 2004); see also Actouka Executive Ins. Underwriters v. Simina, 15 FSM Intrm. 642, 651-52 (Pon. 2008); Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 232 (Pon. 2002).

We will enforce the contract's unambiguous terms. Those terms award compensation "based on an allocation formula, which would prorate the amount of time required from each team member for that particular contract." The parties could have chosen a different compensation formula based on the amount of code produced for the final work product or used some basis other than time spent. They did not. They chose to allocate compensation based on prorated time. We will not rewrite the parties' contract to include a provision that is not there but which one party, the party that drafted the contract, now wishes was in the contract. We will enforce the contract as written. Contracts are not interpreted and enforced on the basis of one party's subjective views or secret hopes but on an objective basis based upon the meaning of the contract's words rather than on what a signatory later says. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 571 n.3 (Pon. 2011).

The contract's words mean that Smith's compensation must be based on a prorated share of the time spent on the ISIMS project. The trial court did not err by concluding that Smith's compensation was based on the proportion of the time spent since that is what the contract required.

3. Hours Worked or Proration of Time

The trial court found that Smith worked 100 hours to Canete's 85 hours (54% of the time spent). The cross-appellants assert that the trial court should have found that Smith worked 50 hours to Canete's 85 so the percentage of time spent by Smith should be 37%, and if the 37% is taken from the \$15,544.05 (instead of the \$20,674.05 the trial court found) then Smith commission would be \$5,751.47 minus the \$2,500 already paid, thus equaling \$3,251.47.

The basis for their calculation that Smith worked only 50 hours is that Smith did not write any of the web-based portion of the ISIMS project but only worked on the service broker part of the

program so Smith must have only worked 50 hours instead of 100. The cross-appellants contend that this "analysis does not dispute the basic findings by the Court, nor does it dispute the facts found by the Court, but it applies the findings to the facts in a more reasonable manner." Cross-Appellants's Br. at 24.

A trial court's "findings" are the facts as found. The cross-appellants are actually arguing (or have to argue) here that the trial court's finding that Smith worked 100 hours is clearly erroneous and that it is obvious that Smith worked only 50 hours but trying to avoid the clearly erroneous standard because he realizes he has little chance of prevailing on it.

We do not feel that 100 hours is clearly erroneous and that it is obvious that Smith could not have worked more than 50. As another court colorfully put it: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish." Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988). There is no five-week-old unrefrigerated dead fish here. We will not reduce Smith's hours or percentage without a better showing by the cross-appellants that Smith only worked only the equivalent of 50 hours or that the time he spent on the ISIMS project amounted to only 37% of the time spent on that contract job.

4. *Corporate or Personal Liability or Both*

Fabian Nimea claims he should not be held personally liable because Smith's contract was with a corporation, not with him – Smith's employer was the FSN Financial Group, Inc. Fabian Nimea contends that the judgment should not have been entered against him personally but should have been entered only against FSN Financial Group, Inc. since, in his view, he was a defendant only on the tort claims on which Smith did not prevail, not on the breach of contract claim on which Smith did prevail.

Smith contends that his contract with the corporation was a temporary expedient and not intended to reflect reality. Smith further contends that Nimea is making this argument for the first time on appeal and that therefore we cannot consider it now. Smith now further contends that Nimea must be personally liable because his employment contract with the corporation was an illegal contract since it does not comply with sections of 51 F.S.M.C. 135 thus making Fabian Nimea's acts in drafting and executing the contract illegal and thus making Fabian Nimea personally liable because, in his view, under the *ultra vires* doctrine a corporation cannot be held liable for a director's or an officer's illegal act.

The defendants did raise the issue below. The answer denied that Fabian Nimea was a party to the contract and asserted that only FSN Financial Group, Inc. contracted with Smith. Answer ¶ 2 (Mar. 7, 2005). Nimea also moved to be dismissed as a defendant on the breach of contract claim. We can consider this issue.

Smith's complaint and its caption called the FSN Financial Group, Inc. a d/b/a of Fabian Nimea. Even if it is wholly owned by one person, a corporation is not and cannot be a d/b/a because a corporation is an artificial, juridical person separate from its owner(s) and is thus a separate party. FSM Telecomm. Corp. v. Helgenberger, 17 FSM Intrm. 407, 410 (Pon. 2011); Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM Intrm. 326, 329 n.1 (Pon. 2011); Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 112 (Pon. 2010). So, despite any indications to the contrary, there were, as a matter of law, two defendants in the trial court case below and two cross-appellants in this appeal – Fabian Nimea, an individual, and the FSN Financial Group, Inc., a corporation.

Smith's complaint treats the person and the corporation as one indivisible defendant and styled

the corporation as a d/b/a of Fabian Nimea. The trial court either mistakenly considered the FSN Financial Group, Inc. and Fabian Nimea to be one defendant or mistakenly thought that there was only one defendant. The trial court at one point referred to "[d]efendant Nimea, in his individual capacity, seek[ing] dismissal from this suit," Smith, 16 FSM Intrm. at 191, which would lead us to believe that the trial court mistakenly thought that there was one defendant present in two "capacities." In the final decision from which Nimea filed his cross appeal, the trial court referred only to "the defendant, Fabian Nimea ("Nimea")" throughout. Smith, 18 FSM Intrm. at 39.

The trial court may have conducted the trial in the mistaken belief there was only one defendant or the trial court may have tried the case and the judgment may have been entered on the implicit understanding that, or on the theory that, the corporation was Fabian Nimea's alter ego⁵ and held the FSN Financial Group, Inc. and Fabian Nimea jointly and severally liable. The October 5, 2011 decision orders "Nimea to pay to Smith the sum of \$8,674.79." Smith v. Nimea, 18 FSM Intrm. 36, 48 (Pon. 2011), and refers only to a single "defendant" throughout the decision. Even though the October 5, 2011 decision is silent on the corporation's existence, the FSN Financial Group, Inc. must be a liable party since it is the employer in Smith's employment contract.

At oral argument, Nimea denied that the alter ego theory was tried by the parties' consent, implicit or otherwise. The alter ego doctrine treats two entities that are nominally separate as the same when one corporation has acted unjustly or fraudulently and specific factors which are determinative on this point include substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 297, 300-01 (Yap 2012); Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 611, 614 (Pon. 2002). The record suggests that Fabian Nimea ran the business as if it were a sole proprietorship.

Since no clear answer to the alter ego question can be determined from the record before us, we will remand the matter to the trial court for it to determine whether its \$8,674.79 judgment is against Fabian Nimea and the FSN Financial Group, Inc. jointly and severally, or just against the FSN Financial Group, Inc., and why. Then, if the trial court decides that the judgment was or should now be entered only against FSN Financial Group, Inc., Smith must be given the opportunity to try to pierce the corporate veil, especially if the corporation is an empty shell, and proceed against Fabian Nimea personally as FSN Financial Group, Inc.'s alter ego.

V. CONCLUSION

Accordingly, we affirm the \$8,674.79 judgment amount and remand the case for the trial court to determine against whom the judgment is entered and why and to take such further action as is consistent with this opinion. The parties shall bear their own costs.

* * * *

⁵ Civil Procedure Rule 15(b) permits issues tried by implied consent to be considered as amendments to the pleadings.