

FSM SUPREME COURT TRIAL DIVISION

EMANUEL "MANNY" MORI, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MYRON HASIGUCHI and TRUK )  
 TRANSPORTATION CO., INC., )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

CIVIL ACTION NO. 2008-1111

ORDER DISPOSING OF MOST PENDING MOTIONS

Ready E. Johnny  
Associate Justice

Decided: October 25, 2013

APPEARANCES:

For the Plaintiff: Sabino S. Asor, Esq.  
P.O. Box 95  
Weno, Chuuk FM 96942

For the Defendants: Stephen V. Finnen, Esq.  
P.O. Box 1450  
Kolonias, Pohnpei FM 96941

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HEADNOTES

Statutes – Construction

When the word "district" appears in an FSM Code provision carried over from the Trust Territory Code by virtue of the Constitution's Transition Clause, "state" will be read in its place. Mori v. Hasiguchi, 19 FSM R. 222, 224 (Chk. 2013).

Civil Procedure – Venue

The venue statute permits, if the interests of justice will be served thereby, the FSM Supreme Court to transfer a trial division case from one venue (state) within the trial division to another venue or to be heard in part in a venue other than the venue in which the case was originally filed. The statute does not require that the venue be changed but leaves to the court's discretion whether to hear all or part of the case in a venue other than where the case was filed. Mori v. Hasiguchi, 19 FSM R. 222, 224-25 (Chk. 2013).

Civil Procedure – Venue; Costs

A motion to try the plaintiff's remaining claim in a Pohnpei venue will, in the court's discretion, be denied when the venue statute required that he originally file his complaint in Chuuk because Chuuk

was the state in which all the defendants could be found and the statute favors convenience for the defendants over convenience for the plaintiff. But because transporting the Pohnpei witnesses to Chuuk would work a distinct hardship on the plaintiff, the court will allow him three months to depose all the needed Pohnpei witnesses in order to preserve their testimony for trial and if he prevails at trial, the expenses of these depositions shall be taxed as costs payable by the defendants. Mori v. Hasiguchi, 19 FSM R. 222, 225 (Chk. 2013).

#### Evidence – Relevant

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the action's determination more probable or less probable than it would be without the evidence. All relevant evidence is admissible, except for the specific exceptions set out in the FSM Rules of Evidence. Mori v. Hasiguchi, 19 FSM R. 222, 225 (Chk. 2013).

#### Evidence – Relevant

When the plaintiff contends that the defendants attempted to interfere with his purchase of Transco stock by trying to get the seller to rescind the sale to him and to purchase it themselves, a past pattern of stock purchases might make it more probable than it would be without the evidence that the defendants tried to get the seller to sell them the shares and, furthermore, written correspondence received by Transco about this matter must also be relevant. Mori v. Hasiguchi, 19 FSM R. 222, 225 (Chk. 2013).

#### Civil Procedure

When there has been no trial yet, there can be no mistrial. Mori v. Hasiguchi, 19 FSM R. 222, 225 (Chk. 2013).

#### Civil Procedure – Motions

Regardless of what a movant calls a motion, the court will look to the actual relief sought and decide the motion on the basis of what it actually is, not what it is labeled. Mori v. Hasiguchi, 19 FSM R. 222, 225-26 (Chk. 2013).

#### Contracts – Consideration

Good and valuable consideration is an element in proving that a buyer was a bona fide purchaser for value. Good and valuable consideration is not the equivalent of fair market value; nor is it the equivalent of book value. Good and valuable consideration is often much lower than either of these values. Mori v. Hasiguchi, 19 FSM R. 222, 226 (Chk. 2013).

#### Civil Procedure – Pleadings – Amendment

Although a court should exercise its discretion liberally to allow amended pleadings, when a proposed amendment to a complaint would be futile because it still would not state a claim upon which the FSM Supreme Court could grant relief, the court may deny the motion to amend. Mori v. Hasiguchi, 19 FSM R. 222, 226 (Chk. 2013).

#### Torts – Conspiracy

Liability for civil conspiracy depends on performance of some underlying tortious act and is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort. Mori v. Hasiguchi, 19 FSM R. 222, 226 (Chk. 2013).

#### Civil Procedure – Pleadings – Amendment

When the proposed amended complaint adding a claim for conspiracy does not allege any underlying torts, the amendment would be futile and the motion to amend would accordingly be denied. Mori v. Hasiguchi, 19 FSM R. 222, 226 (Chk. 2013).

Civil Procedure – Pleadings – Amendment

While an amended pleading, once served, would render a prior pleading of no effect, if a court denies a motion to amend a pleading, the prior pleading must remain as the operative pleading, as is. Mori v. Hasiguchi, 19 FSM R. 222, 226 (Chk. 2013).

Civil Procedure – Pleadings – Amendment

When the court denies a plaintiff's motion to amend his complaint, his prior pleading remains in effect and the defendants must defend against it and the torts alleged in it. Mori v. Hasiguchi, 19 FSM R. 222, 226 (Chk. 2013).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On September 12, 2013, this came before the court for hearing the following motions filed by plaintiff Emanuel "Manny" Mori: 1) Plaintiff Mori's Motion to Change Venue, filed July 30, 2013; 2) Plaintiff Mori's Motion to Compel Discovery, filed August 12, 2013; 3) Plaintiff Mori's Motion for a Mistrial, filed August 16, 2013; and 4) Plaintiff Mori's Motion to Amend Complaint to Conform to the Evidence, filed August 16, 2013. Also pending is Plaintiff Mori's Motion for Rule 11 Sanctions Against Defendants and Their Counsel, filed September 6, 2013, but now superseded by Plaintiff's Revised Motion for Rule 11 Sanctions Against Defendants and Their Counsel, filed September 13, 2013. The Rule 11 motion will be the subject of a later order. The rest are disposed of by this order.

I. MOTION TO CHANGE VENUE

Mori asks that the court change this case's venue to Pohnpei and conduct trial on his remaining claims against the defendants there because he resides there, the tort allegedly took place there, and most of the evidence about the alleged tort is there as are most of the witnesses. Mori's remaining claim is the defendants' alleged tortious interference with Mori's purchase of Truk Transportation Co. ("Transco") stock from Barney Olter on Pohnpei in March 2008. Mori notes that a defendant, Myron Hasiguchi, who resides on Chuuk, has been deposed so that it will not be necessary for him to travel to Pohnpei to testify.

The defendants object to any change of venue. In their view, the plaintiff chose the Chuuk venue when he filed suit here almost five years ago and has, only now, once the case is ready for trial, decided to seek a venue change. The defendants contend that since Mori originally sought venue in Chuuk, he should bear the costs to prosecute his own action in the venue of his choice. The defendants further note that their records are on Chuuk and that their witnesses are also on Chuuk.

The court, "if it deems the interests of justice will be served thereby, may hear any matter in a District other than that in which it is brought, or may hear it partly in one District and partly in another District or Districts, or may transfer it from one District to another." 6 F.S.M.C. 304(3). Generally, when the word "district" appears in an FSM Code provision carried over from the Trust Territory Code by virtue of the Constitution's Transition Clause, "state" will be read in its place. Marsolo v. Esa, 18 FSM Intrm. 59, 66 n.5 (Chk. 2011); FSM v. Kansou, 14 FSM Intrm. 136, 138 n.1 (Chk. 2006).

The statute thus permits, if the interests of justice will be served thereby, a trial division case to be transferred from one venue (state) within the trial division to another venue or to be heard in part in a venue other than the venue in which the case was originally filed. But it does not require that the

venue be changed. The statute leaves it to the court's discretion whether to hear all or part of the case in a venue other than where the case was filed.

Mori filed this case in the Chuuk venue. It has been nearly five years since the case was filed and all of the other issues, including the central issue of stock ownership, have been resolved, mostly in Mori's favor, without a hearing on Pohnpei. Mori now seeks to try the remaining claims in Pohnpei because most of the witnesses for the remaining claim are there. The defendants oppose because all their witnesses are on Chuuk.

The court is not inclined to grant the motion to try Mori's remaining claim in a Pohnpei venue. The venue statute required that he file his complaint here originally because this was the state in which all the defendants could be found. 6 F.S.M.C. 301(1). The statute therefore favors convenience for the defendants over convenience for the plaintiff. The court, in its discretion, will deny the motion.

However, because transporting the Pohnpei witnesses to Chuuk would work a distinct hardship on Mori, the court will allow Mori three months to depose all the needed Pohnpei witnesses in order to preserve their testimony for trial. The Pohnpei witness depositions shall be completed by January 31, 2014. Mori may ask for more time, if needed. If Mori prevails on his remaining claims at trial, the expenses of these depositions shall be taxed as costs payable by the defendants.

## II. MOTION TO COMPEL

Mori noticed Hasiguchi's deposition and served a subpoena duces tecum on him asking him to produce certain documents at his deposition. Hasiguchi produced some of the documents but objected on the ground of relevance to the production of official Transco records of his total stock ownership showing the number of his shares, dates acquired, name and address of person from whom the shares were acquired, and the price of each purchase. He also objected on the ground of relevance to the production of official copies of all written correspondence received by Transco regarding this matter.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the action's determination more probable or less probable than it would be without the evidence, and all relevant evidence is admissible, except for the specific exceptions set out in the FSM Rules of Evidence. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 473 (Pon. 2001). Mori contends that the defendants attempted to interfere with his purchase of Olter's Transco stock by trying to get Barney Olter to rescind the sale and to purchase it themselves. A past pattern of stock purchases might make it more probable than it would be without the evidence that the defendants tried to get Barney Olter to sell them the shares. Furthermore, written correspondence received by Transco about this matter almost by definition must be relevant.

Accordingly, the motion to compel is granted and the defendants must produce, within 30 days, the requested documents except for any, such as written correspondence with their counsel, where privilege applies or any documents already provided.

## III. MOTION FOR MISTRIAL

Mori contends that the defendants have mischaracterized certain Pohnpei Supreme Court probate documents and that this misconduct entitles him a declaration of a mistrial and the dismissal of the defendants' case.

There has been no trial yet, so there can be no mistrial. However, regardless of what a movant calls a motion, the court will look to the actual relief sought and decide the motion on the basis of what

it actually is, not what it is labeled. See McIlrath v. Amaraich, 11 FSM Intrm. 502, 505-06 (App. 2003). Mori seeks a summary adjudication of the defendants' assertion that they acted properly and with the requisite caution when they were asked to transfer the ownership of the Transco stock from Salter Olter to Mori based on a sale by Barney Olter to Mori and some Pohnpei probate documents that the defendants characterize as ambiguous. Mori contends that based on the court's May 13, 2013 ruling that he was a bona fide purchaser for value, Mori v. Hasiguchi, 19 FSM R. 16, 22 (Chk. 2013), the defendants must have acted improperly.

Mori notes that the court has decided that he bought the Transco shares from Barney Olter for "good and valuable consideration" and further contends that this means that the defendants had no right to question the amount of shares he bought or their price when he first tried to have his ownership registered. Mori misunderstands the meaning of good and valuable consideration. Good and valuable consideration is an element in proving that a buyer was a bona fide purchaser for value. Good and valuable consideration is not the equivalent of fair market value; nor is it the equivalent of book value. Good and valuable consideration is often much lower than either of these values. Transco had the right to question the size of the purchase or the number of the shares acquired when the purchase price was not for fair market value or for (a somewhat different valuation) book value. Mori thus has no basis to prevail on this motion. It is denied.

#### IV. MOTION TO AMEND

Mori proposes to amend his complaint to add a civil conspiracy cause of action and appears to drop the earlier complaint's causes of action for intentional interference with a contractual relationship and interference with an advantageous business relationship.

Although a court should exercise its discretion liberally to allow amended pleadings, when a proposed amendment to a complaint would be futile because it still would not state a claim upon which the FSM Supreme Court could grant relief, the court may deny the motion to amend. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000). Liability for civil conspiracy depends on performance of some underlying tortious act and is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort. Ehsa v. Kinkatsukyo, 16 FSM Intrm. 450, 457 (Pon. 2009). The proposed amended complaint does not allege any underlying torts. The amendment would therefore be futile. Accordingly, the motion to amend is denied.

The defendants contend that by filing his motion to amend his complaint and by omitting the intentional interference with a contractual relationship and interference with an advantageous business relationship causes of action in his proposed amended complaint, Mori has implicitly waived those claims and that even if the court denies the amendment it should as a matter of law deem those claims waived or withdrawn. This is not true. While an amended pleading, once served, would render a prior pleading of no effect, if a court denies a motion to amend a pleading, the prior pleading must remain as the operative pleading, as is. *Cf.* People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 412, 415 (Yap 2012) (amended pleading supersedes the former pleading and renders it of no legal effect); Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 337 & n.3 (Pon. 2003) (a proposed amended complaint is not an operative pleading). Since the court, by this order, denies Mori's motion to amend, his prior pleading remains in effect and Transco and Hasiguchi must defend against it and the torts alleged in it.

#### V. CONCLUSION

Mori's motions to change venue to Pohnpei, for a mistrial, and to amend the complaint are denied. Mori may have additional time to depose any needed witnesses on Pohnpei. The motion to

compel production of documents is granted. The defendants shall produce them within 30 days. The court anticipates trial sometime early in 2014.

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FSM SUPREME COURT TRIAL DIVISION

PEOPLE OF THE MUNICIPALITY OF EAURIPIK,	)	CIVIL ACTION NO. 2011-3002
YAP, by and through SANTUS SARONGELFEG,	)	
JOHN HAGLELGAM, and MOSES MOGLIG,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
F/V TERAKA NO. 168, its engines, masts,	)	
bowsprits, boats, anchors, chains, cables, rigging,	)	
apparel, furniture, and all necessaries thereunto	)	
pertaining,	)	
	)	
In Rem Defendant,	)	
	)	
CHEN-JIN TYAN, CHEN-CHAO TING, CHEN CHAO	)	
YOU, YUH YOW FISHERY COMPANY, LTD.,	)	
MARIN MARAWA, LTD., MASANAGA SHIMAZU,	)	
MALAYAN TOWAGE AND SALVAGE	)	
CORPORATION, HSIN HORNG FISHERY	)	
COMPANY, LTD., EDGAR R. PELEAZ, and CHEN	)	
JIA YEN,	)	
	)	
In Personam Defendants.	)	
_____	)	
FEDERATED STATES OF MICRONESIA,	)	
	)	
Plaintiff in Intervention,	)	
	)	
vs.	)	
	)	
F/V TERAKA NO. 168, its engines, masts,	)	
bowsprits, boats, anchors, chains, cables, rigging,	)	
apparel, furniture, and all necessaries thereunto	)	
pertaining,	)	
	)	
In Rem Defendant,	)	
	)	
YUH YOW FISHERY COMPANY, LTD., MARIN	)	
MARAWA, LTD., and MASANAGA SHIMAZU,	)	
	)	
In Personam Defendants.	)	
_____	)	