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Ehsa v. FSM Dev. Bank
19 FSM R. 253 (Pon. 2014)

FSM SUPREME COURT TRIAL DIVISION

PERDUS I. EHSa AND TIMAKIO I. EHSa,)	CIVIL ACTION NO. 2013-030
)	
Plaintiffs,)	
)	
vs.)	
)	
FSM DEVELOPMENT BANK, JOSES GALLen,)	
HON. READY JOHNNY, POHNPEI STATE,)	
and POHNPEI STATE DEPARTMENT OF)	
LAND AND NATURAL RESOURCES, and)	
POHNPEI STATE COURT OF LAND TENURE,)	
)	
Defendants.)	
)	

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Martin G. Yinug
Chief Justice

Decided: January 22, 2014

APPEARANCES:

For the Plaintiffs:	Benjamin M. Abrams, Esq. International Guam Law Offices, P.C. P.O. Box 141 Hagatna, Guam 96932
For the Defendant: (FSM Dev. Bank)	Nora E. Sigrah, Esq. P.O. Box M Kolonias, Pohnpei FM 96941
For the Defendant: (Gallen)	Joses Gallen, Esq. P.O. Box 255 Kolonias, Pohnpei FM 96941
For the Defendant: (Pohnpei)	Monaliza Abello-Pangelinan, Esq. Assistant Attorney General Pohnpei Department of Justice P.O. Box 1555 Kolonias, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Filings

When no reason is provided for late filing and an enlargement of time is never sought, responsive

papers will, on the opposing party's unopposed motion to strike, be stricken from the record as untimely. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 255 (Pon. 2014).

Civil Procedure – Filings; Civil Procedure – Motions

A party who files a motion to enlarge time and files that motion out of time, must demonstrate excusable neglect for the delay. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 256 (Pon. 2014).

Civil Procedure – Filings; Civil Procedure – Motions

When a typhoon disrupted power and shut down all offices, courts, and utilities between October 17 and October 18, 2013, precluding the plaintiffs from properly serving the defendants, it is clear that the plaintiffs were justified in filing their motion *ex parte*, and have demonstrated excusable neglect, as the delay was caused by a *force majeure* event. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 256 (Pon. 2014).

Civil Procedure – Motions

When the plaintiffs have not filed a timely opposition to the defendants' motions to dismiss, they are deemed to have consented to those motions. However, the court still needs to establish that proper grounds exist before it may grant those motions. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014).

Civil Procedure – Dismissal – Before Responsive Pleading

A motion to dismiss for failure to state a claim will be granted only if it appears to a certainty that no relief can be granted under any state of facts that could be proven in support of the claim, and a court must assume that the facts alleged in the complaint are true, and the facts and inferences drawn from the complaint must be viewed by the court in the light most favorable to the party opposing the motion to dismiss the complaint. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014).

Civil Procedure – Dismissal – Lack of Jurisdiction

If it appears that the court lacks subject matter jurisdiction, the case must be dismissed since any judgment rendered by a court without subject matter jurisdiction would be void. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014).

Civil Procedure – Dismissal – Lack of Jurisdiction; Courts

One FSM Supreme Court trial division justice does not have subject matter jurisdiction to set aside orders entered in another separate trial division case, nor does he hold subject matter jurisdiction to grant injunctive relief against another trial division justice. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014).

Courts – Judges; Mandamus and Prohibition – Authority and Jurisdiction

The only procedure available to seek restraint of or injunctive relief against an FSM Supreme Court Trial Division justice is to be found in Rule 21 of the FSM Rules of Appellate Procedure. It is established in this jurisdiction that a writ of prohibition must be directed to a court or tribunal inferior in rank to the one issuing the writ. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014).

Appellate Review; Mandamus and Prohibition

FSM Appellate Rule 21 is a nearly verbatim adoption of U.S. Federal Appellate Rule 21, and so special consideration should be given to United States decisions regarding application of Appellate Rule 21. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014).

Courts – Judges; Mandamus and Prohibition – Authority and Jurisdiction

The structure of the FSM Court system dictates that as a practical matter a writ against a trial

division court may only be issued by the appellate division. Therefore, a writ of mandamus or prohibition, even if characterized as an "injunction" or "setting aside an order" may not be issued by one trial division justice against another FSM Supreme Court trial division justice. Appellate Rule 21 writs of prohibition are the sole procedure available for seeking restraint of a trial court judge's actions in a pending case. Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257-58 (Pon. 2014).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

Plaintiffs filed the First Amended Complaint on October 8, 2013. Defendant FSM Development Bank (FSMDB) filed a motion to dismiss on October 17, 2013. Defendant Joses Gallen joined that motion on the same day. On October 18, 2013, Defendant Pohnpei State filed a motion to dismiss. Plaintiffs filed a memorandum in opposition to Defendants' motions to dismiss on November 25, 2013. Defendant FSMDB filed a motion to strike Plaintiffs' opposition on December 9, 2013.

In addition to these filings, the parties briefed the Court on the issue of whether this Court has jurisdiction to enjoin a judge in the same Court from ruling on a matter that is currently before that other judge. Defendant FSMDB filed its memorandum on October 17, 2013 and Defendant Joses Gallen joined that memorandum on the same day. Defendant Pohnpei State filed its memorandum on October 18, 2013. Lastly, Plaintiffs filed their memorandum, along with a motion for enlargement of time, on October 21, 2013.

The Court, having reviewed the documents listed above, concludes that this matter must be dismissed. The reasons follow:

I. PRELIMINARY MATTERS

A. Defendant's Motion to Strike Plaintiffs' Opposition to Motion to Dismiss

Defendant FSM Development Bank (FSMDB) filed a motion to dismiss on October 17, 2013. Defendant Pohnpei State also filed a motion to dismiss on October 18, 2013. Plaintiffs filed an opposition to these motions to dismiss on November 25, 2013. Finally, on December 9, 2013, FSMDB filed a motion to strike Plaintiffs' opposition filed on November 25, 2013.

FSM Civil Rule 6(d), requires any opposition to Defendants' motions to dismiss to be filed and served within 10 days of service of the motion, and therefore Plaintiffs' motion had a filing deadline of October 28, 2013. Plaintiffs have not filed a motion for enlargement of time, nor offered an explanation for the delay. Where no reason is provided for late filing and an enlargement of time is never sought, responsive papers will be stricken from the record as untimely. See FSM v. Zhang Xiaohui, 14 FSM Intrm. 602, 608-09, 612 (Pon. 2007); Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM Intrm. 238, 240 (Pon. 1993) (where there is no timely opposition filed after the service of a motion, the opposing party is considered to have consented to the motion).

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiffs' opposition filed on November 25, 2013 is stricken from the record, and this Court will consider the Defendants FSMDB and Pohnpei State's motions to dismiss filed on October 17 and 18, 2013 as being unopposed.

B. *Plaintiffs' Ex Parte Motion for enlargement of Time*

On October 9, 2013 the Court ordered Plaintiffs to file, on or before October 17, 2013, a memorandum of law citing legal authority for the proposition that this Court has jurisdiction to enjoin a fellow judge in the same court from ruling on a matter that is currently before that other judge. Plaintiffs failed to comply with that deadline, and instead filed an *ex parte* motion to enlarge time on October 21. As Plaintiffs filed the motion out of time, they must demonstrate excusable neglect for the delay. FSM Civ. R. 6(b)(2).

Here Plaintiffs demonstrate excusable neglect by pointing to a *force majeure* event in the form of Typhoon Francisco which disrupted power and shut down all offices, courts and utilities between October 17 and October 18, 2013. The Typhoon also precluded Plaintiffs from properly serving Defendants with this motion, although a courtesy email copy was sent to Defendants. Under the circumstances it is clear that Plaintiffs were justified in filing their motion *ex parte*, and have demonstrated excusable neglect, as the delay was caused by a *force majeure* event. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219 (Chk. 2001) (excusable neglect established when movant shows good faith and reasonable basis for noncompliance).

NOW THEREFORE IT IS HEREBY ORDERED that time for Plaintiffs to comply with the Court's October 9, 2013 Order is enlarged to October 21, 2013, *nunc pro tunc*.

II. BACKGROUND

The First Amended Complaint is the fourth action filed by Plaintiffs seeking to restrain enforcement actions on a final judgment entered in Civil Action No. 2007-035. Plaintiffs have unsuccessfully attempted to vacate the judgment in Civil Action No. 2007-035, and have appealed the March 13, 2013 order Denying Relief from Judgment through Appeal No. P3-2013. Plaintiffs have declined to post supersedeas bond in that matter, and therefore the Appellate Panel has not granted a stay of the judgment.

Plaintiffs sought to vacate the October 2, 2013 hearing set in Civil Action No. 2007-035 on FSMDB's judgment enforcement actions, Motion to Transfer Title, which was denied. Order Denying Vacation of Hearing entered September 2, 2013. [FSM Dev. Bank v. Ehsa, 19 FSM R. 128 (Pon. 2013).] Plaintiffs then filed for a writ of prohibition from the Appellate Division, seeking restraint of the Trial Court's judgment enforcement actions in Civil Action No. 2007-035. Docketed as Appeal Case No. P5-2013, Plaintiffs' petition was denied by Order entered September 27, 2013. [Ehsa v. Johnny, 19 FSM R. 175 (App. 2013).]

Plaintiffs then filed the instant complaint on October 1, 2013 which requested, inter alia, that a temporary restraining order (TRO) be issued to enjoin a hearing from being held the next day on October 2, 2013 in Civil Action No. 2007-035. A hearing on the TRO was held on October 9, 2013, at which time Plaintiffs conceded that the question of a TRO was moot.

In addition to their efforts in the FSM Supreme Court, the Plaintiffs, on October 2, 2013 also filed a Complaint in Pohnpei Supreme Court, docketed as PCA No. 248-13,¹ in which they raise much the same issues as in the First Amended Complaint in this case. In PCA No. 248-13 Plaintiffs seek a

¹ PCA No. 248-13 has since been removed to this Court and is docketed as Civil Action No. 2013-032. In that case there are pending motions contesting the removal and also pending motions for consolidation of Civil Action No. 2013-032 with the instant matter.

preliminary and permanent injunction against defendants from registration of any transfer of title which may be entered by the FSM Supreme Court in Civil Action No. 2007-035.

III. ANALYSIS

A. *Standard of Review*

Plaintiffs have not filed a timely opposition to Defendants' motions to dismiss, and so are deemed to have consented to the motions. Moses v. Oyang Corp., 10 FSM Intrm. 273, 275 (Chk. 2001). However, the Court still needs to establish that proper grounds exist before it may grant the motions. *Id.* at 275; FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 345.

A motion to dismiss for failure to state a claim will be granted only if it appears to a certainty that no relief can be granted under any state of facts that could be proven in support of the claim, and a court must assume that the facts alleged in the complaint are true, and the facts and inferences drawn from the complaint must be viewed by the court in the light most favorable to the party opposing the motion to dismiss the complaint. Union Indus. Co. v. Santos, 7 FSM Intrm. 242, 244 (Pon. 1995). If it appears that the Court lacks subject matter jurisdiction, the case must be dismissed since any judgment rendered by a court without subject matter jurisdiction would be void. Harper v. William, 14 FSM Intrm. 279, 281 (Chk. 2006).

B. *Subject Matter Jurisdiction*

All six causes of action of the First Amended Complaint seek orders to set aside actions and orders entered by another judge in Civil Action 2007-035, or seek injunctive relief against the Trial Division justice presiding in Civil Action No. 2007-035. One Trial Division Justice of the FSM Supreme Court does not have subject matter jurisdiction to set aside orders entered in another separate Trial Division case, nor does he hold subject matter jurisdiction to grant injunctive relief against another Trial Division justice. Indeed, this common sense principle is so integral to the proper functioning of the FSM Supreme Court that no previous litigant has ever sought such relief from a justice of the Trial Division of the FSM Supreme Court.

The only procedure available to seek restraint of or injunctive relief against an FSM Supreme Court Trial Division justice is to be found in Rule 21 of the FSM Rules of Appellate Procedure. It is established in this jurisdiction that a writ of prohibition must be directed to a court or tribunal inferior in rank to the one issuing the writ. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 8, 10 (App. 1995); see e.g. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116 (Pon. 2001) (Pohnpei Supreme Court not inferior to FSM Supreme Court Trial Division for purpose of issuance of writ of mandamus because no appeal lies from Pohnpei Supreme Court to the FSM Supreme Court Trial Division).

The Berman Court restricted the issuance of a writ of prohibition such that it may only issue from a superior court to an inferior court. The structure of the FSM Court system dictates that as a practical matter a writ against a Trial Division court may only be issued by the Appellate Division. Therefore, a writ of mandamus or prohibition, even if characterized as an "injunction" or "setting aside an order" may not be issued by this Court against another justice of the Trial Division of the FSM Supreme Court.

FSM Appellate Rule 21 is a nearly verbatim adoption of U.S. Federal Appellate Rule 21, and so special consideration should be given to United States decisions regarding application of Appellate Rule 21. Nix v. Ehmes, 1 FSM Intrm. 114, 119 (Pon. 1982). Under the United States Federal Rules of Appellate Procedure, writs of prohibition issued under Appellate Rule 21 are the sole procedure available

for seeking restraint of a district court judge's actions in a pending case. See Dhalluin v. McKibben, 682 F. Supp. 1096, 1097 (D. Nev. 1988) (the structure of the federal courts does not allow a judge of a district court to rule directly on the legality of another judge's judicial acts); In re McBryde, 117 F.3d 208, 225 (5th Cir. 1997) ("[T]he chief judge cannot sit as a quasi-appellate court and review the decisions of the other judges in the district court").

IV. CONCLUSION

In the same manner as US District Court judges, FSM Supreme Court Trial division justices lack jurisdiction to rule directly on the legality of another Trial Division Justice's judicial acts. NOW THEREFORE IT IS HEREBY ORDERED that this case is DISMISSED for lack of subject matter jurisdiction.

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KOSRAE STATE COURT TRIAL DIVISION

JOSEPH S. ITTU,)	CIVIL ACTION NO. 63-12
)	
Appellant,)	
)	
vs.)	
)	
STEPHINSIN S. ITTU,)	
)	
Appellee.)	
_____)	

MEMORANDUM OF DECISION

Aliksa B. Aliksa
Chief Justice

Decided: January 22, 2014

APPEARANCES:

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HEADNOTES

Appellate Review – Standard – Civil Cases

The standard of review for appeals from the Land Court is set by statute. Land Court findings