FSM SUPREME COURT TRIAL DIVISION

PACIFIC SKYLITE HOTEL, Plaintiff, vs. PENTA OCEAN, Defendant.	CIVIL ACTION NO. 2011-022
CAPTAIN OSIAS CAMACHO , WILLIAM OMPOY, THEODY PLAZA, ERNESTO GOMEZ, ANTERO PULMANO AND GEOFREY DELICA, Plaintiffs, vs. PENTA OCEAN CONSTRUCTION COMPANY LTD.and TATSUNOSKE NISHIBA individually and as Administrative Manager of PENTA OCEAN CONSTRUCTION COMPANY LTD., Defendants.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Martin G. Yinug
Chief Justice

Trial: November 17-21, 2013
Decided: February 10, 2014

APPEARANCES:

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HEADNOTES

Evidence; Evidence – Burden of Proof

It is within the court's sound discretion whether to admit additional evidence after trial. Exercise of such discretion must take into account the evidence's probative value against the danger of injuring the opposite party through surprise. The opposing party cannot properly examine or counter evidence offered after trial, and so the burden is on the party offering the evidence to demonstrate good cause why the evidence should be admitted. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 269 (Pon. 2014).

Evidence – Witnesses

When the plaintiffs had ample opportunity to impeach a witness's testimony at trial; when all the arguments and evidence presented by the plaintiffs in their post-trial motion were available at trial and should have been presented at trial; when, if the plaintiffs were sincere in their desire to see the witness prosecuted, then they would have brought the matter to the attention of the appropriate authorities rather than asking the court to refer the matter for a perjury prosecution by a separate branch of government; and when the motion's filing suggests that the true motive was to impeach the witness's credibility, the plaintiffs' motion for an order referring the witness to the FSM Department of Justice for violation of the perjury statute will be denied, and the court will not consider the motion's contents in reaching a decision. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 269 (Pon. 2014).

Contracts – Interpretation

The controlling factor in interpretation of contracts is the parties' intention at the time of entering into the contract. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 274 (Pon. 2014).

Contracts – Interpretation

When a contract's language is ambiguous or uncertain, a court may look beyond the words of the contract to the surrounding circumstances and the parties' intent without changing the writing. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 274 (Pon. 2014).

Contracts – Interpretation

Contracts are not interpreted on the basis of subjective uncommunicated views or secret hopes of one of the parties, but on an objective basis according to the parties' reasonable expectations or understanding based upon circumstances known to the parties and their words and actions when the agreement was entered into. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 274 (Pon. 2014).

Contracts – Interpretation

When, given the plaintiffs' work experience, the objective intent of the parties must have been for the plaintiffs to perform work on a barge, the only two possibilities of the parties' intent that are in any way supported by the contract's context are for the contract term "project" to refer either to the barge's conduction voyage or to its conduction voyage and subsequent dredging activity. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 274 (Pon. 2014).

Contracts – Interpretation

Common law decisions of the United States are an appropriate source of guidance for the FSM Supreme Court for contract issues unresolved by statutes, decisions of constitutional courts, or custom and tradition within the FSM. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 275 (Pon. 2014).

Contracts – Interpretation

The court's precedents establish the validity of the principle of *contra proferentem* – any ambiguity in a contract is to be construed against the drafter – in this jurisdiction. But the rule that

language is interpreted against the party who chose it has no direct application to cases where the language is prescribed by law. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 275 (Pon. 2014).

Contracts – Interpretation

When one party chooses a contract term he is likely to provide more carefully for the protection of his own interests than for those of the other party. However, when the government mandates the specific contract language, neither party can directly impact the language through superior bargaining power and so the rule of *contra proferentem* does not apply. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 275 (Pon. 2014).

Contracts – Interpretation

A rationale for the rule of *contra proferentem* is that the party against whom it operates had the possibility of drafting the language so as to avoid the dispute. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 275 (Pon. 2014).

Contracts – Interpretation

When the employer could not have drafted the contract's duration clause differently because the language was mandated by a government agency, the policy rationale behind the doctrine of *contra proferentem* is inapplicable and the court will not use it to interpret the term "project" in the contract's duration clause. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 275 (Pon. 2014).

Contracts – Damages – Mitigation of

Choosing to remain idle in Pohnpei for nearly three years while forgoing suitable work in the Philippines, is manifestly unreasonable under the circumstances. A court will not compensate an injured party for a loss that he could have avoided by making efforts appropriate in the eyes of the court to the circumstances. The rationale behind this rule is to encourage the injured party to make reasonable efforts to avoid loss. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 275-76 (Pon. 2014).

Contracts – Damages – Mitigation of; Evidence – Burden of Proof; Employer-Employee – Wrongful Discharge

Even when the plaintiffs failed to make reasonable efforts to secure alternative employment, the burden of proof falls on the former employer to show that the former employees could have found alternative employment in their chosen field. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 276 (Pon. 2014).

Contracts – Damages – Mitigation of; Employer-Employee – Wrongful Discharge

When the former employer has demonstrated that suitable alternative employment was available and that the former employees failed to make reasonable efforts to secure alternative employment, the court must conclude that plaintiffs could not recover for breach of contract due to their failure to mitigate damages. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 276 (Pon. 2014).

Contracts – Formation

When the existence of a contract is at issue, the trier of fact determines whether the contract did in fact exist. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 276 (Pon. 2014).

Contracts – Accord and Satisfaction

The necessary elements to establish accord and satisfaction are 1) a claim about whose amount there exists a good faith dispute between the parties; 2) an agreement between the parties that the payment is in full satisfaction of the (contested) obligation and 3) acceptance of the payment by creditor. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 276 (Pon. 2014).

Contracts – Accord and Satisfaction

Accord and satisfaction between the parties bars any further attempt to enforce claims on the obligations that had been satisfied. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 277 (Pon. 2014).

Contracts – Interpretation

When the defendant arranged accommodation for its crew at a hotel and the crew members signed a check-in form that specified the check-out date as January 15, 2011, and since the January, 15 2011 check-out date not an ambiguous term, the meaning of the term is a question of law. The court will interpret the term according to its plain meaning that as a matter of law the contract ran through January 15, 2011. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 277 (Pon. 2014).

Contracts – Interpretation

When a court is presented with a valid contract that lacks a duration clause, it must construct one into the contract using the guideline of reasonableness. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 277 (Pon. 2014).

Contracts – Interpretation

When, under the circumstances, a reasonable duration term would be that the parties intended the crew to remain until the defendant provided the hotel with notice that accommodations were no longer required and when two of the crew members departed before January 27, 2011, and the hotel duly checked them out of the hotel and closed their account, this course of performance aids the court in determining that the parties intended the contract's duration to be that the crew members remain until the hotel was notified that accommodations were no longer required. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 277 (Pon. 2014).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

I. Background

This case was tried from November 17, 2013 through November 21, 2013. The Plaintiffs were represented by Joseph Phillip. The Defendants were represented by Fredrick L. Ramp, Esq. At the conclusion of the trial, the parties requested that the Court allow for the submission of written closing arguments. Plaintiffs filed their closing arguments on December 5, 2013, and Defendants filed theirs on the same day.

The Court having reviewed the testimony adduced at trial and the exhibits that were stipulated to, or otherwise entered into evidence at trial, as well as the arguments of counsel, and having reviewed the parties' closing arguments and other briefs, now finds and determines as follows:

II. Preliminary Matters

Defendants' Motion to Strike

Defendants have filed an unopposed motion to strike all exhibits attached to the closing argument filed by Plaintiffs on December 5, 2013, which were not admitted into evidence. Defendants ask to strike the following documents:

1) Exhibit A- Letter of Plaintiffs' counsel dated July 18, 2012

2) Exhibit B- Letter of Florencio Harper dated July 18, 2013

3) Exhibit C- Letter of David Wolphagen dated July 25, 2013

4) Exhibit C- Letter of David Wolphagen dated July 22, 2013

5) Exhibit D- Non resident worker affidavit of Melvin Santos

6) Exhibit D- Employment contract of Melvin Santos

It is within the sound discretion of the Court whether or not to admit additional evidence after trial. Exercise of such discretion must take into account the probative value of the evidence against the danger of injuring the opposite party through surprise. Evidence offered after trial cannot be properly examined or countered by the opposing party, and so the burden is on the party offering the evidence to demonstrate good cause why the evidence should be admitted. Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 121 (Pon. 1993). In the instant matter, Plaintiffs have not offered any reason why the Court should admit the documents at issue. In view of the lack of any showing by Plaintiffs why the Court should admit these documents into evidence, the Court will exercise its discretion to STRIKE the documents listed *supra*, and will not consider any argument proffered by Plaintiffs in reliance on these documents.

Plaintiffs' Motion to Refer Defendants' Witness to Department of Justice for Perjury

On December 9, 2013 Plaintiffs filed a motion for an order referring Defendants' witness Mr. Ye Lynn Htoon to the FSM Department of Justice and Pohnpei Attorney General's Office for violation of the perjury statutes 11 F.S.M.C. 541(1) and 61 Pon. C. §10-151. Defendants filed a motion in opposition on December 23, 2013.

Having reviewed these filings the Court concludes that Plaintiffs' December 9, 2013 motion is an inappropriate attempt to cast aspersion on the character of Defendant's key witness, Mr. Htoon. Plaintiffs had ample opportunity to impeach Mr. Htoon's testimony at trial, and all the arguments and evidence presented by Plaintiffs in their December 9, 2013 motion were available at trial and should have been presented at trial. If Plaintiffs were sincere in their desire to see Mr. Htoon prosecuted, then they would have brought the matter to the attention of the appropriate authorities, rather than requesting that the Court refer the matter for prosecution by a separate branch of government. That Plaintiffs filed their motion with the Court suggests that their true motivation was to impeach Mr. Htoon's credibility. For all these reasons, Plaintiffs' motion for an order referring Mr. Htoon to the FSM Department of Justice for violation of the perjury statute is DENIED, and the contents of the motion will not be considered by the Court in reaching a decision in this case.

III. FINDINGS OF FACT

The Case of William Ompoy and Ernesto Gomez:

A self propelled barge owned by Kwan Sing Engineering and Construction Company, Ltd. (Kwan Sing) was employed by Defendant Penta-Ocean Construction Company, Ltd. (Penta-Ocean) on the Pohnpei Airport Extension Project as part of a Kwan Sing sub-contract with Penta-Ocean.

Penta-Ocean had two major projects going on in Pohnpei with overlapping schedules. One was

the Airport Improvement Project which had begun first. The other was the Airport Extension Project. The barge and dredging operations were used only on the Airport Extension Project.

The barge departed from the Philippines on December 16, 2010 and arrived in Pohnpei on January 5, 2011.

Twelve Philippine crew members were employed on the transit voyage, also referred to as a "conduction voyage," engaged in the transportation of the barge from the Philippines to Pohnpei.

In order to employ these crew members on the conduction voyage, Kwan Sing had to secure, for each crew member, a certificate from the Philippine Overseas Employment Agency (POEA).

As a condition precedent for the issuance of a certificate, the POEA requires that the certificate recipient submit a work permit from the country of destination, as well as a signed standard-form contract. Therefore it was necessary that each crew member secure a work permit from the state of Pohnpei.

Standard practice in the state of Pohnpei is that a work permit for a foreign worker will issue only upon the filing of a contract between a worker and an employer which is registered in the state of Pohnpei.

Kwan Sing was not registered in the state of Pohnpei, while Penta-Ocean was so registered. Therefore, it was necessary that Penta-Ocean file with the state of Pohnpei employment contracts between itself and each of the twelve crew members employed on Kwan Sing's barge. Each contract set compensation at $500 per month and was for a term of one year.

Penta-Ocean understood that the employment contracts filed with the state of Pohnpei were null instruments as between the company and the crew members. The company filed these employment contracts with the state of Pohnpei for the sole purpose of securing work permits for the Philippine crew members.[1]

The work permits issued by the state of Pohnpei named Penta-Ocean as the employer, and so Penta-Ocean also had to be the employer signatory to the (different) employment contracts filed with the POEA. Thus, although the workers engaged in the conduction voyage would be compensated by Kwan Sing, they signed employment contracts with Penta-Ocean.

All parties to this dispute agree that the contracts filed with the POEA are the controlling contracts in this case. These contracts were entered into evidence as Defendants' Exhibits 3(a) and 3(c).

The contracts executed by Penta-Ocean and the crew members were standard forms used for all of the dozens of Philippine workers employed on Penta-Ocean projects in Pohnpei, regardless of their profession and job responsibilities. The terms of these contracts (except for compensation) were dictated by the requirements of the POEA.

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[1] Plaintiffs testified at trial that they never signed the employment contracts Penta Ocean filed with the state of Pohnpei. Penta-Ocean conceded at trial that the employment contracts submitted to Pohnpei state are not controlling in this instance, and so it is not necessary to determine whether the signatures on these contracts were genuine.

The contracts signed by Plaintiffs William Ompoy and Ernesto Gomez set their individual compensation at $2,000 each per month. This salary was significantly higher than the salary paid to other Philippine workers employed by Penta-Ocean to perform land-based labor in Pohnpei. The higher compensation reflected a risk premium due to the dangers inherent in transporting a barge over the open ocean.

The standard form contracts signed by all of Penta-Ocean's Pohnpei-based Philippine employees (including Plaintiffs) contained a duration clause. Contract duration was stated in paragraph 2 of all the Philippine worker contracts as being "One year and or until the project is finished..."

Although the contracts for all of Penta-Ocean's Pohnpei-based Philippine employees contained the same duration clause, in practice some employees worked for a longer time than others. Some worked for more than one year while others worked for less than one year.

Each Philippine employee would leave Pohnpei when the task he was assigned was complete. With the exception of Plaintiffs in this case, every Philippine employee working on the Airport Extension Project returned to the Philippines when his assigned task was complete.

Of the twelve crew members on the conduction voyage, four were longstanding employees of Kwan Sing who intended to remain with the vessel in Pohnpei performing dredging work. The remaining eight crew members (herein "conduction crew") were needed for the conduction voyage because they held international Seaman's licenses, and thus were licensed to transport ships in the open ocean. The conduction crew, including Plaintiffs William Ompoy and Ernesto Gomez, were all seamen, ships crewmen who devoted their professional careers to working on ships.

The contracts Penta-Ocean signed with the conduction crew were for the conduction voyage only. The duration clause in these contracts read "One year and or until the project is finished." In the context of the conduction crew, the word "project" in the duration clause referred to the conduction voyage.

On December 9, 2010, PAMSCORP[2] convened a meeting with the conduction crew to explore whether they might be willing to extend their contracts with Penta-Ocean, such that they would remain with the barge in Pohnpei to perform dredging work. PAMSCORP explained that the conduction crew would earn a reduced salary for the dredging work (relative to that for the conduction voyage).[3]

At the meeting convened by PAMSCORP, the conduction crew declined the offer from PAMSCORP to remain in Pohnpei with the barge in order to perform dredging work.

The conduction crew arrived in Pohnpei on January 5, 2011, with the barge. Upon their arrival in Pohnpei they were informed orally that their contracts were concluded and so Penta-Ocean would make arrangements for their return to the Philippines. Written termination notices were provided on January 17, 2011.

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[2] PAMSCORP was hired by Kwan Sing to assist in recruiting workers in the Philippines. The meeting between the crew members and PAMSCORP is relevant only insofar as it sheds light on the understanding of the parties when they signed the operative contracts in this case.

[3] Compensation offered for dredging work was less than compensation for transporting a barge across the open ocean because compensation for the latter activity included a significant "risk premium."

Advances given before the barge's departure from the Philippines and payments made upon arrival in Pohnpei total $2,000 each for Mr. Ompoy and Mr. Gomez.

Dredging work using the barge was completed on April 10, 2011, and the barge returned to the Philippines by May 31, 2011. The Airport Extension Project was completed in early August, 2011.

Of the eight workers that constituted the conduction crew, two returned to the Philippines soon after arriving in Pohnpei while the other six are plaintiffs in this case.

Although Penta-Ocean made arrangements for the conduction crew to return to the Philippines on January 15, 2013, the six plaintiffs in this case refused to return. As of trial, Plaintiffs William Ompoy and Ernesto Gomez remain in Pohnpei, while the other four plaintiffs settled with Penta-Ocean and returned to the Philippines in 2011.

Plaintiff William Ompoy made no attempt to mitigate damages after his contract was terminated. Plaintiff Ernesto Gomez secured a job on a fishing vessel and worked between June 2 and early August of 2011.

Plaintiffs faced a substantial obstacle to securing alternative employment in Pohnpei. The state of Pohnpei maintained a policy wherein it charged a substantial fee to any employer who hired a foreign worker who did not already have a work-permit for employment with that new employer. However, Plaintiffs would have been able to secure employment in the Philippines, as jobs appropriate to their profession as seamen were readily available there.

Pacific Skylite Hotel Case:

The conduction crew checked into the Pacific Skylite Hotel (the Hotel) signing the registration forms identifying a check out date as January 15, 2011, which coincided with the airline reservations made by Penta-Ocean for the return of the conduction crew to the Philippines.

A Penta-Ocean employee accompanied two Kwan Sing employees in transporting the conduction crew from the barge to the Hotel on January 5, 2011.

Hotel reservations for the conduction crew were made by Penta-Ocean.

No written commitment guaranteeing payment was requested of Penta-Ocean by the Hotel, nor given by Penta-Ocean. No credit card deposit or cash was requested by the Hotel or given by Penta-Ocean.

No request was made by Penta-Ocean to the Hotel to continue providing accommodations for the conduction crew after January 15, 2011.

Penta-Ocean wrote Yalmer Helgenberger, owner of the Hotel, on January 21, 2011 offering to pay for accommodations until January 14, 2011. The letter also stated clearly that Penta-Ocean would not be liable for the conduction crew's accommodation after January 14, 2011. Yalmer Helgenberger made a counter-offer to Penta-Ocean requiring payment to January 15, 2011. FSM Immigration Officials intervened and suggested payment to January 27, 2011.

A good faith dispute existed between the Hotel and Penta-Ocean as to whether Penta-Ocean was contractually obligated to the Hotel to pay for the conduction crew's room and board.

Penta-Ocean made a payment on February 1, 2011, in compliance with Yalmer Helgenberger's and the FSM Immigration's requests for payment to be made for accommodations through January 27, 2011, thereby establishing accord and satisfaction with Plaintiff.

After receiving the payment from Penta-Ocean, Yalmer Helgenberger took the passports of the conduction crew and refused to release them to FSM Immigration officials despite repeated requests. A criminal action had to be filed against Mr. Helgenberger which resulted in him releasing crew members' passports so that four crew members were able to leave Pohnpei and return to the Philippines.

Pacific Skylite Hotel had an occupancy rate of only 30% to 40%. Therefore, keeping the conduction crew in the Hotel cost the Hotel very little in foregone revenue.

The Hotel and Mr. Helgenberger provided room and board to four of the conduction crew members for nearly a year and the remaining two members of the conduction crew for nearly three years.

Based on the evasiveness and contradictions between trial testimony and deposition testimony on the subjects of Mr. Helgenberger's expectations regarding duration of the conduction crew's stay; whether he intentionally withheld the crew members' passports to try to force Penta-Ocean to pay and whether he intended to prevent the conduction crew from leaving the Hotel until Penta-Ocean paid: Mr. Helgenberger's testimony about these subjects and the proceedings in this matter are self serving statements and lack credibility.

Pacific Skylite Hotel seeks as damages the (unpaid) cost of room and board for the conduction crew during their sojourn at the hotel. The only evidence of the alleged cost of feeding the conduction crew is in the form a conclusory statement offered by Ms. Jacqueline Santos (the Hotel clerk) that the total cost of the conduction crew's room and board which remained unpaid as of November 18, 2013 was $306,233.93.

Plaintiff also presented a box full of receipts in order to substantiate Ms. Santos's testimony. These receipts were submitted at trial, despite this Court's May 15, 2013 order which required that the parties submit all exhibits before July 16, 2013. As a result Defendants' counsel was provided with insufficient time to review these receipts. No testimony was offered as to the documents in the box.

IV. Conclusions of Law

The Case of William Ompoy and Ernesto Gomez:

A. *Contract Formation*

The parties agree that the contracts signed in November, 2010 (Def. Ex. 3(a), 3(c)) with the $2,000 per month salary are valid and controlling in this case. The dispute is over the proper interpretation of the duration clause which states that the contract will continue for "One year and or until the project is finished." The dispute boils down to a disagreement over the correct interpretation of the word "project" in the duration clause. Plaintiffs claim that "project" should be interpreted to include any and all work performed by Penta Ocean in the state of Pohnpei. In their reading, the duration clause of the contract mandates that Plaintiffs should have remained employed at a salary of $2,000 per month until both the Airport Extension Project and the Airport Expansion Project had been concluded. In contrast, Defendants argue that "project" should be interpreted as synonymous with "job" and that Plaintiffs' job in this instance was to participate in the conduction voyage.

B. *Contract Interpretation*

The controlling factor in interpretation of contracts is the intention of the parties at the time of entering into the contract. Ponape Transfer & Storage, Inc. v. Wade, 5 FSM Intrm. 354, 356 (Pon. 1992). A contract must be read as a whole in light of the circumstances under which it was made and with the apparent purpose that the parties are trying to accomplish. Yoruw v. Mobil Oil Micronesia, Inc., 16 FSM Intrm. 360, 365 (Yap 2009). Where the language of a contract is ambiguous or uncertain, a court may look beyond the words of the contract to the surrounding circumstances and the parties' intent without changing the writing. Nanpei v. Kihara, 7 FSM Intrm. 319, 324 (App. 1995).

The meaning of the word "project" in the duration clause is ambiguous. At trial Plaintiffs testified that their subjective intent was that the project should encompass all of the several projects being performed by Penta-Ocean in the state of Pohnpei, including dredging operations as well as other land-based work. However, contracts are not interpreted on the basis of subjective uncommunicated views or secret hopes of one of the parties, but on an objective basis according to the reasonable expectations or understanding of the parties based upon circumstances known to the parties and their words and actions, at the time the agreement was entered into. Kihara v. Nanpei, 5 FSM Intrm. 342, 345 (Pon. 1992).

Plaintiffs Mr Ompoy and Mr. Gomez are seasoned seamen with decades of experience. They were hired to perform seamen's duties on the conduction voyage because they possessed International Seaman's Licenses to operate vessels on the high seas, unlike Kwan Sing's longstanding employees. Given Plaintiffs' work experience, the objective intent of the parties must have been for Plaintiffs to perform work on the barge. Thus, the only two possibilities of the intent of the parties that are in any way supported by the context of the contract are for the term "project" to refer to the conduction voyage, or to the conduction voyage and subsequent dredging activity. The conduction voyage, and subsequent arrangements to return to the Philippines, was completed on January 15, 2011. The dredging work was completed on April 10, 2011 and the barge returned to the Philippines on May 31, 2011.

Supporting the contention of the Defendants that the conduction voyage was the "project" for Mr. Ompoy and Mr Gomez are these evidentiary facts: Two of their fellow conduction crew members left voluntarily soon after the barge arrived in Pohnpei; also the unusually high salaries contained in the employment contracts that reflected a risk premium for the inherently dangerous activity of transporting a barge for a long distance across the open ocean; also the minutes of the December 9, 2010 meeting between the crew and PAMSCORP wherein PAMSCORP offered to extend the conduction crew members' contract to include dredging activities, and that offer was rejected; also the e-mail of Captain Camacho sent while the barge was en route to Pohnpei; also the memo of Mr. Remantente; and finally also various documents and testimony of witnesses.

The only evidence supporting a longer duration is the self serving testimony of Mr. Ompoy and Mr. Gomez.

C. *Contra Proferentem*

Plaintiffs urge the Court to employ the principle of contract interpretation known as *contra proferentem*, wherein any ambiguity in a contract is to be construed against the drafter. Plaintiffs suggest that since the meaning of the word "project" in the duration clause of the contract is ambiguous, the Court must construe the ambiguity against the drafter, Penta-Ocean, and apply an expansive construction to the term that would include all projects performed by Penta-Ocean in the state of Pohnpei to which Plaintiffs could contribute.

In examining the merits of Plaintiffs' contention, the Court begins by noting that common law decisions of the United States are an appropriate source of guidance for the FSM Supreme Court for contract issues unresolved by statutes, decisions of constitutional courts or custom and tradition within the Federated States of Micronesia. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 90-91 (Pon. 1987). Plaintiffs are correct in noting that this court's precedents establish the validity of the principle of *contra proferentem* in this jurisdiction. *See* FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 107, 111 (Chk. 2001); Bank of the FSM v. Bartoleme, 4 FSM Intrm. 182, 185 (Pon. 1990); Semens v. Continental Airlines, 2 FSM Intrm. 131, 146-47 (Pon. 1985). However, the cases cited by Plaintiffs all involve contracts that were drafted by a party to the dispute. The contract provision at issue here is one that was forced on both parties by the POEA. The rule that language is interpreted against the party who chose it has no direct application to cases where the language is prescribed by law. RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. b (1981); Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 442 (1st Cir. 2013) (where the government mandates that private parties use uniform language for a certain type of contract the parties' obligations are as the government intended them to be and the parties' private intentions are irrelevant).

Since the language of the duration clause was mandated by POEA, rather than selected by Penta-Ocean, the policy rationales underpinning the principle of *contra proferentem* are inapplicable. One rationale behind the rule of *contra proferentem* is that when one party chooses the term of a contract he is likely to provide more carefully for the protection of his own interests than for those of the other party. However, when the government mandates the specific contract language, neither party can directly impact the language through superior bargaining power and so the rule of *contra proferentem* does not apply. Kolbe, 738 F.3d at 442 n.9; *accord* Lass v. Bank of America, 695 F.3d 129, 137 (1st Cir. 2012). Another rationale for the rule of *contra proferentem* is that the party against whom it operates had the possibility of drafting the language so as to avoid the dispute. Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228, 1248 (11th Cir. 2002) (citing 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.11 (2d ed. 1998). Here Penta-Ocean could not have drafted the duration clause differently because the language was mandated by the POEA, and so this policy rationale is similarly inapplicable.

For all the above reasons the Court declines to employ the doctrine of *contra proferentem* in interpreting the term "project" in the duration clause at issue in this case.

D. *Mitigation of Damages*

Even if the Court were to find, *arguendo*, that Penta-Ocean breached its employment contracts with Plaintiffs, it is clear that Plaintiffs failed in their obligation to mitigate their damages. Abiding by the advice of their "advisor"[4] Martin Jano, they remained in Pohnpei for nearly three years awaiting the outcome of these proceedings.[5] Choosing to remain idle in Pohnpei for nearly three years, while forgoing suitable work in the Philippines, is manifestly unreasonable under the circumstances. A court will not compensate an injured party for loss that he could have avoided by making efforts appropriate

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[4] Martin Jano was Plaintiffs' initial attorney of record in this matter when it was filed in Pohnpei Supreme Court. After the matter was removed to the FSM Supreme Court, Mr. Jano could not continue as their attorney because he was not licensed to practice before this Court. Despite this limitation, he continued to offer advice to Plaintiffs, including a recommendation that they forgo mitigating their damages in the Philippines and instead remain in Pohnpei so as to be available to testify at trial.

[5] Plaintiff Ernesto Gomez secured a job on a fishing vessel between June 2 and early August, 2010. No evidence was presented regarding his compensation during this time.

in the eyes of the court to the circumstances. Panuelo v. Pepsi Cola Bottling Company of Guam, 5 FSM Intrm. 123, 129 (Pon.1991); RESTATEMENT (SECOND) OF CONTRACTS § 350(1). The rationale behind this rule is to encourage the injured party to make reasonable efforts to avoid loss. RESTATEMENT (SECOND) OF CONTRACTS § 350(1) cmt. a.

Although Plaintiffs failed to make reasonable efforts to secure alternative employment, the burden of proof falls on Penta-Ocean to show that Plaintiffs could have found alternative employment in their chosen field. Levy v. Tharrington, 62 P.2d 641, 642 (Okla. 1936) ("the burden rests upon the employer to show by a preponderance of the evidence that the servant might, with reasonable diligence, have obtained other remunerative employment of a like character after his discharge"). Penta-Ocean met this burden of proof by eliciting testimony from Plaintiffs at trial that jobs as seamen were readily available in the Philippines. Penta-Ocean also presented a letter from PAMSCORP in which the latter offered to secure employment for Plaintiffs in the Philippines in the form of additional conduction voyages.

Since Penta-Ocean has demonstrated that suitable alternative employment was available in the Philippines, and Plaintiffs failed to make reasonable efforts to secure alternative employment, the Court must conclude that Plaintiffs could not recover for breach of contract due to their failure to mitigate damages.

E. *Repatriation of Plaintiffs to the Philippines*

Defendant's closing argument includes a concession that it remains liable for the cost of returning Plaintiffs to the Philippines. Def. Cl. Arg. at 21 ("Plaintiffs had been paid $2,000 each and are therefore entitled to nothing further than their return travel to the Philippines.")

Pacific Skylite Hotel Case:

A. *Accord and Satisfaction*

While the cause of action in the Pacific Skylite Hotel case against Penta-Ocean is not expressly stated, the claim is a contract claim. The Hotel claims that since Penta-Ocean made reservations for the six crew members at the Hotel and a Penta-Ocean employee accompanied the crew throughout the check-in process at the Hotel, it follows that Penta-Ocean is liable for these crew members' room and board for an indefinite period of time, which continues. In other words, Plaintiff claims that Penta-Ocean has a contract with the Hotel to provide food and lodging to the crew members for an indefinite period of time. Opposing this view, Penta Ocean denies that a contract ever existed between the parties, and also argues that even if a contract was formed on January 5, 2011, it was only valid until the originally selected check-out date of January 15, 2011.

Where the existence of a contract is at issue, it is for the trier of fact to determine whether the contract did in fact exist. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm 613, 620 (App. 1996). In this case the Court did not make a finding of fact as to whether a contract existed. Instead, the Court found (supra) that Penta-Ocean's payment for room and board until January 27 established accord and satisfaction between the parties. The necessary elements to establish accord and satisfaction are (1) a claim about whose amount there exists a good faith dispute between the parties; (2) an agreement between the parties that the payment is in full satisfaction of the (contested) obligation and (3) acceptance of the payment by creditor. *See* Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (I), 7 FSM Intrm. 387, 389 (Pon. 1996); 1 AM. JUR. 2D *Accord and Satisfaction* § 7, at 474 (1994). Here the parties had a good faith dispute as to whether Penta-Ocean's conduct established a contract between itself and the Hotel. There was also a good faith dispute as to whether, even if a

contract were established, Penta-Ocean was obligated to pay through January 14, 2011 or alternatively until January 15, 2011. Penta-Ocean offered to pay through January 14 in full satisfaction of its obligation to the hotel. The Hotel counter-offered that Penta-Ocean pay through January 15, 2011. When the Hotel ultimately paid through January 27, 2011 this established accord and satisfaction between the parties that bars the Hotel from any attempt to enforce claims on the obligations that had been satisfied. *See* 1 AM. JUR. 2D *Accord and Satisfaction* § 1, at 470 (1994); Nevets C.M., Inc. v. Nissho Iwai American Corp., 726 F. Supp. 525, 536 (D.N.J. 1989).

B. *Penta-Ocean did not Breach a Contract with the Hotel*

Assuming, *arguendo*, that a contract existed between Penta-Ocean and the Hotel, and accord and satisfaction were not established, the Hotel's claim for breach of contract must still fail. It is undisputed that Penta-Ocean paid its obligation in full for the time period from January 5, 2011 through January 27, 2011. The question that must be answered by this Court is whether the contract requires Penta-Ocean to compensate the Hotel for accommodation of the conduction crew beyond January 27, 2011.

When Penta-Ocean arranged for accommodation for the conduction crew at the Hotel, the conduction crew members signed a check-in form that specified the check-out date as January 15, 2011. As the check-out date of January 15, 2011 is not an ambiguous term, the meaning of the term is a question of law, and the Court will interpret the meaning of the term according to its plain meaning. Nanpei v. Kihara, 7 FSM Intrm. 319, 323 (App. 1995). A plain reading of the contract would suggest duration through January 15, 2011, and so as a matter of law the contract ran through January 15, 2011.

Arguing against this plain meaning, the Hotel points out that the check-in form only has 10 lines, and so it argues that the January 15, 2011 check-out time was not a reflection of the parties' intentions, but rather represents a clerical entry divorced from the intentions of the parties. If the Court were to accept the Hotel's argument, which it declines to do, then the Court would have to construct a duration clause into a contract that does not specify a particular duration.

Where a Court is presented with a valid contract that lacks a duration clause, it must construct one into the contract using the guideline of reasonableness. *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981); Iriarte v. Micronesian Developers, Inc., 6 FSM Intrm. 332, 335 (Pon. 1994). Thus, the contract between the Hotel and Penta Ocean would be for a reasonable time. The duration suggested by Plaintiff, the Hotel, that the contract is of indefinite duration which continues, is manifestly unreasonable. Rather, under the circumstances, a reasonable duration term would be that the parties intended the conduction crew to remain until Penta-Ocean would provide the Hotel with notice that accommodations are no longer required. In fact, two of the conduction crew members departed before January 27, 2011, and the Hotel duly checked them out of the hotel and closed their account. This course of performance aids the Court in determining that the parties intended the duration of the contract to be that the conduction crew members remain until the Hotel is notified that accommodations are no longer required. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981). The Hotel was notified on January 21, 2011 through a letter from Mr. Tatsunoske Nishiba of Penta-Ocean, that the company would not be liable for accommodation from January 15, 2011 onward. Therefore, the duration of the contract cannot be said to continue beyond January 21, 2011.

As demonstrated above, accord and satisfaction was established between the parties. Furthermore, even if accord and satisfaction were not established, the plain meaning of the contract is that its duration continues until January 15, 2011. Finally, even if this interpretation were rejected, the Court would supply a reasonable duration term such that the duration of the contract would be

established to end before January 21, 2011. It is undisputed that Penta-Ocean paid all of its obligations to the Hotel through January 27, 2011.

For all these reasons the Hotel's claim for breach of contract must fail.

V. Costs

Defendants shall be awarded their reasonable costs. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997). Defendants shall submit their costs to the Court within 20 days of service of this decision on them. Plaintiffs shall then have 10 days to respond to the submission.

VI. Conclusion

Accordingly, the clerk shall enter judgment for Defendant Penta-Ocean Construction Company, Ltd. against Plaintiff Pacific Skylite Hotel on the claim for breach of contract. The clerk shall also enter judgment for Defendants Penta-Ocean Construction Company, Ltd. and Tatsunoske Nishiba individually and as Administration Manager of Penta-Ocean Construction Company Ltd. against Plaintiffs William Ompoy and Ernesto Gomez on the claim for breach of contract. Penta-Ocean Construction Company, Ltd. remains liable for the cost of returning plaintiffs William Ompoy and Ernesto Gomez to the Philippines. Defendants are awarded costs, which shall be submitted to the Court as directed above.

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FSM SUPREME COURT TRIAL DIVISION

JENNIFER HARDEN and WAYNE HARDEN,	)	CIVIL ACTION NO. 2010-018
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
SENIOHRA INEK and the ESTATE OF EWALT INEK,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING MOTION TO AMEND FINDING OF FACTS; DENYING MOTION TO AMEND JUDGMENT; DENYING MOTION FOR STAY OF JUDGMENT

Martin G. Yinug
Chief Justice

Decided: February 10, 2014

APPEARANCES:

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