FSM SUPREME COURT APPELLATE DIVISION

TADASY ANDREW and HEIRS OF EDMOND TULENKUN, Appellants, vs. HEIRS OF TULENSRU SEYMOUR, Appellees.	APPEAL CASE NO. K3-2013 KSC Civil Action No. 45-12

OPINION

Argued: February 20, 2014
Decided: March 26, 2014

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellants: Sasaki L. George, Esq.
P.O. Box 780
Tafunsak, Kosrae FM 96944

Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

For the Appellees: Harry A. Seymour, Esq.
P.O. Box 389
Tafunsak, Kosrae FM 96944

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HEADNOTES

Appellate Review – Dismissal

A contention that the appeal should be dismissed because the appellants filed their brief on November 12, 2013, instead of on the court-ordered November 8, 2013 deadline is frivolous. An appeal's dismissal on purely procedural grounds is a sanction normally reserved for severe disregard of the rules resulting in prejudice to the opposing party. Andrew v. Heirs of Seymour, 19 FSM R. 331, 336-37 (App. 2014).

Appellate Review – Briefs, Record, and Oral Argument

A brief was timely filed on November 12, 2013, when the appellate clerk's office was closed on the due date, Friday, November 8, 2013; when Monday, November 11, 2013, was a national holiday; and when November 12, 2013, was the next day that the clerk's office was open for business. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337 (App. 2014).

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

The appellate court applies the same standard in reviewing a trial court's grant of summary judgment that the trial court initially employed under Rule 56(c), that is, it views the facts in the light most favorable to the party against whom judgment was entered and it determines de novo whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337 (App. 2014).

Appellate Review – Standard – De Novo

Jurisdictional issues are mainly questions of law. Questions of law are reviewed de novo. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337 (App. 2014).

Appellate Review – Decisions Reviewable – Interlocutory

Normally, a partial summary judgment is not appealable because only final judgments and orders can be appealed. A decision finding liability but not determining the amount of damages is not a final order or judgment and thus usually not appealable. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337 (App. 2014).

Appellate Review – Decisions Reviewable – Interlocutory

Since a party in the Kosrae State Court may appeal to the FSM Supreme Court appellate division from an interlocutory order granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify an injunction, the court can exercise jurisdiction on this basis over a partial summary judgment granting an injunction even if there was no final judgment. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337 (App. 2014).

Civil Procedure – Injunctions

Permanent injunctions are only issued as a result of or as part of a final judgment. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337 (App. 2014).

Civil Procedure – Summary Judgment; Judgments

A Kosrae State Court order cannot be a partial final judgment when the court failed to include the express determination required by Kosrae Civil Procedure Rule 54(b) "that there is no just reason for delay" and the "express direction for the entry of judgment" which would allow the entry of a partial final judgment. Andrew v. Heirs of Seymour, 19 FSM R. 331, 337-38 (App. 2014).

Judgments; Torts – Damages

When the plaintiffs made two claims in their complaint – trespass and due process violation – and sought damages for both, but the trial court did not calculate any damages, neither claim has been fully adjudicated and therefore neither claim could be granted partial final judgment status under Rule 54(b). Andrew v. Heirs of Seymour, 19 FSM R. 331, 338 (App. 2014).

Civil Procedure – Summary Judgment; Judgments

Since a permanent injunction is imposed only as part of a final judgment and since there is no final judgment in the absence of either a final judgment including the ruling on damages or an order containing express language that there is no just cause for delay and directing the clerk to enter a final judgment, the permanent injunction must be vacated, which would leave the earlier preliminary

injunction in place. Andrew v. Heirs of Seymour, 19 FSM R. 331, 338 (App. 2014).

Constitutional Law – Due Process; Torts; Torts – Trespass

For either a trespass cause of action or a cause of action against a municipal government for due process violations, the plaintiffs did not have to prove title or ownership, just a greater right to possession. Andrew v. Heirs of Seymour, 19 FSM R. 331, 338 (App. 2014).

Civil Procedure – Pleadings

As a general rule, pro se parties are allowed greater leeway and their pleadings are construed more liberally because of their lack of legal training. Andrew v. Heirs of Seymour, 19 FSM R. 331, 339 (App. 2014).

Civil Procedure – Res Judicata; Property – Land Court

Under the res judicata effect as enshrined by Kosrae statute, a Land Court justice must not adjudicate a matter previously decided by a court between the same parties or those under whom the parties claim which dispute involves the same parcel. The Kosrae Land Court must accept prior judgments as res judicata and determine those issues without evidence. Andrew v. Heirs of Seymour, 19 FSM R. 331, 339 (App. 2014).

Civil Procedure – Res Judicata; Property – Land Registration

A Trust Territory High Court case that renders a judgment about ownership of land between certain parties does not, by itself, entitle one of those parties (or a party claiming under that party) to a certificate of title for that land because there may be other persons who have claims, even better claims to ownership than the parties in the Trust Territory case. Andrew v. Heirs of Seymour, 19 FSM R. 331, 340 (App. 2014).

Civil Procedure – Summary Judgment – Procedure

Regardless of whether the non-movants filed a written opposition, a movant plaintiff, when requesting summary judgment, must overcome all of the adverse parties' affirmative defenses and counterclaims in order to be entitled to summary judgment. Andrew v. Heirs of Seymour, 19 FSM R. 331, 340 (App. 2014).

Civil Procedure – Summary Judgment – Procedure

When moving for a summary adjudication, a plaintiff must put forth evidence that there is no issue of material fact and that the affirmative defense is insufficient as a matter of law. Andrew v. Heirs of Seymour, 19 FSM R. 331, 340 (App. 2014).

Civil Procedure – Pleadings

Regardless of what a litigant designates something in the litigant's pleadings, it must be treated as what it really is. Andrew v. Heirs of Seymour, 19 FSM R. 331, 340 n.6 (App. 2014).

Judgments – Relief from Judgment; Compact of Free Association

In an appropriate case, the Kosrae State Court has the power to grant a party relief from a Trust Territory High Court judgment through an independent action in equity. This has even been acknowledged by treaty with the United States. Andrew v. Heirs of Seymour, 19 FSM R. 331, 341 (App. 2014).

Judgments – Relief from Judgment; Compact of Free Association

Under the Compact of Free Association, final judgments in civil cases rendered by any Trust Territory court continue in full force and effect, subject to the constitutional power of the courts of the Federated States of Micronesia to grant relief from judgments in appropriate cases. Andrew v. Heirs

of Seymour, 19 FSM R. 331, 341 (App. 2014).

Judgments – Collateral Attack; Judgments – Relief from Judgment

Kosrae Civil Procedure Rule 60(b) does not limit the power of the court to entertain an independent action. A party collaterally attacking a judgment has the burden to establish its prerequisites. The five essential elements that an independent action in equity to set aside a judgment must satisfy are: 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law. If any one of the elements is missing the court cannot take equitable jurisdiction of the case. Andrew v. Heirs of Seymour, 19 FSM R. 331, 341 (App. 2014).

Judgments – Collateral Attack; Judgments – Relief from Judgment

A judgment entered against a party without notice or an opportunity to be heard is void and subject to direct or collateral attack. Andrew v. Heirs of Seymour, 19 FSM R. 331, 341 (App. 2014).

Civil Procedure – Summary Judgment – Procedure

Until the movants address the defendants' affirmative defense and the defendants have had the opportunity to show that their defense – their independent action for relief from a Trust Territory High Court judgment – presents a genuine issue of material fact and is not insufficient as a matter of law, the movants are not entitled to summary judgment on their trespass cause of action. Andrew v. Heirs of Seymour, 19 FSM R. 331, 341 (App. 2014).

Civil Procedure – Injunctions; Judgments – Relief from Judgment

There are civil procedure mechanisms to address situations where the Kosrae State Court would be in the position of being asked to enforce contradictory judgments. Under Kosrae Civil Procedure Rule 60(b)(5), on motion and on such terms as are just, the Kosrae State Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding when a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Thus, a party could be relieved from an inconsistent permanent injunction as a final order that it is no longer equitable that it should have prospective application. Andrew v. Heirs of Seymour, 19 FSM R. 331, 341 & n.7 (App. 2014).

Constitutional Law – Kosrae – Interpretation

Unnecessary constitutional adjudication is to be avoided. Andrew v. Heirs of Seymour, 19 FSM R. 331, 342 (App. 2014).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This appeal is from the Kosrae State Court's March 25, 2013 Order Granting Motion for Partial Summary Judgment ("Order") that entered a permanent injunction barring Tadasy Andrew, the Heirs of Edmond Tulenkun, the Utwe Municipal Government and Mayor Natchuo Andrew from entering the land of the Heirs of Tulensru Seymour in Yawal, Utwe Municipality and from constructing a farm road there or engaging in any other activities on the land. We vacate the partial summary judgment and the permanent injunction with directions for further proceedings. Our explanation follows.

I. BACKGROUND

The land called Yawal in Utwe was owned by Edmond Tulenkun and used as pasture land for cattle. At some point, Ned Asraka from Tafunsak came to use the upper part of Yawal as pasture land for his cattle. Eventually, cattle raising ceased. Asraka's sons Edmond Ned and Tulensru Seymour, later conducted some logging activities on upper Yawal.

In Trust Territory High Court Civil Action No. 99, Edmond Tulenkun successfully defended a claim to Yawal by Tulensru Seymour. That court, on July 27, 1956, determined that neither Edmond Ned and Tulensru Seymour had any ownership rights in part of Yawal. Tulenkun later died. Tulensru Seymour then filed another lawsuit, Trust Territory High Court Civil Action No. 4-76, over Yawal. On April 23, 1979, Tulensru Seymour obtained on a default basis, because the one child of Tulenkun who had been named failed to appear, a judgment giving him title to and setting the boundaries for upper Yawal.

In September 2005, the Yawal area was designated for ownership registration by the Kosrae Land Court. The parties were notified. The Heirs of Tulensru Seymour moved to dismiss the Land Court case, Land Court Action No. 53-05, on the ground that the April 23, 1979 judgment in Trust Territory High Court No. 4-76 barred the Land Court from adjudicating the case. The Land Court agreed and dismissed the case on May 18, 2006, concluding that, under Kosrae State Code Section 11.612(6), it could not disregard the Trust Territory High Court judgments, ruling that the two Trust Territory High Court cases each referred to different land. The Heirs of Edmond Tulenkun appealed to the Kosrae State Court.

On October 4, 2007, the Kosrae State Court, concluding that the Land Court decision was supported by substantial evidence, affirmed the Land Court dismissal on the grounds of the res judicata effect of the Trust Territory High Court Civil Action No. 4-76 judgment. Heirs of Tulenkun v. Heirs of Seymour, 15 FSM Intrm. 342, 346-47 (Kos. S. Ct. Tr. 2007). The Heirs of Edmond Tulenkun then appealed to the FSM Supreme Court appellate division. That appeal was dismissed on December 1, 2008, for the failure to prosecute the appeal because the attorney they had hired to handle the appeal for them had not filed a brief.[1] *See* Heirs of Tulenkun v. Simon, 16 FSM Intrm. 636, 646 (Kos. S. Ct. Tr. 2009).

On September 18, 2010, Tadasy Andrew,[2] "as the authorized representative of the Heirs of Edmond Tulenkun," filed suit in Kosrae Land Court (Land Court Case No. 28-10) asking it to quiet title to Parcel Nos. 018U01, 018U02, and 018U03, commonly known as Yawal, alleging that all previous litigation had only concerned Parcel Nos. 018U01 and 018U02, while that suit encompassed all three parcels. Land Court Case No. 28-10 is still pending because the Land Court principal judge has disqualified himself.

On June 12, 2012, the Heirs of Seymour filed in the Kosrae State Court (Civil Action No. 45-12) a Complaint for Injunctive and Other Equitable Relief against Tadasy Andrew, the Heirs of Edmond Tulenkun, the Utwe Municipal Government, and Mayor Natchuo Andrew. The Heirs of Seymour noted that they had prevailed in Land Court Action No. 53-05, which concerned Parcel Nos. 18-U-01 and 18-

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[1] The Heirs of Tulenkun sued that attorney for a refund of the fees they had paid him to pursue the appeal and were awarded a return of the fees they had paid. Heirs of Tulenkun v. Simon, 16 FSM Intrm. 636, 646 (Kos. S. Ct. Tr. 2009), *appeal dismissed*, 17 FSM Intrm. 646 (App. 2011) (lack of jurisdiction).

[2] Tadasy Andrew is a grandson of Edmond Tulenkun.

U-02, stated that they owned upper Yawal, and alleged that the Heirs of Tulenkun were continuing to trespass on and farm upper Yawal and that the Utwe Municipal Government was, without their permission, building a farm road to upper Yawal to assist the Heirs of Tulenkun. They sought to have those activities enjoined and damages awarded. On July 13, 2012, Tadasy Andrew, individually and as the Heirs of Edmond Tulenkun's authorized representative, and Natchuo Andrew filed, pro se, an answer with a copy of the complaint that Tadasy Andrew had filed in Land Court Case No. 28-10 attached as an exhibit.

On July 31, 2012, the Kosrae State Court, after a July 18, 2012 hearing, issued a preliminary injunction. On October 16, 2012, the Heirs of Seymour filed their motion for partial summary judgment in which they sought a permanent injunction. The defendants did not file a response. On March 13, 2013, the Kosrae State Court issued a notice that the motion would be heard on March 20, 2013. On March 19, 2013, Tadasy Andrew filed a handwritten motion for a continuance so that he could find counsel. That motion was denied during the March 20, 2013 hearing and the plaintiffs' partial summary judgment motion was granted orally.

On March 25, 2013, the Kosrae State Court granted partial summary judgment and issued a permanent injunction. Order at 5 (Mar. 25, 2013). The Kosrae State Court concluded that there was no genuine issue of material fact because the defendants' claims had been dismissed with prejudice by the FSM Supreme Court appellate division; because the defendants' activities on Yawal were not disputed; and that just because the Heirs of Tulenkun had filed a new case in the Land Court it did not mean that they did not have to comply with the previous court judgment. Order at 3 (Mar. 25, 2013). Therefore, the defendants were "permanently enjoined from entering the Plaintiffs' land in Yawal, constructing the farm road or engaging in any other activities on the land." Order at 5 (Mar. 25, 2013). No damages were awarded and that issue was deferred to later. *Id.*

Tadasy Andrew and the Heirs of Edmond Tulenkun (collectively "the Tulenkuns") timely appealed. The Utwe Municipal Government and Natchuo Andrew did not file an appeal

II. Issues Presented

A. *On Merits*

The Tulenkuns contend that the Kosrae State Court erred 1) by holding that there was no genuine issue as to any material fact when it granted partial summary judgment; 2) by exercising jurisdiction over the matter since the Kosrae State Court does not have jurisdiction to determine land ownership interests or boundaries but only has jurisdiction to review decisions of the Kosrae Land Court; 3) by deciding the case when the Kosrae Land Court has not yet decided Land Court Case No. 28-10; and 4) because a permanent injunction in this case makes the Kosrae Land Court Act of 2000 and Article VI, section 6 of the Kosrae Constitution meaningless.

The Heirs of Tulensru Seymour contend that the issues this appeal actually presents are: 1) whether the appellants may now raise issues that were not presented to the trial court; 2) whether there were any genuine issues of material fact present; and 3) whether they were entitled to partial summary judgment and a permanent injunction as a matter of law.

B. *Brief's November 12, 2013 Filing*

The Heirs of Tulensru Seymour also contend that the appeal should be dismissed because the appellants filed their brief on November 12, 2013, instead of on the court-ordered November 8, 2013 deadline. We must reject this contention as frivolous.

An appeal's dismissal on purely procedural grounds is a sanction normally reserved for severe disregard of the rules resulting in prejudice to the opposing party. Akinaga v. Heirs of Mike, 15 FSM Intrm. 391, 394 (App. 2007). We have previously held that a delay of only two days in filing the appellate brief does not warrant dismissal of the appeal when there is no showing of prejudice. Kephas v. Kosrae, 3 FSM Intrm. 248, 253 (App. 1987). The Heirs of Seymour neither claim nor show any prejudice. Furthermore, it seems that the appellate clerk's office was closed on the due date, Friday, November 8, 2013; that Monday, November 11, 2013, was a national holiday; and that November 12, 2013, was the next day that the clerk's office was open for business. The brief was thus timely filed. FSM App. R. 26(a).

III. Standard of Review

We apply the same standard in reviewing a trial court's grant of summary judgment that the trial court initially employed under Rule 56(c), that is, we view the facts in the light most favorable to the party against whom judgment was entered and we determine *de novo* 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). Jurisdictional issues are mainly questions of law. Questions of law are reviewed dè novo. Palsis v. Kosrae, 17 FSM Intrm. 236, 240 (App. 2010).

VI. Analysis

A. *Jurisdiction and Permanent Injunction*

This appeal is from an order granting partial summary judgment (and a purported permanent injunction) that left the amount of damages for a later hearing. Normally, a partial summary judgment is not appealable because only final judgments and orders can be appealed. Smith v. Nimea, 16 FSM Intrm. 346, 349 (App. 2009) (purpose of limiting appeals to those from final decisions is to combine in one appellate review all stages of the proceeding once there is a final judgment or order since this advances the policy of judicial economy which dictates against piecemeal appeals from the same civil action). A decision finding liability but not determining the amount of damages is not a final order or judgment and thus usually not appealable. Santos v. Bank of Hawaii, 9 FSM Intrm. 285, 287 (App. 1999).

However, in this case, the Kosrae State Court issued an injunction as part of the partial summary judgment. A party in the Kosrae State Court may appeal to the appellate court (currently the FSM Supreme Court appellate division), "[f]rom an interlocutory order granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify an injunction." Kos. S.C. § 6.404(2). Thus, we can exercise jurisdiction on this basis even if there was no final judgment.

Permanent injunctions are only issued as a result of or as part of a final judgment. Presumably, the Kosrae State Court intended the "permanent injunction" to take effect as a final judgment when it was entered. However, the March 25, 2013 order could not be a partial final judgment because the Kosrae State Court failed to include the express determination required by Kosrae Civil Procedure Rule 54(b)[3] "that there is no just reason for delay" and the "express direction for the entry of judgment"

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[3] When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

which would allow the entry of a partial final judgment. *See, e.g.*, Hartman v. Bank of Guam, 10 FSM Intrm. 89, 94 (App. 2001) (when trial court entered a judgment on four claims pursuant to FSM Civil Rule 54(b) that stated that "there is no just reason for delay," and expressly directed entry of judgment as to the four claims, then that judgment was final and appealable); Smith, 16 FSM Intrm. at 349 (when the trial court did not expressly determine that there was no just cause for delay and did not expressly direct the entry of judgment, the appeal is not from a final decision).

The Heirs of Seymour made two claims in their complaint – trespass and due process violation – and sought damages for both. Since no damages have been calculated, neither claim has been fully adjudicated and therefore neither claim could be granted partial final judgment status under Rule 54(b). Alexander v. City of Colorado Springs, 655 P.2d 851, 852 (Colo. 1982) (even though trial court made Rule 54(b) certification when it granted a permanent injunction while reserving the questions of liability and damages there was no partial final judgment because in the absence of damages no one claim was fully adjudicated).

Since a permanent injunction is imposed only as part of a final judgment and there is no final judgment in the absence of either a final judgment including the ruling on damages (either granting or denying) or an order containing express language that there is no just cause for delay and directing the clerk to enter a final judgment, the permanent injunction must be vacated. This leaves the July 13, 2012 preliminary injunction in place.

B. *State Court Jurisdiction to Determine Land Ownership Interests*

The Tulenkuns contend that the Kosrae State Court decision should be reversed because the Kosrae State Court does not have jurisdiction to determine land ownership interests or land boundaries since it only has jurisdiction to review Kosrae Land Court decisions. The Heirs of Seymour note that their causes of action did not require the Kosrae State Court to determine title.

The Heirs of Seymour are correct. The case was filed in the Kosrae State Court as an action for trespass against the Tulenkuns and the Utwe Municipal Government and Mayor Natchuo Andrew and an action against the Utwe Municipal Government and Mayor Natchuo Andrew for due process violations. For either of these causes of action, the plaintiffs did not have to prove title or ownership, just a greater right to possession. Thus, the Kosrae State Court only had to determine who had a better right to possession. It did not have to conclusively determine ownership or fix boundaries.

C. *Genuine Issue as to Any Material Fact*

The Tulenkuns contend that the trial court should not have granted summary judgment because there were genuine issues of material fact present. They claim the ownership and boundaries of upper Yawal are disputed. They add that no certificate of title has been issued for upper Yawal; that there is a case pending in Kosrae Land Court concerning all of Yawal, including upper Yawal; and that the

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> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Kos. Civ. R. 54(b).

Tulenkuns have been occupying and farming Yawal for over 100 years.

1. *Whether Issues Were Raised below*

The Heirs of Seymour contend that not only was there no genuine issue of material fact present because the matter involved the same land as Land Court Case No. 53-05, but that by claiming the land is in dispute (and explaining why) they are raising new issues on appeal that they did not raise below, specifically the history of the Trust Territory High Court cases about upper Yawal.

The defendants attached, as Exhibit A, a copy of the complaint in Land Court No. 28-10, which carried a lengthy recitation of the issues that the Heirs of Seymour claim were not raised below. That exhibit and its recitation were incorporated into the defendants' answer by reference in numbered paragraph 4. Answer at 2, ¶ 4 (July 13, 2012). These issues were thus raised in the pleadings.

2. *Defendants Appearing Pro Se*

Tadasy Andrew appeared pro se in the Kosrae State Court and he apparently also stood in for the other heirs of Edmond Tulenkun.[4] Having been served with the notice of hearing on the motion for a permanent injunction only two days before the hearing, he asked the Kosrae State Court for a continuance to find counsel but was denied.[5] As a general rule, pro se parties are allowed greater leeway and their pleadings are construed more liberally because of their lack of legal training. *See, e.g.*, Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 885-86 (D. Kan. 1997). The Tulenkuns do not seem to have been given any such leeway. They were facing a permanent injunction and not allowed any time to find counsel. The Tulenkuns therefore should or must be given some leeway with the use of evidence of the history of the Trust Territory High Court cases.

3. *Res Judicata*

If, in light of the short notice for the permanent injunction hearing, they are allowed that leeway, there may be a genuine issue of material fact present to preclude summary judgment. This could be true even allowing for the effect of res judicata as enshrined by statute. "A [Land Court] justice shall not adjudicate a matter previously decided by a court between the same parties or those under whom the parties claim which dispute involves the same parcel. The Land Court shall accept prior judgments as res judicata and determine those issues without evidence." Kos. S.C. § 11.612(6). It is unclear exactly who were the parties to Trust Territory High Court Case No. 4-76 since that case only named (and served) one defendant. Furthermore, the description of the land in Trust Territory High Court Case No. 99, which the Heirs of Seymour contend only covers the part of Yawal that they do not now claim, does not correspond with the current description of Parcel No. 018-U-01, which the Heirs of Seymour contend is the only part of Yawal the Tulenkuns own. Thus, even if Trust Territory High Court Cases

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[4] A summons was issued for and papers and filings were often served on a trial counselor named Chang B. William who never appeared in the case. Why a summons and complaint would be served on him when he was not a named party is a matter of conjecture. He apparently had represented the Tulenkuns in the Land Court case, but that is not a reason for him to be served a complaint and summons in this case or for the Heirs of Seymour and the Kosrae State Court to presume that he is or will represent the Tulenkuns in this case. Even the permanent injunction was served on him.

[5] The Kosrae State Court order stated that Chang B. William appeared for the defendants at the March 20, 2013 hearing. However, the Court Session Summary Report of that hearing and both sides at oral argument indicate that Tadasy Andrew appeared at that hearing without counsel.

No. 99 and 4-76 did involve different parts of Yawal, those parts must have overlapped.

We also note here that a Trust Territory High Court case that renders a judgment about ownership of land between certain parties does not, by itself, entitle one of those parties (or a party claiming under that party) to a certificate of title for that land because there may be other persons who have claims, even better claims to ownership than the parties in the Trust Territory case.

The Tulenkuns should have the opportunity to show that res judicata does not apply to them because they do not claim under the named individual defendant in that case.

4. *Issues Raised Through Affirmative Defense*

The Heirs of Seymour also contend that the Tulenkuns cannot raise these issues because they never filed a written response to the motion for permanent injunction and therefore cannot raise any issues about whether there were genuine issues of material fact. Again, this is the problem of whether a pro se defendant should be given leeway – be allowed to raise arguments in opposition when he did not file an opposition. Regardless of whether the Tulenkuns filed a written opposition, the Heirs of Seymour were still required to address these issues in their motion and they did not.

In order to be entitled to summary judgment, a movant, even when the motion is unopposed, must overcome all of the adverse parties' affirmative defenses and counterclaims. In order to succeed on its summary judgment motion a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 530 (Chk. 2011); Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 108 (Pon. 2010); Dungawin v. Simina, 17 FSM Intrm. 51, 54 (Chk. 2010) (burden of demonstrating that no triable fact issues exist encompasses affirmative defenses as well as the movant's own factual allegations); FSM Dev. Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335, 337 (Chk. 2009) (same); Sigrah v. Microlife Plus, 13 FSM Intrm. 375, 379 (Kos. 2005) (at trial, the burden of going forward with evidence as to affirmative defenses is normally on the defendant, but when the plaintiff seeks summary judgment it has the burden of clearly establishing the lack of any triable issues of fact and the burden extends to affirmative defenses as well as to the plaintiff's own positive allegations). At a minimum, a plaintiff must address affirmative defenses when requesting summary judgment. FSM Dev. Bank v. Jonah, 13 FSM Intrm. 522, 523 (Kos. 2005); Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 309 (Pon. 2004); Island Homes Constr. Corp. v. Falcam, 11 FSM Intrm. 414, 416 (Pon. 2003). When moving for a summary adjudication, a plaintiff must put forth evidence that there is no issue of material fact and that the affirmative defense is insufficient as a matter of law. Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (I), 7 FSM Intrm. 387, 389 (Pon. 1996).

Although not designated as such in their pro se answer, the defendants' denial of the allegation that the Heirs of Seymour own Yawal and the denial that the defendants' entry onto Yawal is unlawful, Answer at 2, ¶4 (July 13, 2012) (incorporating by reference attached Ex. A, complaint in Land Court Case No. 28-10), must be considered an affirmative defense and counterclaim in the nature of an independent action for relief from the judgment in Trust Territory High Court No. 4-76.[6] Neither the

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[6] Regardless of what a litigant designates something in the litigant's pleadings, it must be treated as what it really is. *See* Mori v. Hasiguchi, 18 FSM Intrm. 83, 84 (App. 2011); Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 n.5 (App. 2011); McIlrath v. Amaraich, 11 FSM Intrm. 502, 505-06 (App. 2003); People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 307, 313 (Yap 2012); *cf.* Kos. Civ. R. 8(c) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on such terms, as justice requires, shall treat the pleading as if there had been a proper

partial summary judgment motion nor the Kosrae State Court's partial summary judgment order addressed this defense and counterclaim as such.

The Kosrae State Court has the power to, in an appropriate case, grant a party relief from a Trust Territory High Court judgment through an independent action in equity. This has even been acknowledged by treaty with the United States. "[F]inal judgments in civil cases rendered by any court of the Trust Territory of the Pacific Islands shall continue in full force and effect, subject to the constitutional power of the courts of . . . the Federated States of Micronesia to grant relief from judgments in appropriate cases." Compact of Free Ass'n § 176. "[R]ule [60(b)] does not limit the power of a court to entertain an independent action." Kos. Civ. R. 60(b). A party collaterally attacking a judgment has the burden to establish its prerequisites. *See, e.g.*, U.S. Care, Inc. v. Pioneer Life Ins. Co., 244 F. Supp. 2d 1057, 1062 (C.D. Cal. 2002). The five essential elements that an independent action in equity to set aside a judgment must satisfy are: 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law. Arthur v. FSM Dev. Bank, 16 FSM Intrm. 653, 659 (App. 2009). If any one of the elements is missing the court cannot take equitable jurisdiction of the case. *Id.* A judgment entered against a party without notice or an opportunity to be heard is void and subject to direct or collateral attack. Pastor v. Ngusun, 11 FSM Intrm. 281, 285 (Chk. S. Ct. Tr. 2002). The Tulenkuns contend that the Trust Territory High Court No. 4-76 judgment is such a judgment.

Until the Heirs of Seymour address the defendants' affirmative defense and the Tulenkuns have had the opportunity to show that their defense – their independent action for relief from the 4-76 Trust Territory High Court judgment – presents a genuine issue of material fact and is not insufficient as a matter of law, the Heirs of Seymour are not entitled to summary judgment on their trespass cause of action. Accordingly, the Kosrae State Court's partial summary judgment is also vacated.

D. *Deciding Case While Kosrae Land Court Case No. 28-10 Is Pending*

The Tulenkuns also contend that the permanent injunction should be vacated and the case dismissed because Land Court Case No. 28-10 is still pending. They argue that if they prevail in the Land Court case and that decision is, using the substantial evidence rule, upheld by the Kosrae State Court (on a presumed appeal to the Kosrae State Court), the Kosrae State Court would then be in the position of enforcing contradictory judgments – a judgment that the Tulenkuns own the land and a permanent injunction barring them from entering or using the same land. Since we have vacated the permanent injunction and the partial summary judgment we do not reach this issue but note that there are civil procedure mechanisms to address such situations.[7]

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designation.").

[7] Under Kosrae Civil Procedure Rule 60(b)(5), "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [when] . . . the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Thus, the Tulenkuns could be relieved from an inconsistent permanent injunction as a final order that it is no longer equitable that it should have prospective application.

E. *Constitutional and Statutory Propriety of Permanent Injunction*

The Tulenkuns contend that the permanent injunction makes the Land Court Act and the Kosrae Constitution Article VI, section 6 meaningless because under the Land Court Act, the Kosrae State Court's function is to review, as an appellate court using the substantial evidence rule, Land Court decisions. They contend that if, using that rule, the Kosrae State Court affirms a Land Court judgment in their favor while the Kosrae State Court permanent injunction bars them from entering and using upper Yawal it would be inconsistent with the substantial justice standard of Kos. S.C. § 6.402. Since we have vacated the partial summary judgment and the permanent injunction on other grounds we do not reach this issue. Unnecessary constitutional adjudication is to be avoided. Kosrae v. Langu, 9 FSM Intrm. 243, 251 (App. 1999).

V. CONCLUSION

Accordingly, the permanent injunction and the partial summary judgment are vacated. The preliminary injunction remains in effect. This matter is remanded for further proceedings consistent with this opinion.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. THERSTON BENJAMIN a/k/a DOHDOHN BENJAMIN, Defendant.	CRIMINAL CASE NO. 2013-502

ORDER SUPPRESSING EVIDENCE AND DENYING QUASHING INFORMATION

Dennis K. Yamase
Associate Justice

Decided: March 28, 2014

APPEARANCES:

For the Plaintiff: Pole Atanraoi-Reim, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941