

FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHUIT SOAP COMPANY, ) CIVIL ACTION NO. 2005-007  
)  
Plaintiff, )  
)  
vs. )  
)  
ERINE McVEY and DO IT BEST HARDWARE, )  
a business organization, and BOARD OF TRUSTEES )  
OF THE POHNPEI STATE PUBLIC LANDS TRUST, )  
)  
Defendants. )  
\_\_\_\_\_ )

ORDER ABOUT EXCLUDING TRIAL EVIDENCE

Ready E. Johnny  
Associate Justice

Decided: May 1, 2014

APPEARANCES:

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

For the Defendant: Monaliza Abello-Pangelinan, Esq.  
(Board of Trustees) Assistant Attorney General  
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HEADNOTES

Torts – Damages

Actual damages are an amount to compensate for a proven injury or loss; damages that repay actual losses and are also termed compensatory damages, or tangible damages, or real damages. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377 (Pon. 2014).

Torts – Damages – Punitive; Torts – Governmental Liability

Punitive damages cannot be imposed on the Board of Trustees of the Pohnpei State Public Lands Trust because the Pohnpei state government is statutorily immune from punitive damages and the Board is a Pohnpei government agency. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377 (Pon. 2014).

Torts – Damages – Punitive

Punitive damages are, by definition, not actual (compensatory) damages, but are a windfall.

Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377 (Pon. 2014).

Contracts – Damages – Consequential

Consequential damages can only be awarded if the loss was such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377 (Pon. 2014).

Contracts – Damages – Consequential

In the absence of a contractual or statutory right of renewal, consequential damages for the failure to renew cannot have been in the contemplation of both parties. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377 (Pon. 2014).

Contracts – Damages – Consequential; Property – Public Lands

It cannot be said that consequential damages were contemplated for the termination of a lease five months early when the leased land had remained undeveloped for a long while and when it is difficult to see what development could have taken place in those five months that would have earned the plaintiff a profit during those five months, that is, whether there would be any consequential damages because the plaintiff was deprived of the use of an undeveloped lot for the last five months of its lease. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377 (Pon. 2014).

Contracts – Damages; Evidence – Witnesses

When, in general, the witnesses' emotional attachment to the lot is irrelevant to the plaintiff's actual damages from the Board's violation of its civil right to due process, and when, without knowing what the witnesses' testimony will be, it is unknown whether testimony about the lot's necessary background history will unavoidably include some mention of emotional attachment, the court cannot make a blanket ruling barring all mention of a witness's emotional attachment to the lot. During trial, the defendant may object to any irrelevant questions and move to strike any irrelevant matter in a witness's answer to a relevant question. That should be sufficient protection. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 377-78 (Pon. 2014).

Civil Procedure – Joinder, Misjoinder, and Severance; Civil Rights – Remedies and Damages; Property – Public Lands

Where the evidentiary hearing or trial mandated by the appellate court is to determine the plaintiff's actual damages for the defendant's violation of the plaintiff's civil rights when it terminated the lot lease five months early, and where damages beyond the five-month period are contingent on whether the plaintiff should be granted a new or renewed lease to the lot, that is not the subject of the trial but is the subject of what will be a different proceeding. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 378 (Pon. 2014).

Contracts – Specific Performance; Property – Public Lands

When, if specific performance were ordered, the court would order that the plaintiff be allowed to resume possession of a lot for five more months, but when, because that lot was undeveloped and did not generate any revenue, five months of resumed occupation by the plaintiff would not affect the plaintiff's income and thus specific performance of the last five months of the lease would seem pointless, a money award for actual damages should suffice. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 378 (Pon. 2014).

Civil Procedure – Joinder, Misjoinder, and Severance; Torts – Damages

An issue is not part of the trial mandated by the appellate court and that may not be appropriate for trial since there may not be disputed material facts, might be resolved by a summary adjudication

\without the need of a trial so, rather than delay the mandated trial further, the court will separate the issue from the civil rights damages trial. Carlos Etscheit Soap Co. v. McVey, 19 FSM R. 374, 379 (Pon. 2014).

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#### COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on 1) Defendant Board of Trustees of the Pohnpei State Public Lands Trust's Motion to Exclude Evidence from Trial, filed March 13, 2014; 2) plaintiff Carlos Etscheit Soap Company's Opposition to Motion in Limine, filed March 24, 2014; and 3) Reply in Support of Defendant Board of Trustees of the Pohnpei State Public Lands Trust's Motion to Exclude Evidence from Trial, filed March 13, 2014. The motion is granted in part and denied in part.

The Board of Trustees of the Pohnpei State Public Lands Trust ("the Board") asks 1) that only evidence of actual damages be permitted at trial; 2) that the Carlos Etscheit Soap Company ("Soap Company") not be permitted to introduce any evidence about developing Lot No. 014-A-08; 3) that any evidence of the Soap Company's shareholders' emotional attachment to Lot No. 014-A-08 be excluded; 4) that any relief beyond the Soap Company's claimed five-month period be disregarded because the Soap Company did not have an automatic right to lease renewal; 5) that the Soap Company's remedy of specific performance be ruled unavailable; and 6) that the Soap Company not be permitted to litigate its September 20, 2013 "notice of appeal" of the Board's July 26, 2013 award of Lot No. 014-A-08 to Erine McVey.

#### I. ACTUAL DAMAGES

The Soap Company responds that since a court can only award actual, not speculative, damages, this part of the Board's motion is meaningless. The Board replies that the relevant appellate decision limits the court to actual damages and thus precludes evidence of or claims for punitive or exemplary damages, for consequential damages, and for damages for future development plans beyond the five months left on the Soap Company's lease.

The appellate court stated that "the only error the trial court appears to have made was in neglecting to conduct a hearing on actual damages in the civil rights claims. However, the trial court never foreclosed the issue, suggesting that it may in due time have requested briefs on the issue." Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 438-39 (App. 2011) (footnote omitted). It therefore remanded this case "to the trial court for further determination as to actual damages." *Id.* at 438. It also affirmed what it called the underlying finding of fact "that the Soap Company lease agreement did not contain a provision entitling the lessee to an automatic right of renewal." *Id.* And it "recommend[ed] that the trial court explore the question whether any lease payment should be refunded." *Id.* This suggestion was made because the Soap Company had made its annual lease payments, as per the lease, in advance.<sup>1</sup>

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<sup>1</sup> "The lessee, in consideration of the foregoing, covenants and agrees to pay to the Authority in the manner prescribed herein, rental at the rate as specified in Item 3 in advance within thirty (30) days after January 1st of every year this Lease Agreement is in effect . . ." Lease Agreement art. 3, at 2. The appellate court reasoned that "if the lease agreement expired on July 1, 2005, then the January 1, 2005 payment of \$212.70 was twice what was due." Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 438 n.7 (App.

Following the appellate court's direction, trial will be held on the civil rights damages claims for the Board's termination of the Soap Company's lease five months early. Trial will be limited to the Soap Company's actual damages incurred during and because of its deprivation of Lot No. 014-A-08 for those five months due to the Board's violation of the Soap Company's due process right to notice and an opportunity to be heard. Actual damages are "[a]n amount . . . to compensate for a proven injury or loss; damages that repay actual losses. – Also termed *compensatory damages*; *tangible damages*; *real damages*." BLACK'S LAW DICTIONARY 445 (9th ed. 2009).

The Board correctly notes that punitive damages cannot be imposed on it. Pohnpei state government is statutorily immune from punitive damages, 58 Pon. C. § 2-106, and the Board is a Pohnpei government agency. Even without a statute, punitive damages are generally not recoverable from sovereign defendants. *E.g.*, Damarlane v. United States, 6 FSM Intrm. 357, 361 (Pon. 1994). Furthermore, punitive damages are, by definition, not actual (compensatory) damages, but are a windfall. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010); Elymore v. Walter, 10 FSM Intrm. 166, 168 (Pon. 2001).

## II. DEVELOPMENT OF LOT No. 014-A-08

The Soap Company's claim for damages based on its future development plans is a claim for consequential damages based on the premise that its Lot No. 014-A-08 lease would unquestionably be renewed and that its future development plans would be successful and profitable. The court's conclusion that the Soap Company did not have a contractual right to renewal of its Lot No. 014-A-08 lease was affirmed on appeal. McVey, 17 FSM Intrm. at 438. Consequential damages can only be awarded if the loss was such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 256 (App. 2006). In the absence of a contractual or statutory right of renewal, consequential damages for the failure to renew cannot have been in the contemplation of both parties.

The court further cannot say that consequential damages were contemplated for the termination of a lease five months early when the leased land had remained undeveloped. Since Lot No. 014-A-08 was undeveloped and had been that way for a long while, it is difficult to see what development could have taken place in those five months that would have earned the Soap Company a profit during those five months, that is, whether there would be any consequential damages because Soap Company was deprived of the use of undeveloped Lot No. 014-A-08 for the last five months of its lease. If the Soap Company has any evidence that it could have developed Lot No. 014-A-08 and earned a profit before the end of June 2005, it will have the opportunity to prove it. Accordingly, any evidence of future development damages on the Soap Company's civil rights due process violation claim will be limited to the actual damages that occurred February through June 2005, not later. Otherwise, evidence of future development damages will be excluded.

## III. SOAP COMPANY'S SHAREHOLDERS' EMOTIONAL ATTACHMENT

The Board asks that any evidence of the Soap Company's shareholders' emotional attachment to Lot No. 014-A-08 be excluded and that no damages be awarded for their emotional distress. The Soap Company responds that it is not seeking emotional distress damages but that some evidence about emotional attachment may come in as part of the background evidence on Lot No. 014-A-08's history. The Board replies that, in light of that Soap Company concession, testimony listed in Soap

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2011). The annual rent for Lot No. 014-A-08 was \$212.70.

Company's pretrial statement relating to three witnesses' emotional attachment to Lot No. 014-A-08 is irrelevant.

The court considers that, in general, those witnesses' emotional attachment to Lot No. 014-A-08 is irrelevant to the Soap Company's actual damages from the Board's violation of its civil right to due process. However, without knowing what the witnesses' testimony will be, it is unknown whether testimony about Lot No. 014-A-08's necessary background history will unavoidably include some mention of emotional attachment. The court therefore cannot make a blanket ruling barring all mention of a witness's emotional attachment to Lot No. 014-A-08. During trial, the Board may object to any irrelevant questions and move to strike any irrelevant matter in a witness's answer to a relevant question. That should be sufficient protection.

#### IV. RELIEF BEYOND THE FIVE-MONTH PERIOD

The Board contends that the Soap Company is trying to argue that it was automatically entitled to renewal of its Lot No. 014-A-08 lease because that was the Board's pattern of practice. The Board seeks to bar any evidence of this because, in its view, its actions in other cases are irrelevant to this case and because the Pohnpei Statute of Frauds, 58 Pon. C. § 1-103(4) and (5), bars actions for contracts not in writing for the sale of an interest in land or an agreement that cannot be performed within one year. The Soap Company argues that the court can fashion relief to compensate it for the Board's civil rights violation.

As stated above, the evidentiary hearing or trial mandated by the appellate court is to determine the Soap Company's actual damages for the Board's violation of the Soap Company's civil rights when it terminated the Lot No. 014-A-08 lease five months early. Damages beyond the five-month period – beyond February through June 2005 – are contingent on whether the Soap Company should be granted a new or renewed lease to Lot No. 014-A-08. That is not the subject of this trial but is the subject of what will be a different proceeding. *See infra* pt. VI.

#### V. SPECIFIC PERFORMANCE

The Board contends that the Soap Company is not entitled to any specific performance remedy because specific performance is a contract remedy and not a civil rights claim and because specific performance cannot be ordered against a sovereign.

The court has previously ordered specific performance against the State of Pohnpei, Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 126, 129 (Pon. 1993), *aff'd*, 7 FSM Intrm. 613 (App. 1996), when it allowed a plaintiff to continue commercial dredging for the same amount of time it had been prevented by Pohnpei from dredging under a license it had been issued. If specific performance were ordered here, the court would order the Soap Company to be allowed to resume possession for five more months. In Ponape Construction Co. v. Pohnpei, 6 FSM Intrm. 114 (Pon. 1993), *aff'd*, 7 FSM Intrm. 613 (App. 1996), the plaintiff's resumed commercial dredging operation earned it further revenue. In this case, Lot No. 014-A-08 was undeveloped and did not generate any revenue. It seems five months of resumed occupation by the Soap Company would not affect the Soap Company's income. Specific performance of the last five months of the lease therefore seems pointless. A money award for actual damages should suffice.

#### VI. SOAP COMPANY'S SEPTEMBER 20, 2013 "NOTICE OF APPEAL"

The Board contends that the Soap Company's "appeal" from the Board's July 25, 2013 decision awarding the Lot No. 014-A-08 leasehold to McVey circumvents the Board's due process rights by

challenging a new action of the Board and that the Soap Company should therefore either amend the complaint<sup>2</sup> or file a new complaint. The Board therefore concludes that no mention should be made at trial of the July 25, 2013 award of the Lot No. 014-A-08 leasehold to McVey.

The Soap Company responds that the Board's motion seems to be a motion to bifurcate trial. The Soap Company notes that it is up to the court to decide whether to consider its appeal of the Board's July 25, 2013 decision at the same time as the damages trial or separately. The Soap Company adds that if the court considers it beneficial, it would be willing to "amend"<sup>3</sup> its pleading. The Board replies that since the operative pleading is the Soap Company's August 28, 2006 Second Amended Complaint, the Board's July 25, 2013 decision cannot be before the court. The Board adds that it does not seek to "bifurcate" the trial because trial cannot be bifurcated when the issue of the July 25, 2013 award is not properly before the court.

What the Board overlooks is the Soap Company's "appeal" constitutes the Soap Company's contention that the Board has not complied with the court's previous orders about putting the Lot No. 014-A-08 leasehold up for bid and awarding the lease. Since the Soap Company has complied with the administrative review process, the Board has not shown any reason that would prevent the court from considering the Soap Company's "appeal" of the July 25, 2013 award. Since this issue is not part of the trial mandated by the appellate court, the court will not include it in the upcoming trial. Furthermore, this issue may not be appropriate for trial since there may not be disputed material facts. It might be resolved by a summary adjudication without the need of a trial. Rather than delay the mandated trial further, the court will separate the issue of the current lease for Lot No. 014-A-08 from the civil rights damages trial.

#### VII. CONCLUSION

Accordingly, the parties may file and serve no later than June 13, 2014, any motion that seem appropriate about the Soap Company's challenge to the Board's July 25, 2013 award of the Lot No. 014-A-08 leasehold to Erine McVey. The court will set a date for the mandated civil rights damages trial once it is able to determine available dates on Pohnpei. The Soap Company cannot introduce at trial any evidence of punitive damages, consequential damages after June 2005 (development of Lot No. 014-A-08), and relief beyond June 2005. The Soap Company's challenge of the Board's award of the Lot No. 014-A-08 leasehold to Erine McVey will be considered later.

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<sup>2</sup> The correct term would be "supplement the complaint," not "amend the complaint," since the events involved occurred after the initial complaint was filed. See FSM Civ. R. 15(d); Herman v. Municipality of Patta, 16 FSM Intrm. 167, 170 (Chk. 2008).

<sup>3</sup> The Soap Company means "supplement."