FSM SUPREME COURT TRIAL DIVISION

SASAKI L. GEORGE, Plaintiff, vs. CANNEY PALSIS, individually and in his capacity as Directing Attorney for Kosrae MLSC; LEE PLISCOU, individually and in his capacity as the Executive Director of MLSC; ROBERT RUECHO, in his capacity as Board President of MLSC; LILLIAN TENORIO, individually and in her capacity as Board Secretary/Treasurer of MLSC; MICHAEL GAAN, individually and in his capacity as Board member of MLSC; MICRONESIAN LEGAL SERVICES CORPORATION; LEGAL SERVICES CORPORATION; JOHN DOES 1-20; JANE DOES 1-20; DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE NON-PROFIT ENTITIES 1-20; and DOE GOVERNMENTAL ENTITIES 1-20, Defendants.	CIVIL ACTION NO. 2013-2004

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND DISMISSING CERTAIN DEFENDANTS

Ready E. Johnny
Associate Justice

Decided: September 23, 2014

APPEARANCES:

For the Plaintiff: Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

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

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HEADNOTES

Contracts – Formation; Contracts – Unilateral; Employer-Employee – Employee Handbook

Personnel handbook provisions can be enforceable as an employment contract if they meet the requirements for the formation of a unilateral contract, which are: the offer must be definite in form and must be communicated to the offeree. An employer's general statements of policy are no more

than that and do not meet the contractual requirements for an offer. George v. Palsis, 19 FSM R. 558, 564 (Kos. 2014).

Contracts – Formation; Contracts – Unilateral; Employer-Employee – Employee Handbook

When a personnel policies manual is detailed and the court finds that it was intended to set the terms of employment; when a review of the employee handbook makes it clear that the employer intended its employees to be bound by the manual's terms and that it intended to bind itself to these terms, the personnel policies manual was meant to be an offer for a unilateral employment contract and an employee has accepted the offer through his continued employment. George v. Palsis, 19 FSM R. 558, 564 (Kos. 2014).

Contracts – Breach; Contracts – Interpretation

Whether a breach of contract has occurred is generally not a question of law but is rather a factual question, but when the facts are undisputed, the determination of whether there has been a material non-compliance with a contract's terms is necessarily reduced to a question of law. George v. Palsis, 19 FSM R. 558, 564 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds; Contracts – Interpretation

When only the construction of a contract is at issue, the legal effect and interpretation of the contract is a question of law, and summary judgment is proper. George v. Palsis, 19 FSM R. 558, 565 (Kos. 2014).

Contracts – Interpretation

A written instrument, such as a contract, must be read as a whole and in the light of the circumstances under which it was made. George v. Palsis, 19 FSM R. 558, 565 (Kos. 2014).

Contracts – Interpretation; Employer-Employee – Employee Handbook

When the Personnel Manual, read as a whole, authorizes the payment of the full amount (if it is 600 hours or less) of accrued annual leave to a former employee only when that employee has resigned with two weeks' written notice, the result must be that an employee's right to accrued annual leave pay is contingent upon certain events and if those events do not occur, the right never becomes a vested property interest. When it is undisputed that those events (written resignation with two weeks' notice) never occurred, the former employee, as a matter of law, did not have a vested property interest in his accrued annual leave. George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014).

Civil Procedure – Summary Judgment – For Nonmovant

When summary judgment has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that its nonmoving opponent is not entitled to judgment as a matter of law. George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014).

Evidence – Burden of Proof

In a civil case, the plaintiff has the burden of proving each element of the plaintiff's cause of action by a preponderance of the evidence, and if the plaintiff fails to prove any one element, judgment will be entered against the plaintiff. George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds

Unless a court, viewing the facts and inferences therefrom in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the court must deny the motion. But Rule 56(c) requires that

summary judgment be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014).

Civil Procedure – Summary Judgment – Procedure

When the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds

When a plaintiff has failed to make a showing sufficient to establish the existence of any element essential to his case on which he will bear the burden of proof at trial, Rule 56(c) mandates the entry of summary judgment in the defendant's favor. In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. George v. Palsis, 19 FSM R. 558, 566-67 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds

When factual support for an essential element of the claim being asserted against the movant is absent from the case record, a party moving for summary judgment is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. George v. Palsis, 19 FSM R. 558, 567 (Kos. 2014).

Civil Procedure – Summary Judgment – Procedure; Torts – Infliction of Emotional Distress

When faced with a defendant's summary judgment motion, the court cannot give any heed to the nonmovant plaintiff's assertion that he intends to call witnesses at trial to support his emotional distress claim or to his assertion that a favorable judgment on his wrongful termination claims will amply support this claim because the plaintiff must show that he has admissible evidence to support his claim, and the time for him to do that is now, or never. George v. Palsis, 19 FSM R. 558, 567 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds

A nonmovant's contention that evidence will be introduced sometime in the future or at trial and that it will show certain things is hearsay and since hearsay is generally not admissible evidence, it cannot be relied upon to create a material issue of fact when opposing a summary judgment motion. George v. Palsis, 19 FSM R. 558, 567 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Infliction of Emotional Distress

One element of an intentional infliction of emotional distress claim is that the plaintiff must have suffered some physical manifestation of the alleged infliction of emotional distress, and when the plaintiff has not shown any physical ailments or manifestations resulting from his employment termination, his claim must fail for lack of proof and the defendants are entitled to summary judgment on this cause of action. George v. Palsis, 19 FSM R. 558, 567 (Kos. 2014).

Torts – Defamation

Defamation is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency

to injure him in his occupation. George v. Palsis, 19 FSM R. 558, 567 (Kos. 2014).

Torts – Invasion of Privacy

Whoever publicizes a matter about another that places the other in a false light before the public is liable for tortious invasion of privacy if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. George v. Palsis, 19 FSM R. 558, 567-68 (Kos. 2014).

Torts – Defamation; Torts – Invasion of Privacy

Publication is a necessary element of defamation and of the false light tort. George v. Palsis, 19 FSM R. 558, 568 (Kos. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Defamation; Torts – Invasion of Privacy

Summary judgment will be granted for the defendants on the plaintiff's defamation and false light cause of action when the plaintiff has failed to make a sufficient showing on essential elements of his case with respect to which he has the burden of proof and when he, in his opposition to the summary judgment motion, has not shown that he has admissible evidence to support his claim, and the time for him to do that is now, or never. George v. Palsis, 19 FSM R. 558, 568 (Kos. 2014).

Torts – Breach of Implied Covenant of Good Faith

The breach of an implied covenant of good faith and fair dealing is a common law tort claim that arises out of a contractual relationship between the parties because contracts impose upon the parties an implied undertaking that each party will not intentionally or purposefully do anything to prevent the other party from carrying out its part of the agreement. FSM courts, however, have not yet extended this doctrine's application to contracts other than insurance contracts. George v. Palsis, 19 FSM R. 558, 568 (Kos. 2014).

Torts – Breach of Implied Covenant of Good Faith

When the court has ruled that the plaintiff's right to payment for accrued annual leave hours was contingent on him giving at least two weeks' written notice of his resignation and that since he was terminated involuntarily those events never occurred, the defendants are entitled to summary judgment on the plaintiff's breach of an implied covenant of good faith and fair dealing cause of action insofar as it applies to the plaintiff's accrued annual leave hours claim. George v. Palsis, 19 FSM R. 558, 568 (Kos. 2014).

Employer-Employee – Wrongful Discharge; Torts – Breach of Implied Covenant of Good Faith

When the court has not held that the implied covenant of good faith and fair dealing could never be applied to an employment contract, the court, at the summary judgment stage of the proceeding, will not dismiss this cause of action as it might apply to the plaintiff's claim for wrongful termination in violation of his employment contract. George v. Palsis, 19 FSM R. 558, 568 (Kos. 2014).

Constitutional Law – Due Process; Employer-Employee – Wrongful Discharge

The constitutional guarantee of due process only protects persons from the governments, and those acting under them, established or recognized by the Constitution. Thus, a person's termination by a non-governmental employer does not state a cause of action for unconstitutional deprivation of due process because no governmental entity or official is a defendant; the defendant is not alleged to be performing an essential governmental function; and a government action is not at issue. George v. Palsis, 19 FSM R. 558, 569 (Kos. 2014).

Constitutional Law – Due Process; Employer-Employee – Wrongful Discharge

An employer is not a governmental entity when it was not created by the FSM national government nor by any government established or recognized (national, state, or local) by the FSM Constitution; when it is merely funded, in part, by the FSM national and four state governments; when it is incorporated in the United States Commonwealth of the Northern Marianas and its parent corporation was created by the act of the United States Congress so that even if it were a governmental entity, it would be an entity of a government to which the FSM Constitution's due process clause does not apply. It will therefore be entitled to summary judgment on a former employee's wrongful termination in violation of constitutional due process cause of action. George v. Palsis, 19 FSM R. 558, 569 (Kos. 2014).

Civil Rights – Persons Liable

In a civil rights action under 11 F.S.M.C. 701, a private person who is not acting under color of law but who deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of, or because of his having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia, may be held civilly liable under 11 F.S.M.C. 701(3) for that violation. George v. Palsis, 19 FSM R. 558, 569 (Kos. 2014).

Civil Rights – Acts Violating; Employer-Employee – Wrongful Discharge

A former employee's allegation that his termination violated public policy under the FSM Constitution and the right to be free of religious discrimination does not state a cause of action. To the extent that any defendant could be held civilly liable for the violation of public policy, it would be under 11 F.S.M.C. 701(3), and the public policy as expressed in the civil rights statute. George v. Palsis, 19 FSM R. 558, 569 (Kos. 2014).

Employer-Employee – Wrongful Discharge

A former employee's allegation that his termination violated human rights policy under the FSM Constitution and his right to work and enjoy just and favorable working conditions under Article 23 of the United Nations Universal Declaration of Human Rights does not state a recognized cause of action. These claims are actionable under FSM domestic law. George v. Palsis, 19 FSM R. 558, 569-70 (Kos. 2014).

Torts – Respondeat Superior

Vicarious liability is not a cause of action but a means by which a defendant is held liable for the act of another, such as a principal being held liable for the torts or contracts of its agent. Respondeat superior is just the same doctrine holding an employer or a principal liable for the employee's or agent's wrongful acts. Neither term describes a cause of action. George v. Palsis, 19 FSM R. 558, 570 (Kos. 2014).

Business Organizations – Corporations; Civil Procedure – Parties

A parent corporation named as a defendant on the theory that it was liable for the conduct of the board members and executive director of its subsidiary corporation, will be dismissed when there is no evidence that it is the alter ego of the parent corporation and when there is no evidence (or even allegation) that it is a shell corporation with no assets and that therefore there is a need to pierce the corporate veil in order to obtain any relief. George v. Palsis, 19 FSM R. 558, 570 (Kos. 2014).

Civil Procedure – Parties – "John Doe"

Since the FSM has no rule or statute permitting the use of fictitious names to designate defendants, the listing of "John Doe" defendants in in personam actions is not a pleading practice recognized in the FSM; therefore the presence of "John Doe" defendants serves no purpose and a trial court should dismiss them without prejudice. George v. Palsis, 19 FSM R. 558, 570 (Kos. 2014).

Civil Procedure – Dismissal; Civil Procedure – Parties

When, in response to the defendants' interrogatories asking the plaintiff about all facts that gave rise to the certain defendants' liability both individually and as board members, the plaintiff responded that he had none, those defendants will be dismissed. George v. Palsis, 19 FSM R. 558, 571 (Kos. 2014).

Civil Procedure – Dismissal; Civil Procedure – Parties

When there are no factual allegations that a defendant took any actions or failed to take any action in an individual capacity, he will be dismissed as a defendant in his individual capacity. George v. Palsis, 19 FSM R. 558, 571 (Kos. 2014).

Civil Procedure – Parties – Official Capacity

A suit against someone in his official capacity is a suit against the entity that employs that person. George v. Palsis, 19 FSM R. 558, 571 (Kos. 2014).

Civil Procedure – Dismissal; Civil Procedure – Parties

When the defendants have not shown that they have a right, as a matter of law to a corporate official's dismissal in his official capacity, he will be dismissed only in his individual capacity, but when the plaintiff has alleged actions by another official that, if true and if proven, would give rise to tort liability for the violation of the plaintiff's civil rights, that person will not be dismissed as a defendant. George v. Palsis, 19 FSM R. 558, 571 (Kos. 2014).

Torts – Respondeat Superior

When two of the corporation's officials remain as defendants, the plaintiff's claim of respondeat superior or vicarious liability will not be dismissed since the corporation is still potentially vicariously liable for any liability they might have. George v. Palsis, 19 FSM R. 558, 571 (Kos. 2014).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on 1) the plaintiff's Motion for Partial Summary Judgment, filed May 12, 2014; the defendants' Opposition to Motion for Summary Judgment, filed May 27, 2014: Plaintiff's Reply to Defendants' Opposition to Motion for Partial Summary Judgment, filed July 8, 2014; and 2) the defendants' Motion for Partial Summary Judgment, filed May 27, 2014; Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment, filed July 11, 2014; and the defendants' Reply in Support of Motion for Partial Summary Judgment, filed July 18, 2014. The plaintiff's motion is denied and the defendants' motion is granted in part. The reasons follow.

I. Background

Plaintiff Sasaki L. George was an employee of defendant Micronesian Legal Services Corporation's Kosrae office, starting as a trial counselor in 1996 and becoming a staff attorney in 1999. On March 5, 2013, George was given a proposed notice of termination. On March 27, 2013, MLSC Executive Director Lee Pliscou approved the termination. On July 18, 2013, the MLSC Interim Executive Committee upheld the Executive Director's decision.

On December 23, 2013, George filed suit alleging wrongful termination in violation of his employment contract, of public policy, of human rights policy, of constitutional due process, and of civil

rights; breach of the covenant of good faith and fair dealing; conversion and unauthorized possession; vicarious liability and respondeat superior; defamation and false light; and intentional infliction of emotional distress. George seeks a judgment reinstating him as an MLSC staff attorney in Kosrae and with an award of back pay and other damages, fees, and costs. The defendants answered and raised the affirmative defenses of George's failure to state a claim; private sector employment; failure to mitigate damages; good faith effort to protect a legally cognizable interest; harmless error; justification; administrative remedies; and waiver and estoppel.

George then moved for summary judgment on the issue of his unpaid accrued annual leave. The defendants opposed. They also moved for the dismissal of all defendants except the Micronesian Legal Services Corporation and for summary judgment on all causes of action except wrongful termination in violation of a contract.

I. GEORGE'S MOTION

George moves for summary judgment on the issue of liability for 493¾ hours of annual leave (equaling $7,870.37 minus income tax and social security withholdings) that he had accrued before he was terminated. George contends that he had a property interest in these accrued but unused annual leave hours, and that MLSC's failure to pay him constitutes a breach of his employment contract and a conversion of his property.

The defendants contend that because George did not resign his position at MLSC but was involuntarily terminated for cause, MLSC cannot be liable to George for any accrued annual leave. The defendants argue that pursuant to MLSC's employee manual MLSC is liable for accrued annual leave only when an employee who has worked for MLSC for at least one year has resigned from MLSC employ. The MLSC Personnel Manual provision that sets forth the circumstance under which a former employee is paid for any accrued annual leave hours states: "A resigning MLSC employee is entitled to payment for accrued Annual Leave if the employee has been employed for at least one year as of the employee's last day of work at MLSC; otherwise no payment for accrued Annual Leave is made." MLSC Personnel Manual pt. A.4. The defendants add that George's claim for accrued annual leave is a breach of contract action for pay granted by his MLSC employment contract and note that if George happens to prevail on his wrongful termination claim, his accrued annual leave pay claim would be moot since if George is reinstated, his accrued leave hours would be reinstated, not paid.

Personnel handbook provisions can be enforceable as an employment contract if they meet the requirements for the formation of a unilateral contract, which are: the offer must be definite in form and must be communicated to the offeree, but an employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer. Reg v. Falan, 14 FSM R. 426, 431 (Yap 2006). When a personnel policies manual is detailed and the court finds that it was intended to set the terms of employment; when a review of the employee handbook makes it clear that the employer intended its employees to be bound by the manual's terms and that it intended to bind itself to these terms, the personnel policies manual was meant to be an offer for a unilateral employment contract and an employee has accepted the offer through his continued employment. *Id.* at 431-32. The MLSC Personnel Manual meets these criteria.

Thus, if George has a right to payment for his unused annual leave hours, his MLSC employment contract created that right. If the employment contract required MLSC to pay George for his accrued annual leave hours, MLSC breached it by not paying George. Whether a breach of contract has occurred is generally not a question of law but is rather a factual question, "but when the facts are undisputed, the determination of whether there has been a material non-compliance with a contract's terms is necessarily reduced to a question of law." FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 570

(Pon. 2011). "Where only the construction of a contract is at issue, the legal effect and interpretation of the contract is a question of law, and summary judgment is proper." Kennedy, Ryan, Monigal & Assocs., Inc. v. Watkins, 609 N.E.2d 925, 928 (Ill. App. Ct. 1993).

George claims that since he was [contractually] entitled to pay for his accrued annual leave hours, those hours were therefore his property and when MLSC did not pay him for them, that constituted a conversion of his property. Thus, whether George's "property" was converted depends on whether George's interest in the accrued annual leave hours had become a vested, as opposed to a contingent, property interest. The MLSC Personnel Manual clearly states the circumstance when a former employee will receive payment for accrued annual leave hours; that is, when those accrued hours cease to be a contingent interest and become a vested property right. That occurs when the employee resigns after having been employed for at least one year and if the employee has given MLSC written notice of his or her resignation at least two weeks before the resignation's effective date. MLSC Personnel Manual pt. A.4. Any hours in excess of 600 cannot be accrued but are forfeited.[1] MLSC Personnel Manual pt. E.2. "[O]therwise no payment for accrued Annual Leave is made." MLSC Personnel Manual pt. A.4.

Thus, the right to payment for accrued annual leave hours (without actually taking annual leave), although enforceable, is only a contingent right which does not become absolute unless the terms of the contract creating it have been complied with. Under the MLSC Personnel Manual there are two ways the contingent right to payment for unused annual leave hours becomes vested. One way is a provision which, under certain circumstances not relevant here, allows employees to "cash in" and MLSC to "buy out" accrued annual leave hours in excess of 350 hours. MLSC Personnel Manual pt. E.2. The other is when an employee has resigned with at least two weeks' written notice. *Id.* pt. A.4. Payment for accrued annual leave hours is allowed in those two circumstances.

George contends that since the MLSC Personnel Manual phrase "otherwise no payment for accrued Annual Leave is made" is in the MLSC Personnel Manual part labeled "Resignation," it cannot apply to his situation because he did not resign. He was involuntarily terminated, and that since no manual provision expressly prohibits him from being paid for accrued annual leave hours when he has been fired, those hours must be his vested property and he should be paid.

However, a written instrument, such as a contract, must be read as a whole and in the light of the circumstances under which it was made. *See* Yoruw v. Mobil Oil Micronesia, Inc., 16 FSM R. 360, 365 (Yap 2009); *see, e.g.*, Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 197 (E.D.N.Y. 2004) ("[a]ll written instruments must be read as a whole"); Nature's Sunshine Prods., Inc. v. Watson, 174 P.3d 647, 652 (Utah Ct. App. 2007) (general principle governing interpretation of written instruments is that they "must be read as a whole"). The MLSC Personnel Manual, read as a whole, authorizes the payment of the full amount (if it is 600 hours or less) of accrued annual leave to a former MLSC employee only when that employee has resigned with two weeks' written notice. Otherwise, no payment will be made.[2] Similar provisions are not unusual. *See, e.g.*, Arregui v. Risk Mgt. Servs., LLC, 62 So.3d 136, 139 (La. Ct. App. 2011) (former employee was entitled to unused vacation pay because she had completed the full two weeks of work after written notice of resignation

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[1] "MLSC encourages all employees to take their Annual Leave." MLSC Personnel Manual pt. E.2.

[2] The policy reasons for this requirement seem apparent – 1) to discourage sudden resignations without any notice and encourage two weeks' notice so MLSC can manage its personnel better and 2) to encourage (give a financial incentive to) an employee facing involuntary termination to voluntarily resign instead so that MLSC would not have to go through the involuntary termination process.

when she was out sick the last two days of the two-week notice period); ISS Int'l Serv. Sys., Inc. v. Alabama Motor Express, Inc., 686 So.2d 1184, 1189 (Ala. Civ. App. 1996) (former employee could not collect $1200 in unused vacation pay because he had failed to give two weeks' written notice before resigning).

When the MLSC Personnel Manual is read as a whole, the result must be that an MLSC employee's right to accrued annual leave pay is contingent upon certain events and if those events do not occur, the right never becomes a vested property interest. Since it is undisputed that those events [written resignation with two weeks' notice] never occurred, George, as a matter of law, did not have a vested property interest in his accrued annual leave. His motion for summary judgment must therefore be denied.

When summary judgment has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that its nonmoving opponent is not entitled to judgment as a matter of law. Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 102, 110 n.5 (Pon. 2010). That would be the case here except that, as noted by the defendants, if George should prevail on his wrongful termination claim and be reinstated then his accrued hours would also be reinstated. That being so, no judgment will issue on this claim at this time.

II. The Defendants' Motion

The defendants move to dismiss all of the defendants except MLSC and for summary judgment on all causes of action except for conversion and unauthorized possession (which is the subject of George's summary judgment motion decided above) and the cause of action for wrongful termination in violation of his employment contract.

A. *Summary Judgment on Various Causes of Action*

The defendants move for summary judgment because, in their view, George has failed to allege or have evidence to support one or more elements of each of the causes of action for which they seek summary judgment. In a civil case, the plaintiff has the burden of proving each element of the plaintiff's cause of action by a preponderance of the evidence, and if the plaintiff fails to prove any one element, judgment will be entered against the plaintiff. Nakamura v. FSM Telecomm. Corp., 17 FSM R. 119, 123 (Chk. 2010).

Unless a court, viewing the facts and inferences therefrom in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the court must deny the motion. Rosario v. College of Micronesia-FSM, 11 FSM R. 355, 358 (App. 2003). Rule 56(c) requires that summary judgment be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Peniknos v. Nakasone, 18 FSM R. 470, 478 (Pon. 2012). When the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. Nanpei v. Kihara, 7 FSM R. 319, 325 (App. 1995).

When a plaintiff has failed to make a showing sufficient to establish the existence of any element essential to his case on which he will bear the burden of proof at trial, Rule 56(c) mandates the entry

of summary judgment in the defendant's favor. Ruben v. Chuuk, 18 FSM R. 425, 430 (Chk. 2012); FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 573 (Pon. 2011). In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Peniknos, 18 FSM R. at 478-79; Suldan v. Mobil Oil Micronesia, Inc., 10 FSM R. 574, 578 (Pon. 2002); Kosrae v. Worswick, 10 FSM R. 288, 291-92 (Kos. 2001). Thus, when factual support for an essential element of the claim being asserted against the movant is absent from the case record, a party moving for summary judgment is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. Worswick, 10 FSM R. at 291-92.

1. *Intentional Infliction of Emotional Distress*

George does not allege that he suffered any physical injury or that there was any physical manifestation of his alleged emotional distress. Nor did he provide any evidence of physical injury or physical manifestation of his alleged emotional distress in response to the defendants' discovery requests. He asserts that he intends to call witnesses at trial to support his emotional distress claim and he further asserts that a favorable judgment on his wrongful termination claims will amply support this claim.

The court cannot give any heed to this assertion. When faced with a summary judgment motion, a nonmovant plaintiff must show that he has admissible evidence to support his claim, and the time for him to do that is now, or never. FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 572 (Pon. 2011). A nonmovant's contention that evidence will be introduced sometime in the future or at trial and that it will show certain things is hearsay and since hearsay is generally not admissible evidence, it cannot be relied upon to create a material issue of fact when opposing a summary judgment motion. Dereas v. Eas, 15 FSM Intrm. 135, 140 (Chk. S. Ct. Tr. 2007) (citing Goyo Corp. v. Christian, 12 FSM Intrm. 140, 147 (Pon. 2003)).

One element of an intentional infliction of emotional distress claim is that the plaintiff must have suffered some physical manifestation of the alleged infliction of emotional distress, and when the plaintiff has not shown any physical ailments or manifestations resulting from his employment termination, his claim must fail for lack of proof. Poll v. Victor, 18 FSM R. 235, 246 (Pon. 2012). Since George has not produced any competent evidence to support this essential element of his intentional infliction of emotional distress claim, the defendants are entitled to summary judgment on this cause of action.

2. *Defamation and False Light*

The defendants move to dismiss George's defamation and false light cause of action because George has failed to provide any evidence of statements alleged to be defamatory having been published to other persons. George contends that a favorable decision on his first cause of action (wrongful termination in violation of employment contract) will provide support for this claim.

Defamation is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation. *See* FSM Dev. Bank v. Abello, 18 FSM R. 192, 197 (Pon. 2012) (libel is a defamation published by writing or other fixed representation to the eye). And whoever publicizes a matter about another that places the other in a false light before the public is liable for tortious invasion of privacy if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of

the publicized matter and the false light in which the other would be placed. Nethon v. Mobil Oil Micronesia, Inc., 6 FSM R. 451, 456 (Chk. 1994). Publication is a necessary element of defamation and of the false light tort.

In response to the defendants' discovery requests, George either could not or did not identify any person to whom any allegedly defamatory material, written or oral, had been published or identify any documents that were defamatory. Based on these responses, the defendants make out a prima facie case that essential elements of George's claim of defamation and for false light are absent from the case record, and that they are "entitled to a judgment as a matter of law." Since George, the nonmoving party has failed to make a sufficient showing on essential elements of his case with respect to which he has the burden of proof and George, in his opposition to the motion, not having shown that he has admissible evidence to support his claim, and the time for him to do that is now, or never, summary judgment will be granted for the defendants on George's defamation and false light cause of action.

3. *Breach of the Covenant of Good Faith and Fair Dealing*

The defendants contend that they are entitled to summary judgment on George's cause of action for the breach of the covenant of good faith and fair dealing because the court has, so far, only adopted that covenant as positive FSM law in the context of insurance contracts. They further contend that even if the covenant's reach were extended to employment contracts, the covenant would sound only in contract and not in tort.

The breach of an implied covenant of good faith and fair dealing is a common law tort claim that arises out of a contractual relationship between the parties because contracts impose upon the parties an implied undertaking that each party will not intentionally or purposefully do anything to prevent the other party from carrying out its part of the agreement. FSM v. GMP Hawaii, Inc., 16 FSM R. 601, 605 (Pon. 2009). FSM courts, however, have not yet extended this doctrine's application to contracts other than insurance contracts. *Id.*

George argues that just because the court has not yet applied this covenant to employment contracts does not mean that it should not do so in this case. George pled that the defendants breached this covenant when they did not pay him for his accrued annual leave hours and contends that upon a finding in his favor for his accrued annual leave hours there should also be an attendant finding of a breach of the covenant of good faith and fair dealing. As discussed above, George's right to payment for those hours was contingent on him giving at least two weeks' written notice of his resignation and that since he was terminated involuntarily those events never occurred. The defendants are therefore entitled to summary judgment on this cause of action insofar as it applies to George's accrued annual leave hours claim.

The court has not held that the implied covenant of good faith and fair dealing could never be applied to an employment contract. The court, at this stage of the proceeding, will thus not grant the defendants summary judgment nor dismiss this cause of action as it might apply to George's claim for wrongful termination in violation of his employment contract.

4. *Wrongful Termination in Violation of Due Process*

The defendants contend that the cause of action for wrongful termination in violation of constitutional due process must be dismissed because MLSC, George's employer, was neither a governmental entity nor a private entity acting under the color of law, and neither were any of the other defendants.

The constitutional guarantee of due process only protects persons from the governments, and those acting under them, established or recognized by the Constitution. Semwen v. Seaward Holdings, Micronesia, 7 FSM R. 111, 113 (Chk. 1995). A person's termination by a non-governmental employer does not state a cause of action for unconstitutional deprivation of due process because no governmental entity or official is a defendant; the defendant is not alleged to be performing an essential governmental function; and a government action is not at issue. *Id.*

MLSC is not a governmental entity. It was not created by the FSM national government nor by any government established or recognized (national, state, or local) by the FSM Constitution. Merely because it is funded, in part, by the FSM national and four state governments, does not make it a governmental entity. MLSC is incorporated in the United States Commonwealth of the Northern Marianas. Its parent corporation, Legal Service Corporation, was created by the act of the United States Congress. Thus even if MLSC were a governmental entity, it would be an entity of a government to which the FSM Constitution's due process clause does not apply. The defendants are entitled to summary judgment on George's wrongful termination in violation of constitutional due process cause of action.

5. *Wrongful Termination in Violation of Civil Rights*

The defendants make the same contentions for George's wrongful termination in violation of civil rights cause of action that they did for George's wrongful termination in violation of constitutional due process cause of action – that the defendants were neither governmental entities nor private persons acting under the color of law and so George has failed on an essential element of his claim.

The defendants are mistaken. In a civil rights action under 11 F.S.M.C. 701, a private person who is not acting under color of law but who "deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of, or because of his having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia," 11 F.S.M.C. 701(1), may be held civilly liable under 11 F.S.M.C. 701(3) for that violation. *See* Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 102, 110 (Pon. 2010); Harper v. William, 14 FSM R. 279, 282 (Chk. 2006); Pau v. Kansou, 8 FSM R. 524, 526 (Chk. 1998). George alleges that his FSM constitutional right of freedom of religion was violated because his employment difficulties that ended in his termination arose from religious discrimination against him. The defendants have not shown that George has failed to allege an essential element or that there is a complete absence of proof for any essential element of George's claim that he was wrongfully terminated in violation of his civil rights to freedom of religion. Summary judgment on this cause of action must be denied.

6. *Wrongful Termination in Violation of Public Policy*

George pleads a cause of action that his termination violated public policy under the FSM Constitution and the right to be free of religious discrimination. The defendants contend that this does not state a cause of action. The defendants are correct. To the extent that any defendant could be held civilly liable for the violation of public policy, it would be under 11 F.S.M.C. 701(3), and the public policy as expressed in the civil rights statute. This cause of action is therefore dismissed.

7. *Wrongful Termination in Violation of Human Rights Policy*

George pleads a cause of action that his termination violated human rights policy under the FSM Constitution and his right to work and enjoy just and favorable working conditions under Article 23 of the United Nations Universal Declaration of Human Rights. The defendants contend that this does not state a recognized cause of action. The defendants are correct and this cause of action is dismissed.

George's claims are actionable under FSM domestic law.

8. *Vicarious Liability and Respondeat Superior*

Although George has pled vicarious liability and respondeat superior as a cause of action, neither term refers to a cause of action. "Vicarious liability is not a cause of action but a means by which a defendant is held liable for the act of another, such as a principal being held liable for the torts or contracts of its agent." Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010) (citing BLACK'S LAW DICTIONARY 1404 (5th ed. 1979)). And respondeat superior is just the same doctrine "holding an employer or a principal liable for the employee's or agent's wrongful acts." BLACK'S LAW DICTIONARY 1426 (9th ed. 2009). Neither term describes a cause of action. Vicarious liability and respondeat superior will therefore be discussed when discussing whether and which defendants should be dismissed.

B. *Dismissal of Defendants*

The defendants move that all defendants, except MLSC, be dismissed because George's employment contract was with MLSC and no one else. If the moving defendants' summary judgment motion were granted in its entirety, this would be appropriate. That is not the case, so the various defendants must be considered separately.

1. *Legal Services Corporation*

George named Legal Services Corporation as a defendant on a respondeat superior theory – that it was liable for the conduct of the board members and executive director of its subsidiary corporation, MLSC. There is no evidence that MLSC is the alter ego of Legal Services Corporation and that there is no evidence (or even allegation) that MLSC is a shell corporation with no assets and that therefore there is a need to pierce the corporate veil in order to obtain any relief. *See* Smith v. Nimea, 19 FSM R. 163, 174 (App. 2013). Accordingly, Legal Services Corporation is dismissed as a defendant.

2. *"John Doe" Defendants*

The moving defendants seek to dismiss all those unnamed defendants described as John Does 1-20; Jane Does 1-20; Doe Corporations 1-20; Doe Partnerships 1-20; Doe Non-Profit Entities 1-20; and Doe Governmental Entities 1-20.

Since the FSM has no rule or statute permitting the use of fictitious names to designate defendants, the listing of "John Doe" defendants in *in personam* actions is not a pleading practice recognized in the FSM; therefore the presence of "John Doe" defendants serves no purpose and a trial court should dismiss them without prejudice. Berman v. Pohnpei, 17 FSM R. 360, 366 n.1 (App. 2011) (no authority to proceed against unknown persons in the absence of a statute or rule). Accordingly, all 120 unnamed defendants designated as John Doe, Jane Doe, or some other form of Doe entity are dismissed without prejudice and will henceforth be stricken from the caption.

3. *Palsis, Pliscou, Ruecho, Tenorio, and Gaan*

The defendants also move to dismiss defendants Canney Palsis, Lee Pliscou, Robert Ruecho, Lillian Tenorio, and Michael Gaan, who are being sued individually as well as in their official capacities as MLSC officials.

Robert Ruecho, Lillian Tenorio, and Michael Gaan are members of the MLSC Board of Directors.

In response to the defendants' interrogatories asking George about all facts that gave rise to their liability both individually and as board members, George responded that he had none. Robert Ruecho, Lillian Tenorio, and Michael Gaan are therefore dismissed as defendants.

For the dismissal of MLSC Executive Director Lee Pliscou, the defendants contend that since he was not a party to George's employment contract once all of George's causes of action except breach of employment contract are dismissed Pliscou should also be dismissed. As explained above, while most of George's causes of action other than the breach of contract are dismissed, not all are. However, there are no factual allegations that Pliscou took any actions or failed to take any action in an individual capacity. He will therefore be dismissed as a defendant in his individual capacity.

A suit against Pliscou (or Palsis) in his official capacity is a suit against MLSC. Alexander v. Pohnpei, 18 FSM R. 392, 400 (Pon. 2012) (suit for damages against someone in his official capacity is a claim against the entity that employs that person); Jacob v. Johnny, 18 FSM R. 226, 231-32 (Pon. 2012) (same); Marsolo v. Esa, 17 FSM R. 480, 485-86 (Chk. 2011) (same); Herman v. Bisalen, 16 FSM R. 293, 295 (Chk. 2009) (same). While it is unclear exactly what official actions Pliscou is alleged to have taken (other than not authorizing payment for George's accrued annual leave hours) that would give rise to liability, the defendants have not shown that they have a right, as a matter of law to Pliscou's dismissal in his official capacity. He will therefore be dismissed only in his individual capacity.

The defendants' ground for dismissing Canney Palsis is the same as the one they advanced for dismissing Pliscou. However, in Palsis's case, George has alleged actions by Palsis that, if true and if proven, would give rise to tort liability for the violation of George's civil rights. Palsis will not be dismissed as a defendant.

Since Palsis and Pliscou remain as defendants, George's claim of respondeat superior or vicarious liability will not be dismissed either. MLSC is still potentially vicariously liable for any liability they might have.

IV. Conclusion

Sasaki George's summary judgment motion for conversion and unauthorized possession because of the non-payment of accrued annual leave hours is denied but no judgment is rendered on that claim since if George prevails on his breach of contract claim, those hours will be reinstated.

The defendants are granted summary judgment on George's causes of action for wrongful termination in violation of public policy, wrongful termination in violation of human rights policy, wrongful termination in violation of constitutional due process, defamation and false light, and intentional infliction of emotional distress and those causes of action are dismissed. George's cause of action for breach of the covenant of good faith and fair dealing is dismissed only insofar as it relates to his claim for payment of accrued annual leave hours.

Unnamed defendants listed as John Does 1-20; Jane Does 1-20; Doe Corporations 1-20; Doe Partnerships 1-20; Doe Non-Profit Entities 1-20; and Doe Governmental Entities 1-20, and named defendants Robert Ruecho, Lillian Tenorio, and Michael Gaan are all dismissed. Defendant Lee Pliscou is dismissed in his individual capacity only. George's vicarious liability and respondeat superior claim remains only in relation to defendants Lee Pliscou and Canney Palsis. All dismissed defendants shall be stricken from the case caption.

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