

PT&S should sue her for breach of contract in a separate action.

Ihara's last argument is that PT&S has unclean hands because it applied her last paycheck of \$26.50 to her debt on the airline tickets. Ihara has not shown that this setoff was wrongful and even if she had, this is not a defense to conversion. "A defendant may successfully defend a conversion action by proving that the plaintiff consented to the defendant's taking, or that the defendant had rights in the property superior to the plaintiff's, or that the plaintiff has waived its cause of action, or that the plaintiff is estopped from asserting any right to the property." Iriarte, 18 FSM R. at 357. Ihara's defense was that the counterclaimants had authorized her taking. That defense failed.

V. CONCLUSION

Accordingly, we affirm the trial court judgment. The appellees are entitled to their costs. FSM App. R. 39(a).

* * * *

FSM SUPREME COURT APPELLATE DIVISION

QUIRINO LOYOLA, in his capacity as Nett)	APPEAL CASE NO. P1-2014
District Election Chairman, ex rel.)	
ADELINO EDMUND,)	
)	
Appellant-Petitioner,)	
)	
vs.)	
)	
PETERIKO HAIRENS,)	
)	
Appellee-Respondent.)	
_____)	

ORDER DISMISSING APPEAL

Argued: October 7, 2014
Decided: October 27, 2014

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Temporary Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

APPEARANCES:

For the Appellant: Joseph S. Phillip, Esq.
P.O. Box 464
Kolonia, Pohnpei FM 96941

For the Appellee: Marstella E. Jack, Esq. (argued)
P.O. Box 2210
Kolonias, Pohnpei FM 96941

* * * *

HEADNOTES

Courts – Recusal – Close Relationship

A judge is disqualified to sit on a lawsuit when a party's counsel is the judge's sister-in-law. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 606 (App. 2014).

Courts – Recusal – Rule of Necessity

The only time the "rule of necessity" may be applied to allow a judge not to recuse himself is if no other judge is available to hear the case. The "rule of necessity" cannot be applied to permit an otherwise disqualified justice to serve as long as it is possible to appoint a temporary judge who is not disqualified. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 606 (App. 2014).

Appellate Review – Decisions Reviewable

An appellate court is obligated to examine the basis of its appellate jurisdiction, *sua sponte*, if necessary. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 606 (App. 2014).

Appellate Review – Decisions Reviewable; Appellate Review – Notice of Appeal

One requisite of appellate jurisdiction is that there must be a timely filed notice of appeal. This requirement is mandatory and jurisdictional. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 607 (App. 2014).

Appellate Review – Notice of Appeal

While a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order must be treated as filed after such entry and on the day thereof, other prematurely filed notices of appeal have no effect and never transfer jurisdiction to the FSM Supreme Court appellate division. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 607 (App. 2014).

Appellate Review; Constitutional Law – Due Process

There is no due process violation from the different composition of the two appellate panels when the first appellate panel had before it an interlocutory appeal and the later appeal was from a final judgment on the merits. There is no due process reason why a different panel could not be constituted for the second appeal case when the first panel had completed its work on the appeal case before it and then, after a new and final trial division decision, a different group of three judges was empaneled to hear the new appeal case. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 607 (App. 2014).

Appellate Review – Decisions Reviewable

When, in order for the FSM Supreme Court appellate division to have jurisdiction over the second Nett District Court appellate division's decision about whether the Nett Chief Justice should have heard the trial division case, the appellant would have had to have filed a notice of appeal from that decision. Since he did not, the FSM Supreme Court does not have jurisdiction to review the part of the second decision which the court would have had jurisdiction to review if there had been a timely notice of appeal, and since there was no timely notice of appeal from the decision that would require interpretation of the FSM Constitution's due process clause, the appeal must be dismissed. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 603, 607-08 (App. 2014).

* * * *

COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This case arises from a municipal election in Nett District, Pohnpei. We conclude that because of the manner in which this appeal came before us, we lack jurisdiction to decide it and must dismiss it. Our reasoning follows.

I.

In 2013 election, Adelino Edmund received enough write-in votes for Nett district administrator that the Nett Election Chairman Quirino Loyola considered him the "second winner" necessitating a run-off election. Peteriko Hairens was the "first winner" but did not have a majority of the votes cast if the Edmund votes were considered valid since a number of other candidates each received a lesser number of votes. A run-off election was scheduled for December 27, 2013.

On December 20, 2013, Peteriko Hairens filed suit in Nett District Court to void or exclude the Edmund write-in votes and to exclude Edmund's name from the already printed run-off ballots since Edmund had already served two terms as Nett district administrator, and he was thus, under the Nett Constitution, ineligible to serve another. On December 25, 2013, Nett District Chief Justice Eneriko Ekiek orally enjoined the December 27th election. This decision was not reduced to writing and entered until the 27th when the run-off election was already underway.

On December 26, 2013, Loyola appealed Chief Justice Ekiek's oral decision to the Nett District Court appellate division. On January 15, 2014, a three-judge panel in the Nett District Court appellate division ruled that

there is nothing in the record that shows clear error on the part of the Trial Court when it granted the TRO. Additionally, the issue of whether Chief Justice Ekiek properly denied Respondent's Motion to Disqualify is not reviewable by the Appellate Panel at this time. However, the issue is well-documented in the record and is appealable after a final judgment is rendered as to the declaratory relief sought by [Peteriko Hairens].

Hairens v. Loyola, Opinion at 4 (Nett Dist. Ct. App. No. 2013-01 Jan. 15, 2014). On January 16, 2014, Chief Justice Ekiek held Loyola in contempt and ordered him to invalidate Edmund's write-in votes and re-certify the election results, making Hairens the winner.

On January 20, 2014, Loyola filed a notice of appeal in the FSM Supreme Court appellate division and also asked that a single justice issue a writ of prohibition to prohibit Chief Justice Ekiek for further hearing the case until the FSM Supreme Court has decided this appeal. The Nett District Court trial division issued its decision on January 21, 2014, and denied a motion to stay on January 29, 2014.

On January 28, 2014, FSM Chief Justice Martin G. Yinug issued an order that asked Loyola to file a brief on whether the FSM Supreme Court appellate division has jurisdiction over his petition and whether his petition should have first been filed in a division of the Pohnpei Supreme Court. After briefing, we, on May 15, 2014, held that since under Pohnpei Supreme Court case law there was no appeal from the Nett District Court to the Pohnpei Supreme Court and that since the Nett District Court appellate division was the highest Pohnpei court in which a decision could be had,

we may exercise jurisdiction over this appeal to the extent that it is an appeal from the Nett District Court appellate division and we consider this petition for a writ of prohibition if a writ of prohibition has already been sought and denied in the Nett District Court appellate division or to the extent that it is a petition for a writ of prohibition directed to the Nett District Court appellate division.

Loyola ex rel. Edmund v. Hairens, 19 FSM R. 401, 403 (App. 2014).

On February 14, 2014, a different three-judge panel of the Nett District Court appellate division heard oral argument on the merits. In its February 24, 2014 decision, it noted that, although Hairens's counsel was Chief Justice Ekiek's sister-in-law, the other Nett District Court justice, Associate Justice Gregorio Edmund, was closely related to write-in candidate Adelino Edmund was obviously disqualified. Relying on the rule of necessity, it affirmed Chief Justice Ekiek's denial of his disqualification holding that, "[a]lthough there was a conflict of interest that arose as to Chief Justice Ekiek's relation to Appellee's counsel, there was essentially no other justice available to hear the case." Hairens v. Loyola, Opinion at 5 (Nett Dist. Ct. App. 2014-01 Feb. 24, 2014). It did not consider or discuss whether Chief Justice Ekiek could have appointed a temporary judge to hear the case. It then affirmed the Chief Justice Ekiek's rulings on the merits. *Id.* at 6-8.

II.

It is undisputed that since Hairens's counsel was his sister-in-law, Chief Justice Ekiek was disqualified to sit on Hairens's lawsuit to prevent the run-off election under both the Pohnpei statute, 4 Pon. C. § 7-103(2)(d)(ii), and the ABA Code of Judicial Conduct. The Nett District Court appellate division ruled that since the other Nett District Court judge was also disqualified Chief Justice Ekiek could hear and decide the case through the application of the "rule of necessity."

As Loyola notes, we have held that the only time the Rule of Necessity may be applied to allow a judge not to recuse himself is if no other judge is available to hear the case. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM R. 1, 5 (App. 1997). As Loyola further notes, the "rule of necessity" cannot be applied to permit an otherwise disqualified justice to serve as long as it is possible to appoint a temporary judge who is not disqualified. Ruben v. Petewon, 14 FSM R. 146, 148 n.1 (Chk. S. Ct. App. 2006); Cholymay v. Chuuk State Election Comm'n, 10 FSM R. 145, 151 (Chk. S. Ct. App. 2001).

Loyola contends that a temporary judge could have been appointed to hear the case in the Nett District Court trial division and that, since one was not, his right to due process under the FSM Constitution was violated. He asserts that, since his due process rights were violated when the case was heard by a disqualified judge, we should vacate the decisions below and remand for a new (temporary) judge who is not disqualified to decide the merits.

III.

But we must first determine if we have jurisdiction over this issue. An appellate court is obligated to examine the basis of its appellate jurisdiction, *sua sponte*, if necessary. Simon v. Heirs of Tulenkun, 17 FSM R. 646, 648 (App. 2011); Berman v. Pohnpei Legislature, 17 FSM R. 339, 352 (App. 2011); Alonso v. Pridgen, 15 FSM R. 597, 598 n.1 (App. 2008).

"The appellate division of the Supreme Court may review . . . cases heard in state or local courts if they require interpretation of this Constitution . . ." FSM Const. art. XI, § 7. This appeal from a local court requires interpretation of the FSM Constitution's due process clause – specifically, Loyola's

due process right to adjudication by an impartial and detached judge. See Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM R. 500, 503 (App. 2011). That is the only issue that Loyola has raised in this appeal and, if it is properly before us, we may decide it. Under Pohnpei Supreme Court case law, as noted in our earlier order, the Nett District Court appellate division is the highest Pohnpei court in which a decision could be had since the Pohnpei Supreme Court has ruled that there is no appeal from Pohnpei municipal courts to the state court system. Loyola ex rel. Edmund v. Hairens, 19 FSM R. 401, 402 (App. 2014) (relying on Katerson v. Gallen, Opinion, App. No. 4-2002 (Pon. S. Ct. App. June 26, 2006)).

One requisite of appellate jurisdiction is that there must be a timely filed notice of appeal. This requirement is mandatory and jurisdictional. Jonah v. FSM Dev. Bank, 17 FSM R. 506, 508 (App. 2011). While "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof," FSM App. R. 4(a)(2), the first Nett District Court appellate division panel never announced a decision on the issue of Chief Justice Ekiek's disqualification. Rule 4(a)(2) thus does not apply to this appeal. Other prematurely filed notices of appeal have no effect and never transfer jurisdiction to the FSM Supreme Court appellate division. Damarlane v. Pohnpei, 9 FSM R. 114, 119 (App. 1999).

Loyola contends that the lack of a notice of appeal from the second Nett District Court appellate division decision is irrelevant because that appellate panel never had jurisdiction over the case since there already was an appellate panel presiding over the case – the first appellate panel that had heard the interlocutory appeal and that had affirmed the December 27, 2013 temporary restraining order. Loyola contends that the second Nett District Court appellate division panel was without any authority and thus its rulings were all void from the start. If true, that would violate Loyola's right to due process.

We do not see any due process violation from the different composition of the two appellate panels. The first Nett District Court appellate division panel had before it an interlocutory appeal docketed as Appeal Case No. 2013-01. The later appeal was from a final judgment on the merits and was docketed as Appeal Case No. 2014-01. We see no due process reason why a different panel could not be constituted for the second Nett District Court appellate division appeal case. The first panel had completed its work on the appeal case before it and then, after a new and final Nett District Court trial division decision, a different group of three judges was empaneled to hear the new appeal case.

The same situation has occurred in this court. We have had different panels for an interlocutory appeal and a later appeal from a final judgment. See *e.g.*, Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 332 (App. 1992) (interlocutory appeal from Civil Action No. 1990-075) and Damarlane v. United States, 8 FSM Intrm. 45 (App. 1997) (appeal from final judgment in Civil Action No. 1990-075) and *see, e.g.*, Smith v. Nimea, 16 FSM Intrm. 346 (App. 2009) (interlocutory appeal from Civil Action No. 2005-004) and Smith v. Nimea, 19 FSM R. 163 (App. 2013) (appeal from final judgment in Civil Action No. 2005-004). Like here, those appeals had different appellate docket numbers and different notices of appeal.

The second Nett District Court appellate division panel ruled on the issue of whether Chief Justice Ekiek should not have heard the Nett District Court trial division case. No notice of appeal to the FSM Supreme Court appellate division was filed after that decision. Since the issue of whether Chief Justice Ekiek should not have heard the Nett District Court trial division case was not decided by the first Nett District Court appellate division panel (and that panel made a point of not deciding it) that was not part of the decision appealed to us. In order for us to have jurisdiction over the second Nett District Court appellate division panel's decision on whether Chief Justice Ekiek should have heard the trial division case, Loyola would have had to have filed a new notice of appeal. Since he did not, we

do not have jurisdiction to review the part of that decision which we would have had jurisdiction to review if there had been a timely notice of appeal. Pohnpei v. AHPW, Inc., 13 FSM Intrm. 159, 161 (App. 2005); Felix v. Adams, 13 FSM Intrm. 28, 29 (App. 2004).

IV.

Accordingly, since there is no timely notice of appeal from the decision that would require interpretation of the FSM Constitution's due process clause, we must dismiss this appeal.

* * * *

FSM SUPREME COURT TRIAL DIVISION

HAMLIN SAIMON, JOSHAIA SAIMON, and LENORA SIGRAH,)	CIVIL ACTION NO. 2013-2001
)	
Plaintiffs-Respondents,)	
)	
vs.)	
)	
GINN P. NENA,)	
)	
Defendant-Petitioner, Third-Party Plaintiff,)	
)	
vs.)	
)	
KOSRAE LAND and KOSRAE STATE GOVERNMENT,)	
)	
Third-Party Defendants.)	
_____)	

ORDER REMANDING CASE TO THE KOSRAE STATE COURT

Ready E. Johnny
Associate Justice

Decided: October 28, 2014

APPEARANCES:

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

* * * *