

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.

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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
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HEADNOTES

Jurisdiction – Removal

Under FSM GCO 1992-2, § II(D), a party has effected removal of a case to the FSM Supreme Court when written notice thereof has been given to all parties and a copy of the petition has been filed with the clerk of the state court. The removal is thus accomplished automatically without any FSM Supreme Court action. Saimon v. Nena, 19 FSM R. 608, 610 (Kos. 2014).

Jurisdiction – Removal

Regardless of how it is styled, an opposition to a verified petition to remove can only be a motion to remand the case to the state court it came from on the ground that it was improvidently removed. Saimon v. Nena, 19 FSM R. 608, 610 (Kos. 2014).

Jurisdiction – Removal

A party may remove a case from state court to the FSM Supreme Court if the case is one over which the FSM Supreme Court would have subject-matter jurisdiction if the case had originally been filed in the FSM Supreme Court; if the removal was effected within 60 days after the receipt by any party, through service or otherwise, of a copy of an initial or amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable; and if the party removing the case has not previously waived the its right to remove. Saimon v. Nena, 19 FSM R. 608, 611 (Kos. 2014).

Jurisdiction – Arising Under National Law; Jurisdiction – Removal

A case arises under the FSM Constitution or national law when the FSM Constitutional issue or the national law issue is an essential element of one or more of the plaintiff's causes of action, and it must be disclosed upon the face of the complaint, unaided by the answer, the petition for removal, or any pleadings subsequently filed in the case, and it may not be inferred from a defense asserted or one expected to be made, and the national law issue must be a substantial one. Saimon v. Nena, 19 FSM R. 608, 611 (Kos. 2014).

Jurisdiction – Arising Under National Law; Jurisdiction – Removal

As a defense raised in the answer to the original complaint, a defendant's due process claims would not make it a case over which the FSM Supreme Court would have jurisdiction because it would not be considered a case arising under the FSM Constitution or national law. Saimon v. Nena, 19 FSM R. 608, 611 (Kos. 2014).

Jurisdiction – Arising Under National Law

The determination of whether a case is one "arising under" the FSM Constitution, national law, or treaties is derived from the plaintiff's cause of action, not inferred from any possible defenses that are or that might be raised. Saimon v. Nena, 19 FSM R. 608, 611 (Kos. 2014).

Jurisdiction – Removal

Since a cross-claim cannot form a basis for the FSM Supreme Court's jurisdiction because determination of whether a case arises under the Constitution, national law, or a treaty is based on the plaintiff's statement of his cause of action, not on whatever defenses that are or that might be raise, a third-party claim should not create subject-matter jurisdiction in the FSM Supreme Court either. Saimon v. Nena, 19 FSM R. 608, 611 (Kos. 2014).

COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

I.

On June 4, 2013, Hamlin Saimon, Joshua Saimon, and Lenora Sigrah filed this case in the Kosrae State Court against Ginn P. Nena (docketed as Civil Action No. 39-2013), alleging that Nena was, without their permission, building a permanent structure on land that they owned called Inwalul and asking that Nena be enjoined from any construction on and any further presence in Inwalul, and that unspecified damages be awarded. On July 22, 2013, Nena filed his answer and on July 31, 2013, he filed a third-party complaint against the Kosrae Land Court (as successor to the Kosrae Land Commission) and the Kosrae state government, alleging that the third-party defendants violated his predecessor's right to due process by registering the land Inwalul as the plaintiffs' property without giving Nena's predecessor any notice or opportunity to be heard on his claim to the same land. On September 20, 2013, Nena removed this case to the FSM Supreme Court by filing a verified petition for removal.

On October 1, 2013, the plaintiffs filed their opposition to the removal. Under FSM GCO 1992-2, §II(D), a party has effected removal of a case to the FSM Supreme Court when written notice thereof has been given to all parties and a copy of the petition has been filed with the clerk of the state court. The removal is thus accomplished automatically without any FSM Supreme Court action. Shrew v. Sigrah, 13 FSM R. 30, 32 (Kos. 2004); Wilson v. Pohncei Family Headstart Program, Inc., 7 FSM R. 411, 412 (Pon. 1996) (removal is effected upon compliance with the FSM GCO 1992-2 procedures; state court takes no further action following removal unless and until a case is remanded). Therefore, the plaintiffs' opposition to the verified petition to remove is a motion to remand the case to the Kosrae State Court because an opposition to a removal petition, regardless of how it is styled, can only be a motion to remand the case to the state court it came from on the ground that it was improvidently removed. Etscheit v. McVey, 13 FSM R. 477, 479 (Pon. 2005); Gilmete v. Adams, 11 FSM R. 105, 107 & n.1 (Pon. 2002); Porwek v. American Int'l Co. Micronesia, 8 FSM R. 436, 438 (Chk. 1998).

The plaintiffs' grounds for remand were that the removal petition was filed too late; that they were not served with copies of all process, pleadings and orders served upon or by Nena in the action; and that the FSM Supreme Court lacked subject matter jurisdiction over the case since it did not arise under national law and there was no diversity of citizenship. Nena opposed, asserting that the case arose under the FSM Constitution's due process clause because the Kosrae land registration team and the Kosrae Land Commission did not give his father, Palikkun Nena, notice of and an opportunity to be heard at the preliminary hearing or include him in any of the proceedings that resulted in a certificate of title eventually being issued to the plaintiffs.

On November 25, 2013, the court issued an order "denying" the removal petition, that is, the order remanded the case to the Kosrae State Court, because the causes of action in the plaintiffs' complaint did not arise under the FSM Constitution or national law and because Nena's due process claims were made only in his answer. After the court granted an enlargement of time for that purpose, Nena, on December 16, 2013, moved for the court to reconsider its order on the basis that his third-party complaint and the causes of action alleged therein arose under the FSM Constitution due process clause and that the third-party complaint was the first filing from which it could be determined that the case arose under the FSM Constitution's due process clause. Since it was a matter of first impression, the court requested further briefing. Nena filed a supplemental brief on April 25, 2014. The plaintiffs and the third-party defendants did not file anything.

II.

A party may remove a case from state court to the FSM Supreme Court if the case is one over which the FSM Supreme Court would have subject-matter jurisdiction if the case had originally been filed in the FSM Supreme Court, FSM GCO 1992-2, § 1; if the removal was effected within 60 days "after the receipt by any party, through service or otherwise, of a copy of an initial or amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable," *id.* § II(B); and if the party removing the case has not previously waived the its right to remove, *id.* § III(C).

The FSM Supreme Court has subject-matter jurisdiction over cases arising under the FSM Constitution, national laws, or treaties. FSM Const. art. XI, § 6(b). The third-party complaint alleges claims under the FSM Constitution's due process clause that the third-party defendants violated the due process rights of Nena's predecessor-in-interest. A case arises under the FSM Constitution or national law when the FSM Constitutional issue or the national law issue is an essential element of one or more of the plaintiff's causes of action, and it must be disclosed upon the face of the complaint, unaided by the answer, the petition for removal or any pleadings subsequently filed in the case, and it may not be inferred from a defense asserted or one expected to be made, and the national law issue must be a substantial one. Etscheit v. McVey, 13 FSM R. 477, 479 (Pon. 2005); David v. San Nicolas, 8 FSM R. 597, 598 (Pon. 1998).

Nena's due process claims were originally raised as a defense to the plaintiffs' trespass claims. Nena's due process claims are a defense, which, if proven, would result in Nena prevailing in the case and would also likely result in the voiding of the current certificate of title and the start of Kosrae Land Court proceedings to determine and register title. As a defense raised in the answer to the original complaint, Nena's due process claims would not make this a case over which the FSM Supreme Court would have jurisdiction because it would not be considered a case arising under the FSM Constitution or national law. The determination of whether a case is one "arising under" the FSM Constitution, national law, or treaties is derived from the plaintiff's cause of action, not inferred from any possible defenses that are or that might be raised. FSM Dev. Bank v. Ehsa, 18 FSM R. 608, 615 (Pon. 2013); Etscheit, 13 FSM R. at 479; Enlet v. Bruton, 10 FSM R. 36, 40 (Chk. 2001); FSM Dev. Bank v. Ifraim, 10 FSM R. 1, 4 (Chk. 2001); David, 8 FSM R. at 598.

The court does not see how, merely by filing a third-party complaint against the successor tribunal to the one in which Nena's father was not given due process would convert a case over which the FSM Supreme Court did not have subject-matter jurisdiction into a case over which it does have jurisdiction. Since a cross-claim cannot form a basis for the FSM Supreme Court's jurisdiction because determination of whether a case arises under the Constitution, national law, or a treaty is based on the plaintiff's statement of his cause of action, not on whatever defenses that are or that might be raised, Mailo v. Chuuk, 12 FSM R. 597, 600 (Chk. 2004), a third-party claim should not create subject-matter jurisdiction in the FSM Supreme Court either.

III.

Accordingly, this case is remanded to the Kosrae State Court. By this order, jurisdiction is returned to the Kosrae State Court. It may now proceed with the matter.

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