

at 9:30 a.m. at the FSM Supreme Court in Palikir, Pohnpei.

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FSM SUPREME COURT TRIAL DIVISION

CIVIL ACTION NO. 2012-1024

EOT MUNICIPALITY, ETTAL MUNICIPALITY,)
FANANOU MUNICIPALITY, FANAPANGAS)
MUNICIPALITY, LUKINOCHE MUNICIPALITY, MOCH)
MUNICIPALITY, NOMWIN MUNICIPALITY, PAREM)
MUNICIPALITY, RUO MUNICIPALITY, SATOWAN)
MUNICIPALITY, TAMATAM MUNICIPALITY, and)
UDOT MUNICIPALITY,)

Plaintiffs,)

vs.)

JOHNSON ELIMO, in his capacity as Governor of)
Chuuk State, CHUUK STATE, and FEDERATED)
STATES OF MICRONESIA,)

Defendants.)

FEDERATED STATES OF MICRONESIA,)

Cross-Claimant/)
Counter-Cross-Defendant,)

vs.)

STATE OF CHUUK,)

Cross-Defendant/)
Counter-Cross-Claimant.)

ORDER TO ENTER PARTIAL FINAL JUDGMENT

Beauleen Carl-Worswick
Associate Justice

Decided: March 13, 2015

APPEARANCE:

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

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HEADNOTES

Civil Procedure – Motions – Unopposed

While, by rule, the failure to oppose a motion is generally deemed a consent to the motion, the court still needs good grounds before it can grant an unopposed motion. Even for an unopposed motion to be granted, it must be well grounded in law and fact. Eot Municipality v. Elimo, 20 FSM R. 7, 9 (Chk. 2015).

Sovereign Immunity – Chuuk

Since sovereign immunity implicates a court's subject matter jurisdiction, the defense of sovereign immunity can be raised at any time, either by a party or by the court. The law is well established that counsel for the State or one of its agencies may not by failure to plead the defense, waive the defense of governmental immunity in the absence of express statutory authorization. Eot Municipality v. Elimo, 20 FSM R. 7, 10-11 (Chk. 2015).

Sovereign Immunity – Chuuk

Even when there is no provision in the state's constitution or its statutes expressing the immunity of the state from liability for interest payments not assented to, such immunity is an attribute of sovereignty and is implied by law for the state's benefit. Eot Municipality v. Elimo, 20 FSM R. 7, 11 (Chk. 2015).

Judgments – Interest; Sovereign Immunity – Chuuk

Statutes, 6 F.S.M.C. 1401; 8 TTC 1, that read: "Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered" are statutes of general application to money judgments and not statutes that specifically address judgments against sovereign defendants. Eot Municipality v. Elimo, 20 FSM R. 7, 11 (Chk. 2015).

Sovereign Immunity – Chuuk

Logically, when the Commonwealth of the Northern Marianas also has an identically-worded statute derived from the same source as the FSM Code and Chuuk state law – the Trust Territory Code, the statutes would be interpreted and applied against their respective sovereigns in the same manner. Eot Municipality v. Elimo, 20 FSM R. 7, 11 (Chk. 2015).

Judgments – Interest; Sovereign Immunity – Chuuk

In the absence of an express statutory waiver of immunity against post-judgment interest, the Chuuk government is not liable for such interest even though there is a statute of general application imposing 9% post-judgment interest on money judgments, but Chuuk is liable for the 5% interest it agreed to on a loan. Eot Municipality v. Elimo, 20 FSM R. 7, 11-12 (Chk. 2015).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On March 18, 2014, the court granted the plaintiff Chuuk municipalities summary judgment on their breach of contract claim against the State of Chuuk only (but not against the other defendant, Governor Johnson S. Elimo) for Chuuk's failure to repay the money borrowed from the plaintiffs' municipal capital improvement project funds in 1999 (with 5% interest per annum starting October 2002). Eot Municipality v. Elimo, 19 FSM R. 290, 295-96 (Chk. 2014).

I. PROCEDURAL BACKGROUND

On August 6, 2014, the plaintiffs, asserting that there was no just cause for delay, moved to have a final judgment entered on this claim while the litigation over their other claims proceeds. They ask that the partial final judgment they desire specifically include language imposing the statutory 9% interest from entry of judgment, thus raising the State of Chuuk's liability for the loan amount from 5% interest to 9% and to also impose the 9% statutory interest on the 5% interest that has accrued to date.

Uncertain whether when the sovereign State of Chuuk has agreed by contract to pay 5% interest on its unpaid debt that it could also be held liable for 9% post-judgment interest, the court, on October 16, 2014, requested briefing on this point. The court suggested that the parties consult and refer to Marine Revitalization Corp. v. Department of Land & Natural Resources, 2010 MP 18 (N. Mar. I. 2010); Pacific Rock Corp. v. Perez, 2005 Guam 15 (Guam 2005); Sumitomo Construction Co. v. Guam, 2001 Guam 23 (Guam 2001), cases from neighboring Pacific island jurisdictions¹ with similar statutes concerning post-judgment interest. The court also suggested various United States cases that discuss the point.²

The municipalities filed their brief on November 14, 2014. Chuuk did not file a response brief. The municipalities contend that the court should consider the lack of response to be Chuuk's acquiescence to their motion.

While, by rule, the failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d), the court still needs good grounds before it can grant an unopposed motion. Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 442 (App. 1994); Lee v. Lee, 13 FSM R. 68, 71 (Chk. 2004). Even for an unopposed motion to be granted, it must be well grounded in law and fact. In re Parcel No. 046-A-01, 6 FSM R. 149, 153 (Pon. 1993).

II. PLAINTIFFS' POSITION

The municipalities, quoting United States v. Bayard, 127 U.S. 251, 260, 8 S. Ct. 1156, 1161, 32 L. Ed. 159, 162-63 (1888) and further citing United States v. North Carolina, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336 (1890), note that as a general rule claims of interest are not allowed against a government except when the government has stipulated to pay interest or when a statute expressly provides for its payment either as damages or as interest. They contend, however, that both 6

¹ The court has, in the past, urged consultation of case law from other Pacific island jurisdictions. See Nix v. Ehmes, 1 FSM R. 114, 119 n.2 (Pon. 1982); Lonno v. Trust Territory, 1 FSM R. 53, 71 (Kos. 1982)

² Those other cases were: United States v. North Carolina, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336 (1890); United States v. Bayard, 127 U.S. 251, 8 S. Ct. 1156, 32 L. Ed. 159 (1888); United States v. Sherman, 98 U.S. (8 Otto) 565, 25 L. Ed. 235 (1878); State Tax Comm'n v. United Verde Extension Mining Co., 4 P.2d 395 (Ariz. 1931); Jobe v. Urquant, 143 S.W. 121 (Ark. 1912); Martin Marietta Corp. v. Division of Employment & Training, 784 P.2d 850 (Colo. Ct. App. 1989); Treadway v. Terrell, 158 So. 512 (Fla. 1935); Flack v. Graham, 461 So. 2d 82 (Fla. 1984); Chun v. Board of Trustees of Employees' Ret. Sys., 106 P.3d 339 (Haw. 2005); University of Utah v. Twin Falls County, 842 P.2d 689 (Idaho 1992); Bradley v. Commonwealth, 301 S.W.3d 27 (Ky. 2009); Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 990 N.E.2d 1042 (Mass. 2013); Albuquerque Commons P'ship v. City Council of Albuquerque, 212 P.3d 1122 (N.M. 2009); Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004); Yancey v. North Carolina State Highway & Pub. Works Comm'n, 22 S.E.2d 256 (N.C. 1942); Hart v. Salt Lake County Comm'n, 945 P.2d 125 (Utah Ct. App. 1997); Jenkins v. Washington State Dep't of Soc. & Health Servs., 157 P.3d 368 (Wash. 2007).

F.S.M.C. 1401 and 8 TTC 1³ provide the necessary statutory authorization to impose post-judgment interest on the State of Chuuk and they argue that the imposition of interest encourages judgment-debtors to pay.⁴

They note that in two cases they consulted there were state statutes that specifically prohibited the imposition of interest on the state, *e.g.*, Martin Marietta Corp. v. Division of Employment & Training, 784 P.2d 850 (Colo. Ct. App. 1989); Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004), but that there is no prohibitory statute here. The municipalities, in their brief, do agree that "[o]nly the legislature can direct payment of interest against the state," Martin Marietta Corp., 784 P.2d at 852, but assert that 6 F.S.M.C. 1401 or 8 TTC 1 provides that direction. Response to Court Order at 6 (Nov. 14, 2014).

The municipalities also note two cases, Chun v. Board of Trustees of Employees' Ret. Sys., 106 P.3d 339, 356 (Haw. 2005) and Flack v. Graham, 461 So. 2d 82, 83 (Fla. 1984), in which the courts held that although the respective states of Hawaii and Florida had expressly waived their sovereign immunity to the underlying claims, post-judgment interest was not awardable because neither state had expressly and statutorily waived its sovereign immunity to post-judgment interest. The municipalities urge the court not to follow these cases. They contend that these cases espouse the minority position in the United States. They further contend that since the statute in Hawaii was based on the United States Federal Tort Claims Act, Chun should be disregarded because there is no showing that the Chuuk statute was based on the same Act.

The municipalities assert that this is an action on a contract, not a tort action and that Chun is therefore not persuasive. They note that Chuuk has paid 9% interest on judgments that have been collected against it in the past. They also argue that the interest statute that should be applied is the national statute, 6 F.S.M.C. 1401, and the FSM Supreme Court has previously applied national civil rights statutes to collect judgments against Chuuk by garnishing Chuuk funds in the national government's possession even though a Chuuk state statute bars garnishing public property.

III. ANALYSIS

This is not a civil rights case. It is a breach of contract case in which the State of Chuuk agreed to pay 5% interest on the loan(s) that remained unpaid, starting in October 2002. The result should not differ whether it is brought in national or state court. Kitti Mun. Gov't v. Pohnpei, 13 FSM R. 503, 508 (App. 2005) (when the FSM Supreme Court, in the exercise of its jurisdiction, decides a matter of state law, the court's goal should be to apply the law the same way the highest state court would).

Since "[s]overeign immunity implicates a court's subject matter jurisdiction . . . the defense of sovereign immunity can be raised at any time, either by a party or by the court." Sumitomo Constr. Co. v. Guam, 2001 Guam 23 ¶ 22 (Guam 2001). "[T]he law is well established that counsel for the

³ Under the Chuuk Constitution's Transition Clause, Trust Territory Code Title 8 is still applicable law in Chuuk. Chuuk v. Andrew, 15 FSM R. 39, 42 n.2 (Chk. S. Ct. App. 2007).

⁴ The plaintiffs contend that imposing post-judgment interest on the state acts as an incentive for the state to pay the judgments against it in a timely manner. They also ask the court to take judicial notice of the state's general inability to pay its debts and the many unpaid judgments against the state that are sometimes over twenty years old. What they leave unexplained is if the state is generally unable to pay the judgments against it how adding large interest charges on those unpaid judgments (for example, it would triple the amount of a 22-year old judgment cited by the plaintiffs) would make it easier for the state to pay its debts.

State or one of its agencies may not . . . by failure to plead the defense, waive the defense of governmental immunity in the absence of express statutory authorization." Samuels v. Tschachtelin, 763 A.2d 209, 240 (Md. Ct. Spec. App. 2000). Even when there is no provision in the state's constitution or its statutes "expressing the immunity of the state from liability for interest payments not assented to, such immunity is an attribute of sovereignty and is implied by law for the benefit of the state . . ." Treadway v. Terrell, 158 So. 512, 517 (Fla. 1935).

The municipalities claim that they are entitled to 9% interest on any judgment and that it should be included in the partial final judgment they seek here either because of the FSM statute that reads: "Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered." 6 F.S.M.C. 1401; or the identically-worded Chuuk [Trust Territory] statute that reads: "Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered." 8 TTC 1.⁵ These are statutes of general application to money judgments in general and not statutes that specifically address judgments against sovereign defendants.

The municipalities neglected to consult and discuss the cases from neighboring island jurisdictions that they were specifically asked to, Marine Revitalization Corp. v. Department of Land & Natural Res., 2010 MP 18 (N. Mar. I. 2010); Pacific Rock Corp. v. Perez, 2005 Guam 15 (Guam 2005); Sumitomo Constr. Co. v. Guam, 2001 Guam 23 (Guam 2001). They should not have. The Commonwealth of the Northern Marianas also has an identically-worded statute, 7 N. Mar. I. Code § 4101, derived from the same source as the FSM Code and Chuuk state law – the Trust Territory Code. Logically, the statutes would be interpreted and applied against their respective sovereigns in the same manner.

In Marine Revitalization Corp. v. Department of Land & Natural Resources, 2010 MP 18 (N. Mar. I. 2010), the Commonwealth's Supreme Court dealt with a substantial trial court judgment against the Commonwealth that had gone unpaid, at the time of the appellate decision, for five years and which was the subject of an a 2008 trial court order in aid of judgment. The Commonwealth Supreme Court vacated parts of the trial court order for violating the principle that judgments must be paid from legislative appropriations for judgments. *Id.* ¶¶ 40-45. It then raised, *sua sponte*, the issue of whether the Commonwealth was liable for the 9% interest included in the judgment and the order in aid of judgment. It held that "a state does not become liable for payment of interest by reason of a general statute imposing liability for interest (such as 7 CMC § 4101)." Marine Revitalization Corp., 2010 MP 18 ¶ 46. It concluded that since the general statute for judgment interest could not apply and since neither the CNMI public law authorizing the lease nor the breached lease that was the subject of the lawsuit made the government liable for post-judgment interest, "the Commonwealth owes no interest on the judgment or on the amount located in the judgment fund."⁶ *Id.*

The Guam situation is similar. The Guam Supreme Court held that since "sovereign immunity can only be waived by duly enacted legislation," that "[i]n the absence of express [legislative] consent to the award of interest *separate from a general waiver of immunity to suit*," the government "is immune from an interest award." Sumitomo Constr. Co. v. Guam, 2001 Guam 23 ¶¶ 9-10 (Guam 2001) (quoting Library of Congress v. Shaw, 478 U.S. 310, 314, 106 S. Ct. 2957, 2961, 92 L. Ed.

⁵ Under the Chuuk Constitution's Transition Clause, Trust Territory Code Title 8 is still applicable law in Chuuk. Chuuk v. Andrew, 15 FSM R. 39, 42 n.2 (Chk. S. Ct. App. 2007).

⁶ The Commonwealth Supreme Court characterized this as the majority view in the United States although the plaintiffs herein contend that it is not. There may be some confusion on this point because of the variety of statutes in the various states.

2d 250, 257 (1986) (emphasis added by the Guam Supreme Court). The Sumitomo Construction court found that Guam had statutorily waived its sovereign immunity in contract procurement cases for pre-judgment interest, Sumitomo Constr. Co., 2001 Guam 23 ¶¶ 11-21, 23, but that there was no statutory waiver of sovereign immunity for post-judgment interest and Guam courts lacked the authority to find an implied waiver, *id.* ¶¶ 22-26. The court concluded that "the trial court erred as a matter of law in awarding post-judgment interest," because "in the absence of an express statutory waiver of immunity against post-judgment interest, the government is not liable for such interest." *Id.* ¶ 27.

The Guam Supreme Court revisited the issue in 2005. The questions before the Guam court were whether an earlier judgment that included post-judgment interest against Guam was *res judicata* and whether Sumitomo Constr. Co. decision barred post-judgment interest on promissory notes. Pacific Rock Corp. v. Perez, 2005 Guam 15 (Guam 2005). The court concluded that *res judicata* did not bar a sovereign from asserting its sovereign immunity in attacking the validity of the part of a trial court judgment awarding post-judgment interest against a government agency.⁷ *Id.* ¶¶ 29-32. However, interest on promissory notes issued to the judgment-creditor pursuant to statute did not constitute "post-judgment interest" so the trial court order that those notes bore interest was valid. *Id.* ¶¶ 33-36.

The court, giving the greatest weight to Marine Revitalization Corp. v. Department of Land & Natural Resources, 2010 MP 18 (N. Mar. 1, 2010), a case interpreting an identical statute derived from the same source as the FSM and Chuuk statutes, therefore concludes that the municipalities are not entitled to the statutory 9% post-judgment interest. There being no good grounds on which to grant it, that part of the motion is denied. The part of the motion asking the court to enter judgment on the defaulted loans is granted and those loan terms regarding interest will be specifically enforced. The municipalities are thus entitled to the continued accrual of 5% on their loans to Chuuk.

IV. CONCLUSION

Accordingly, there being no just cause for further delay, the clerk is expressly directed to enter judgment for the plaintiff municipalities on their loans to the defendant State of Chuuk with five percent interest thereon since October 2002, minus the interest that Chuuk has already paid.

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⁷ The court takes no position on this issue, which is not a part of this case.