FSM SUPREME COURT TRIAL DIVISION

LUEN THAI FISHING VENTURE, LTD. and LIANCHENG OVERSEAS FISHERY (FSM) CO., LTD., Plaintiffs, vs. STATE OF POHNPEI, JOHN EHSA in his capacity as Governor, OFFICE OF FISHERIES AND AQUACULTURE, and MIJU MULSAN COMPANY, LTD., Defendants.	CIVIL ACTION NO. 2013-001

ORDER MEMORIALIZING THE QUASHING OF SUBPOENA

Cyprian Manmaw
Specially Assigned Justice*

Hearing: April 17, 2015
Decided: April 29, 2015

* Chief Justice, State Court of Yap, Colonia, Yap

APPEARANCES:

For the Plaintiffs:	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonia, Pohnpei FM 96941
For the Defendants: (Pohnpei, Ehsa, & Office of Fisheries & Aquaculture)	Judah G. Johnny Pohnpei Attorney General Clayton M. Lawrence, Esq. Assistant Attorney General Pohnpei Department of Justice P.O. Box 1555 Kolonia, Pohnpei FM 96941
For the Defendant: (Miju Mulsan Co.)	Joseph S. Phillip, Esq. P.O. Box 464 Kolonia, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Injunctions; Contempt – Civil

When the parties all agreed that since the court's last order confirming that the preliminary injunction remained in place, the defendants had been complying with the injunction and that therefore, except possibly for some damages that might have accrued, there was no need to proceed on the show cause motion because it was moot. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41c (Pon. 2015).

Civil Procedure – Default and Default Judgments – Entry of Default

Since an entry of default is similar to a finding of liability but it is not a final judgment, an entry of default does not relieve a plaintiff of its burden of proving the damages that flowed from any liability thus established. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41c (Pon. 2015).

Civil Procedure – Discovery

Since a defendant who is in default may participate in a damages hearing if necessary and proper to determine the damages amount, it would seem that a defaulting defendant might be able to conduct some discovery in that regard. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41c (Pon. 2015).

Civil Procedure – Discovery

When it comes to a subpoena commanding the production of documents, the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable and oppressive. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41c-41d (Pon. 2015).

Civil Procedure – Depositions; Evidence – Privileges

It is appropriate to depose another party's attorney only when 1) the deposition is the only practical means of obtaining the information, 2) the information sought will not invade the attorney-client privilege or the work product doctrine, and 3) the information sought is relevant and the need for it outweighs the disadvantages inherent in deposing a party's attorney; or when it has been shown that no other means exist to obtain the information, and that the information sought is crucial to the case's preparation. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41d (Pon. 2015).

Civil Procedure – Discovery; Evidence – Privileges

Since any communication made to or from an attorney can always be sought from the person or entity on the other end of the communication, there should always be another practical means of obtaining the substance of that communication if it does not violate attorney-client privilege or the work product doctrine. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41d (Pon. 2015).

Attorney and Client – Disqualification of Counsel; Civil Procedure – Depositions; Evidence – Witnesses

Since, generally, a lawyer must not act as advocate at a trial in which the lawyer is likely to be a necessary witness, it follows that a party should not be able to potentially disqualify another litigant's advocate by making the other litigant's lawyer into a witness by noticing that advocate's deposition. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41d (Pon. 2015).

Attorneys General; Civil Procedure – Discovery; Evidence – Privileges

To the extent that the discovery a party seeks constitutes internal workings of the Attorney General's Office – attorney work product – it is privileged and not discoverable. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 41a, 41d (Pon. 2015).

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COURT'S OPINION

CYPRIAN MANMAW, Specially Assigned Justice:

On April 17, 2015, when the court was to hear plaintiff Luen Thai Fishing Venture, Ltd.'s motion for an order to show cause why defendants State of Pohnpei and John Ehsa should not be held in contempt, the court heard the defendant State of Pohnpei's Motion to Quash [defendant Miju Mulsan Co.'s] Subpoena Duces Tecum and Deposition of Pohnpei Assistant Attorney General Clayton Lawrence. This was because during a pre-hearing chambers conference, the parties agreed that since the court's last order confirming that the preliminary injunction remains in place, the defendants had been complying with the injunction and that therefore, except possibly for some damages that might have accrued while Luen Thai Fishing Venture, Ltd. was locked out of its premises, there was no need to proceed on the show cause motion because it was moot. Those alleged damages may be addressed by a supplemental pleading under FSM Civil Procedure Rule 15(d).

The hearing therefore proceeded on Pohnpei's Motion to Quash Subpoena Duces Tecum and Deposition. The court granted that motion from the bench. This order memorializes that grant.

I.

By Notice of Deposition and Subpoena Duces Tecum issued April 7, 2015, and served on April 8, 2015, Miju Mulsan Co. sought to depose Pohnpei Assistant Attorney General Clayton Lawrence, one of Pohnpei's counsel in this case, and to have him produce at that deposition copies of all communications that he had made to or received from plaintiffs' counsel; all communications about this case that he had made to the Pohnpei Office of Fisheries and Aquaculture, all communications that he had made to or received from Miju Mulsan Co., its counsel, or its representative named Daniel; all communications about this case or about Governor Ehsa made to the FSM Attorney General or to the FSM Department of Justice, and all documents, including bills and receipts, related to official travel, characterized as fact-finding trips, to Palau, Guam, and Saipan. The deposition was set for April 21, 2015, at the same time that Pohnpei had set for the resumption of its deposition of witness Yalmer Helgenberger.

On April 10, 2015, Pohnpei moved to quash Miju Mulsan Co.'s subpoena. Pohnpei first contended that Miju Mulsan Co. had no standing to seek discovery from it because, on April 26, 2013, an entry of default was made against Miju Mulsan Co. in this case and that default has not been set aside. Although Miju Mulsan Co. had appeared at the preliminary injunction hearing, it has not answered the plaintiffs' complaint or sought to have its default set aside. Since an entry of default is similar to a finding of liability but it is not a final judgment, the entry of default does not relieve a plaintiff of its burden of proving the damages that flowed from any liability thus established. Lee v. FSM, 18 FSM R. 558, 560 (Pon. 2013). Since a defendant who is in default may participate in a damages hearing if necessary and proper to determine the amount of damages, it would seem that a defaulting defendant might be able to conduct some discovery in that regard.

II.

However, none of what appears to be Miju Mulsan Co.'s line of inquiry seems directed to the question of judgment damages. For that reason, the subpoena is unreasonable and oppressive.

When it comes to a subpoena commanding the production of documents, "the court, upon

motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive." FSM Civ. R. 45(b). Pohnpei's motion was made promptly and before the time specified for the deposition.

The deposition is also unreasonable and oppressive because it is appropriate to depose another party's attorney only when 1) the deposition is the only practical means of obtaining the information, 2) the information sought will not invade the attorney-client privilege or the work product doctrine, and 3) the information sought is relevant and the need for it outweighs the disadvantages inherent in deposing a party's attorney; or when it has been shown that no other means exist to obtain the information, and that the information sought is crucial to the case's preparation. Pohnpei v. KSVI No. 3, 9 FSM R. 273, 278 (Pon. 1999). Obviously, since any communication made to or from someone can always be sought from the person or entity on the other end of the communication, there should always be another practical means of obtaining the substance of that communication if it does not violate attorney-client privilege or the work product doctrine. In this case, some of the communications sought were even made by or to the party seeking the discovery – Miju Mulsan Co.

Since, generally, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," FSM MRPC R. 3.7(a), it follows that a party should not be able to potentially disqualify another litigant's advocate by making the other litigant's lawyer into a witness by noticing that advocate's deposition. Furthermore, to the extent that the discovery Miju Mulsan Co. seeks constitutes internal workings of the Attorney General's Office – attorney work product – it is privileged and not discoverable. *See* FSM v. Kansou, 15 FSM R. 373, 377 (Chk. 2007) (communications between prosecutors and a former prosecutor about the case not discoverable – privileged work product); Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM R. 471, 476 (Pon. 1998) (under the work product doctrine, even if a plaintiff demonstrates substantial need for factual information contained in the report of a consulting expert whose services a defendant sought in anticipation of litigation, he would have to show exceptional circumstances under FSM Civil Rule 26(b)(4)(B) before being entitled to discover internal consultations).

III.

For all the foregoing reasons, the motion to quash was granted.

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