

Defendant also takes issue with the Court's oral explanation that it was proper for the Court to consider the admissibility of Skype testimony even in the absence of legislation or court rules specifically addressing the issue. Defendant seems to consider the Court's ruling to represent an impermissible exercise in rule making by a temporary justice. Indeed, the defendant suggests that this judge should have consulted with other justices of the court, Congress, attorneys and the public before rendering a ruling. Defendant goes so far as to argue that it would be acceptable for me to allow Skype testimony in my role as Chief Justice for Yap State Court, but not in my role as an appointed temporary justice.

While it is appropriate for a Chief Justice to engage with all the relevant stake-holders in the process of promulgating a general court order, the decision making process is quite different for a justice called upon to render an evidentiary ruling in a criminal case. A judge presiding over a criminal case has a responsibility to apply the law to the facts of the case, even where a party raises a question of first impression. This judicial power is curtailed by the process of appellate review. It would be an abuse of judicial discretion to delay an evidentiary ruling in order to solicit advice from non-parties suggesting what the law *should be*.

II. CONCLUSION

For all these reasons the motion to disqualify this justice is DENIED.

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FSM SUPREME COURT TRIAL DIVISION

ISAMU NAKASONE STORE, YUTO NAKASONE,)
YUMI NAKASONE, YUKO NAKASONE, and)
TOMOKO AKASONE,)

Plaintiffs,)

vs.)

LUHK EN MEHNLAP DAVID, as Chief Minister)
of Kitti Municipal Government, and KITTI)
MUNICIPAL GOVERNMENT,)

Defendants.)

CIVIL ACTION NO. 2011-018

ORDER GRANTING DISMISSAL

Beauleen Carl-Worswick
Associate Justice

Decided: May 4, 2015

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Isamu Nakasone Store v. David
20 FSM R. 53 (Pon. 2015)

APPEARANCES:

For the Plaintiffs: Mary Berman, Esq.
P.O. Box 163
Kolonja, Pohnpei FM 96941

For the Defendants: Joseph Phillip, Esq.
P.O. Box 464
Kolonja, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Motions – Unopposed

By rule, the failure to oppose a motion is generally deemed a consent to the motion, but even then the court still needs good grounds before it can grant the unopposed motion. Isamu Nakasone Store v. David, 20 FSM R. 53, 56 (Pon. 2015).

Taxation – License and Permit Fees

Pohnpei state law provides that wholesalers and taxi services operating in more than one local government jurisdiction do not have to pay a fee in other than the local jurisdiction where their business establishment is located and that local governments cannot levy business license fees on businesses that do not have any business establishment located within their territory. A "business establishment" is a permanent physical structure operating as a business, and a vehicle does not constitute a business establishment unless such vehicle is fixed in a permanent location. Isamu Nakasone Store v. David, 20 FSM R. 53, 56 (Pon. 2015).

Federalism – National/State Power; Taxation – Constitutionality

Taxing income and taxing imports are both powers reserved exclusively to the national government, and therefore forbidden to municipal governments. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Taxation – License and Permit Fees

A characteristic of a fee is that it must be no greater than the government's costs – the government's "real cost," which is not limited to the government's actual expenditures. Taxation is a legislative function generally to raise revenue, and the legislature may act arbitrarily and disregard benefits bestowed by the government on a taxpayer and go solely on the taxpayer's ability to pay. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Taxation – License and Permit Fees

When a municipality's business license fees are set arbitrarily at the municipal legislature's prerogative and go on the fee-payer's ability to pay, the license fees are revenue-raising taxes. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Civil Procedure – Summary Judgment – Procedure

Regardless of whether the non-movants filed a written opposition, a plaintiff, when moving for summary judgment, must overcome all of the adverse parties' affirmative defenses and counterclaims in order to be entitled to summary judgment. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Isamu Nakasone Store v. David
20 FSM R. 53 (Pon. 2015)

Civil Procedure – Summary Judgment – Procedure

A plaintiff, when moving for a summary adjudication, must show that there is no issue of material fact and must also show that the affirmative defenses are insufficient as a matter of law. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Civil Procedure – Summary Judgment – Procedure; Jurisdiction

Lack of subject-matter jurisdiction is a defense that can be raised at any time by any party or by the court. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Taxation – Constitutionality; Taxation – License and Permit Fees

When a hotel owner with 10 rooms pays the same \$50 business license fee annually regardless of how much or how little income is derived from that hotel; when a hotel owner with 31 rooms pays the same \$300 regardless of how much or how little income those 31 rooms actually generate; and when, if the owner of a 31-room hotel adds five more rooms and generates even more income, the owner would still pay only \$300 annually for a business license, the license fees, even though those license fees are actually taxes, are not taxes on income. Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015).

Constitutional Law – Foreign and Interstate Commerce; Taxation – Constitutionality; Taxation – License and Permit Fees

A municipal "road service" fee is not a tax on imports since it does not vary based on the amount or value of the goods brought into the municipality and since it does not vary based on the origin of those goods. It is a flat annual fee or a tax that does not violate the Constitution's prohibition of local taxes which restrict interstate commerce because the road service fee does not restrict or hinder interstate commerce or impose an import tax, but it does restrict or hinder intrastate or inter-municipal commerce, a type of commerce the FSM Constitution does not grant the national government the power to regulate. Isamu Nakasone Store v. David, 20 FSM R. 53, 57-58 (Pon. 2015).

Civil Procedure – Dismissal; Jurisdiction – Arising under National Law

When the case is not a case arising under the FSM Constitution or national laws, the only grounds asserted for jurisdiction, the FSM Supreme Court does not have subject-matter jurisdiction over it, and when the FSM Supreme Court does not have any subject-matter jurisdiction over a case, the case will be dismissed without prejudice to any later adjudication in a state court. Isamu Nakasone Store v. David, 20 FSM R. 53, 58 (Pon. 2015).

Civil Procedure – Summary Judgment – For the Nonmovant

When a party's summary judgment motion has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, a court may grant summary judgment to the nonmoving party, even 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 factual issue and that its opponent is not entitled to judgment as a matter of law. Isamu Nakasone Store v. David, 20 FSM R. 53, 58 (Pon. 2015).

Civil Procedure – Dismissal; Civil Procedure – Summary Judgment – For the Nonmovant

When there are no material facts in dispute and the defendants are entitled to judgment or to a dismissal on their affirmative defense of lack of subject-matter jurisdiction, the court will render summary judgment in the defendants' favor on the jurisdictional issue because whenever it appears by suggestion of the parties or otherwise that the FSM Supreme Court lacks jurisdiction of the subject matter, it must dismiss the action without prejudice to any case that the plaintiffs may file in a state court of competent jurisdiction. Isamu Nakasone Store v. David, 20 FSM R. 53, 58 (Pon. 2015).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

This comes before the court on the plaintiffs' summary judgment motion, filed March 7, 2014. No response was filed to the motion. By rule, the failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d), but even then 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); Helgenberger v. Mai Xiong Pacific Int'l, Inc., 17 FSM R. 326, 330 (Pon. 2011). The plaintiffs' summary judgment motion is denied and the defendants are granted summary judgment or a dismissal on their affirmative defense of the court's lack of subject-matter jurisdiction. The court's reasoning follows.

I. BACKGROUND

The operative pleadings in this case are the first amended complaint, filed March 15, 2012, and the defendants' answer to the amended complaint, filed May 20, 2013. The first amended complaint states that the plaintiff Isamu Nakasone Store is an unincorporated business establishment located in Kolonia Town, Pohnpei, and that it operates a bakery and distribution services there. The Nakasone Store sells mainly imported goods. It wholesales these imports to small retail stores in Kitti and included as part of the sale contract is free delivery of the purchased goods to those Kitti stores. The Nakasone Store does not have a physical presence in Kitti.

Ever since 2008, the Nakasone Store's delivery van has been stopped in Kitti by the local authorities and not permitted to make deliveries there unless the Nakasone Store paid a \$100 or \$200 annual business license fee for "road service." Kitti Municipality imposes various license fees on businesses located in Kitti. It imposes a \$25 annual business license fee on retail stores in Kitti. It also imposes a \$100 (\$200 since 2011) "road service" business license fee on businesses physically located outside of Kitti but which deliver goods to retail stores in Kitti. The Nakasone Store contends that this is in violation of Pohnpei state law.

Pohnpei state law provides that

wholesalers and taxi services operating in more than one local government jurisdiction shall not have to pay a fee in other than the local jurisdiction where their business establishment is located. Local governments shall not levy business license fees on businesses that do not have any business establishment located within their territory.

12 Pon. C. §7-103(1). The Pohnpei statute defines "business establishment" as "a permanent physical structure operating as a business. A business may have more than one business establishment. A personal residence that is used for business purposes does constitute a business establishment. A vehicle . . . shall not constitute a business establishment unless such vehicle . . . is fixed in a permanent location." *Id.* § 7-103(2). The Nakasone Store van does not remain fixed in a permanent location. It makes deliveries. It therefore is not a business establishment within the meaning of the Pohnpei statute.

The defendants' answer raises as affirmative defenses the lack of personal jurisdiction; the lack of subject-matter jurisdiction; the statute of limitations; waiver; and the failure to state a claim upon which relief may be granted.

II. PLAINTIFFS' POSITION

The plaintiffs contend that they are entitled to summary judgment since Kitti's imposition of "road service" business licenses fees on the Nakasone Store violates the FSM Constitution because the Kitti license fees vary based on the type and size of business, thus making the license fees taxes on income, and because the "road service" fee acts as an import tax. Taxing income and taxing imports are both powers reserved exclusively to the national government, FSM Const. art. IX, § 2(d) & (e), and therefore forbidden to municipal governments.

The plaintiffs first contend that the Kitti business license fees are not really regulatory fees but are taxes because it is apparent that they are imposed to raise revenue and not merely to defer the cost of regulation. Based on the discovery on file in this case, that seems a fair assumption. A characteristic of a fee is that it must be no greater than the government's costs – the government's "real cost," which is not limited to the government's actual expenditures. Chuuk v. Secretary of Finance, 8 FSM R. 353, 384 (Pon. 1998). Taxation is a legislative function generally to raise revenue, and the legislature may act arbitrarily and disregard benefits bestowed by the government on a taxpayer and go solely on the taxpayer's ability to pay. *Id.* Kitti's business license fees were set arbitrarily at the Kitti Legislature's prerogative and go on the fee-payer's ability to pay. Thus, for the purpose of the pending motion, the Kitti license fees are revenue-raising taxes.

The plaintiffs contend that the license fees are taxes on income because a hotel with ten or fewer rooms pays an annual license fee of \$50 while a hotel with 31 or more rooms pays an annual fee of \$300 and because a "real estate" business pays a \$300 fee while a mining or extraction of mineral resources pays \$5,000.

III. AFFIRMATIVE DEFENSE OF LACK OF SUBJECT-MATTER JURISDICTION

Regardless of whether the non-movants filed a written opposition, a plaintiff, when moving for summary judgment, must overcome all of the adverse parties' affirmative defenses and counterclaims in order to be entitled to summary judgment. Andrew v. Heirs of Seymour, 19 FSM R. 331, 340 (App. 2014). When moving for a summary adjudication, a plaintiff must show that there is no issue of material fact and the plaintiff must also show that the affirmative defenses are insufficient as a matter of law. Andrew, 19 FSM R. at 340; *see also Carlos Etscheit Soap Co. v. McVey*, 17 FSM R. 102, 108 (Pon. 2010); Kihara Real Estate, Inc. v. Estate of Nanpei II, 6 FSM R. 48, 53 (Pon. 1993). The defendants' affirmative defense that first concerns the court is the defendants' claim the court lacks subject-matter jurisdiction. Lack of subject-matter jurisdiction is a defense that can be raised at any time by any party or by the court. Berman v. FSM Nat'l Police, 19 FSM R. 118, 123 (App. 2013); Helgenberger v. FSM Dev. Bank, 18 FSM R. 498, 500 (App. 2013); Nelson v. FSM Nat'l Election Dir., 16 FSM R. 414, 419 (App. 2009).

The court must reject the plaintiffs' contention that the Kitti license fees are unconstitutional taxes. While these fees do vary based on ability to pay, they do not vary based on income. The hotel owner with 10 rooms pays the same \$50 annually regardless of how much or how little income is derived from that hotel. The hotel owner with 31 rooms pays the same \$300 regardless of how much or how little income those 31 rooms actually generate. And if the owner of a 31-room hotel adds five more rooms and generates even more income, the owner would still pay only \$300 annually for a business license. The Kitti license fees, even though those license fees are actually taxes, they are not taxes on income.

The "road service" fee is likewise not a tax on imports. It does not vary based on the amount or value of the goods brought into Kitti; nor does it vary based on the origin of those goods. It is a flat

annual fee. Nor is it a tax that violates the Constitution's Article VIII, section 3, which provides that "[s]tate and local governments are prohibited from imposing taxes which restrict interstate commerce." The road service fee does not restrict or hinder interstate commerce or impose an import tax. It does restrict or hinder intrastate or inter-municipal commerce, but the FSM Constitution does not vest in the national government the power to regulate such commerce. Lastly, the plaintiffs' contention that the Kitti "road service" license fee violates their rights to due process and equal protection because it affects their fundamental right to seek employment is wholly without merit.

Accordingly, the plaintiffs' summary judgment motion must be denied on its merits.

IV. DISMISSAL FOR LACK OF SUBJECT-MATTER JURISDICTION

The plaintiffs premise their assertion of FSM Supreme Court subject-matter jurisdiction on their claim that Kitti business license fees are imposed in violation of the FSM Constitution's provisions reserving income and import taxation exclusively to the national government, thus violating the FSM civil rights statute, 11 F.S.M.C. 701, and in violation of the provision's guaranteeing due process and equal protection of the laws. If the plaintiffs' contention were true then this would be a case arising under the national Constitution and laws and the court would have subject-matter jurisdiction under FSM Constitution Article XI, section 6(b). But it is not.

Since this is not a case arising under the FSM Constitution or national laws, the only grounds asserted for jurisdiction, this court does not have subject-matter jurisdiction over this case. When the FSM Supreme Court does not have any subject-matter jurisdiction over a case, the case will be dismissed without prejudice to any later adjudication in a state court. Chuuk Health Care Plan v. Chuuk Public Utility Corp., 18 FSM R. 409, 411 (Chk. 2012).

V. SUMMARY JUDGMENT AND DISMISSAL ON JURISDICTIONAL GROUNDS

When a party's summary judgment motion has been denied as a matter of law and it appears that the nonmoving party is entitled to judgment as a matter of law, a court may grant summary judgment to the nonmoving party, even 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 factual issue and that its opponent is not entitled to judgment as a matter of law. FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 569 (Pon. 2011); Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 102, 110 n.5 (Pon. 2010); Phillip v. Marianas Ins. Co., 12 FSM R. 464, 470 (Pon. 2004). The plaintiffs have had that opportunity.

There being no material facts in dispute and the defendants being entitled to judgment or to a dismissal on their affirmative defense of lack of subject-matter jurisdiction, the court hereby renders summary judgment in the defendants' favor on the jurisdictional issue. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FSM Civ. R. 12(h)(3).

Accordingly, this case is dismissed without prejudice to any case that the plaintiffs may file in a Pohnpei court of competent jurisdiction challenging the Kitti "road service" business license fee.

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