

legally recognizable possessory interest in the land upon which they have settled and absent any such indicia that an interest in land is present, the FSM Supreme Court has subject matter jurisdiction.

Defendant's alleged defect, in terms of the concomitant condition to the fee simple that conveyed the subject land to the Plaintiff, is a question that does not relate to the issue in this trespass action, which is one of right of possession. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 360 (App. 2003). "Our law is clear[,] that in an action for trespass, the judgment is for the right of possession; in such a case, the issue is who has the superior right to possession, not who has title." Ponape Enterprises Co. v. Soumweij, 6 FSM Intrm. 341, 345 (Pon. 1994).

This Court finds that a possessory interest, much less an ownership interest, has not been adequately depicted by the Defendant, to reflect a case or controversy where an interest in land is at issue. The matter before the Court involves the Defendant's entry upon land to which the Plaintiff holds a Certificate of Title and the pending trespass cause of action therefore concerns one for an alleged violation of possession, not for challenge to title.

Accordingly, subject matter jurisdiction is proper for the FSM Supreme Court and Defendant's Motion to Dismiss (predicated upon an alleged lack of subject matter jurisdiction) is hereby DENIED. Furthermore, the Defendant is reminded of the applicable time constraint, *to wit*: that they shall have ten (10) days from the entry of this Order, within which, to file an Answer to the Complaint.

Finally, this Court declines to answer the question as to whether concurrent jurisdiction by the FSM Supreme Court is proper, where land is at issue and the national government is a party, since it determines an interest in land is not present under these facts.

\* \* \* \*

FSM SUPREME COURT TRIAL DIVISION

ALBERT PANUELO,	)	CIVIL ACTION NO. 2014-006
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
FEDERATED STATES OF MICRONESIA,	)	
	)	
Defendant.	)	
_____	)	

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Beauleen Carl-Worswick  
Associate Justice

Hearing: January 8, 2015  
Decided: June 16, 2015

APPEARANCES:

For the Plaintiff: Salomon M. Saimon, Esq.  
Micronesia Legal Services Corporation  
P.O. Box 129  
Kolonía, Pohnpei FM 96941

For the Defendant: Aaron L. Warren, Esq.  
Assistant Attorney General  
FSM Department of Justice  
P.O. Box PS-105  
Palikir, Pohnpei FM 96941

\* \* \* \*

HEADNOTES

Civil Procedure – Judgment on the Pleadings

The standard for evaluating a motion for judgment on the pleadings is almost identical to that for evaluating a summary judgment motion. A motion for judgment on the pleadings will be granted only when the movant has demonstrated that there are no issues of material fact and that the movant is entitled to judgment as a matter of law. The movant must carry its burden solely by reference to the pleadings, and the court must evaluate all facts and inferences in the light most favorable to the non-moving party. Panuelo v. FSM, 20 FSM R. 62, 66 (Pon. 2015).

Civil Procedure – Declaratory Relief

In a case of actual controversy within its jurisdiction, the court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration will have the force and effect of a final judgment or decree and be reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. Panuelo v. FSM, 20 FSM R. 62, 66 n.4 (Pon. 2015).

Public Officers and Employees

As the managing official under 52 F.S.M.C. 135(1), the Secretary has the discretion to ask the Personnel Officer to certify a new eligible list if the current list has no one that is "available or acceptable," and a letter, in which the Secretary stated that, as a result of the interviews, no one was found to be suitable for the position, fulfills the requirement that the list be rejected in writing, but if the Personnel Officer finds the reasons for rejection inadequate, the same list will be returned and an appointment made from the list. Panuelo v. FSM, 20 FSM R. 62, 67 (Pon. 2015).

Civil Procedure – Declaratory Relief; Public Officers and Employees

Because no one shall report to work nor receive a salary unless that person has been previously certified on an appropriate eligible list by the Personnel Officer or his authorized representative, and selected by a Department or agency head, an applicant is not entitled to declaratory relief that he should be hired when, although he was placed on the eligible list, the Secretary, as the result of interviews, found, in writing, no one was available or acceptable and the Personnel Officer did not find the Secretary's reasons inadequate and return the list. Panuelo v. FSM, 20 FSM R. 62, 67-68 (Pon. 2015).

Constitutional Law – Due Process

In order to assert due process, one must point to a property or liberty interest of one's own that is subject to due process. Panuelo v. FSM, 20 FSM R. 62, 68 (Pon. 2015).

Constitutional Law – Due Process

Government employment that is "property" within the meaning of the Due Process Clause cannot be taken without due process. To be property protected under the Constitution, the employment right must be supported by more than merely the employee's own personal hope. There must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. Panuelo v. FSM, 20 FSM R. 62, 68 (Pon. 2015).

Constitutional Law – Due Process; Public Officers and Employees

Since the full rights of continued employment only vest upon appointment, when an applicant was not selected from the certified list, was never appointed to the position he applied for, and no agreement for employment was entered into between the parties, he was never a public employee, and therefore his due process rights never vested. Panuelo v. FSM, 20 FSM R. 62, 68 (Pon. 2015).

Civil Rights – Remedies and Damages

Chapter 7 of Title 11 of the FSM Code creates a statutory cause of action for individuals whose constitutional rights have been violated. It was enacted to safeguard the rights guaranteed to all FSM citizens under Article IV of the FSM Constitution. Panuelo v. FSM, 20 FSM R. 62, 68 (Pon. 2015).

Civil Rights – Remedies and Damages

When a plaintiff has alleged his due process rights were violated but it is proven otherwise, the plaintiff cannot recover under the civil rights statute. Panuelo v. FSM, 20 FSM R. 62, 68 (Pon. 2015).

Contracts – Specific Performance

The equitable remedy of specific performance is one where the court orders a breaching party to do that which he has agreed to do, thereby rendering the non-breaching party the exact benefit which he expected. The remedy is available when money damages are inadequate compensation for the plaintiff, when damages cannot be computed, or when a substitute cannot be purchased. Panuelo v. FSM, 20 FSM R. 62, 69 (Pon. 2015).

Contracts – Specific Performance

Specific performance is available only when the usual contract measures of damages, expectancy, restitution, or reliance money damages, are inadequate compensation or cannot be computed or when a substitute cannot be purchased. Panuelo v. FSM, 20 FSM R. 62, 69 (Pon. 2015).

Contracts – Specific Performance

By ordering the promisor to render the promised performance, the court attempts to produce, as nearly as is practicable, the same effect as if the contract had been performed, but a court will not order a performance that has become impossible, unreasonably burdensome, or unlawful, nor will it issue an order that can be frustrated by the defendant through exercise of a power of termination or otherwise. Panuelo v. FSM, 20 FSM R. 62, 69 (Pon. 2015).

Contracts – Specific Performance; Public Officers and Employees

Because specific performance is a remedy in equity under contract law, an applicant's claim for specific performance is unenforceable when no valid agreement exists between the applicant and the government since, for the court to order the Secretary to hire the applicant based on an invalid contract, through specific performance, would be unlawful and a violation of public policy. Panuelo v. FSM, 20 FSM R. 62, 69 (Pon. 2015).

\* \* \* \*

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. BACKGROUND

A Summons and Complaint was filed by the plaintiff, Albert Panuelo (herein "Panuelo"), on January 29, 2014. An Answer was submitted by the defendant, Federated States of Micronesia (herein "the Government"), on February 5, 2014.

After discovery, on August 29, 2014 the Government filed a Motion for Judgment on the Pleadings pursuant to FSM Civ. R. 12(c). Panuelo entered an Opposition to Motion for Judgment on the Pleadings on September 15, 2014. On September 25, 2014, the Government filed a Reply to Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings. The court heard arguments on the pending motions on January 8, 2015. Based on filings and evidence produced during the hearing, the court grant's the Government's motion.

II. FACTS

On June 18, 2013, Examination Announcement No. FSM-031-13 sought applications for qualified individuals to fill the vacant position of Chief of Immigration and Labor under the FSM Department of Justice. The announcement had a closing date of July 18, 2013, and the position is governed under the National Public Service Systems Act pursuant to 52 F.S.M.C. 111.<sup>1</sup>

Panuelo responded to the announcement by submitting an application. Panuelo, along with several other applicants, were placed on a Certification List by the Personnel Officer, and transmitted to the Secretary of Justice (Secretary) for consideration.<sup>2</sup> The Department of Justice conducted two interviews, Panuelo being one of those interviewed. On August 30, 2013, the Secretary issued a memorandum rejecting the list.

On September 2, 2013, the Personnel Officer sent a letter to the Secretary noting several issues in regards to her memorandum, specifically, if interviews were conducted, the results of those interviews, and the submission of a written statement for the basis of rejection pursuant to Pub. L. No. 1-47, 1st Cong., 1st Spec. Sess. (1979).<sup>3</sup>

The Secretary responded to the letter on September 9, 2013, stating that the applicants were interviewed, but none were found to be suitable to fill the vacancy based on their qualification and their

---

<sup>1</sup> The National Public Service System Act's provisions create a mutual expectation of continued employment for National Government employees and protect that employment right by limiting the permissible grounds, and specifying necessary procedures, for termination. This, in turn, is sufficient protection of the employment right to establish a property interest. *Suldan v. FSM* (II), 1 FSM R. 339, 353-54 (Pon. 1983).

<sup>2</sup> The Complaint states that three (3) individuals were placed on the Certification List, however, the Answer shows that four (4) were listed, and only two interviewed, including Panuelo.

<sup>3</sup> The Personnel Officer's letter refers to "PL-4-17," however, the actual authority cited is Pub. L. No. 1-47, 1st Cong., 1st Spec. Sess. (1979).

ability to head an important division of the FSM government. The Secretary further requested that the position be re-advertised and a new list be re-submitted for consideration. Panuelo then filed suit on January 28, 2014.

### III. STANDARD OF REVIEW

The Governments Motion for Judgment on the Pleadings is made pursuant to FSM Civil Rule 12(c), which states

Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FSM Civ. R. 12(c); 2A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 12.15, at 2343-44 (2d. ed. 1981).

The standard for evaluating a motion for judgment on the pleadings is almost identical to that for evaluating a motion for summary judgment. A motion for judgment on the pleadings shall be granted only when the movant has demonstrated that there are no issues of material fact, and that the movant is entitled to judgment as a matter of law. The moving party must carry its burden by reference solely to the pleadings, and the court must evaluate all facts and inferences in the light most favorable to the non-moving party. Marcus v. Truk Trading Corp., 10 FSM Intrm. 346, 347-48 (Chk. 2001); Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 96 (Pon. 1995).

A motion for judgment on the pleadings may be granted only if the moving party clearly establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law. 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (1990) (citing National Fid. Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987)).

### IV. DISCUSSION

#### *Declaratory Relief*

In Panuelo's Complaint, the first cause of action is based on a claim for declaratory relief, pursuant to 6 F.S.M.C. 1501 and 17 F.S.M.C. 111.<sup>4</sup> The claim states that the Secretary was duty bound to choose from the Certification List submitted by the Personnel Officer. Pl.'s Compl. at 2-3.

52 F.S.M.C. 135(1) governs the filling of vacancies for employment positions in the FSM national government. This section states

---

<sup>4</sup> 6 F.S.M.C. 1501 states "In a case of actual controversy within its jurisdiction, the High Court or a District Court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

(1) Whenever there is a position to be filled, the management official shall ask the Personnel Officer to submit a list of persons eligible. The Personnel Officer shall thereupon certify a list of five, or such lesser number as may be available, taken from eligible lists in the following order: first, reemployment lists; second, promotional lists; and third, open-competitive lists. *The management official shall make the appointment from the list of eligibles submitted to him unless he finds no person available and acceptable to him on the list, in which case he will ask the Personnel Officer to certify a new list, stating in writing his reason for rejecting each of the eligibles on the list previously submitted to him. If the Personnel Officer finds such reasons adequate, he shall then submit a new list of no more than five eligibles selected in like manner, from which the management official shall make an appointment. If the Personnel Officer does not find the reasons adequate, he shall resubmit the list and the appointment shall be made therefrom.*

(emphasis added).

First, as the managing official under 52 F.S.M.C. 135(1), the Secretary has the discretion to request the Personnel Officer to certify a new list if the current list has no one that is "available or acceptable." *Id.* In the September 9, 2013 letter, the Secretary stated that as a result of the interviews, no one was found to be suitable for the position, which fulfills the requirement for rejecting the list in writing.

Next, 52 F.S.M.C. 135(1) states that if the Personnel Officer finds the reasons for rejection inadequate, the same list will be returned and an appointment made from the list. No evidence was provided to show that the Personnel Officer returned the list to the Secretary after the transmittal of the September 9, 2013 letter, which would be required if the explanation for the denial of the list was insufficient.

Further, Public Service Systems Regulations (PSSR) § 5.1 governs the selection requirement, which states: "No person shall report to work nor receive a salary unless he has been previously certified on an appropriate eligible list by the Personnel Officer or his authorized representative, and selected by a Department or agency head."

Here, although Panuelo was placed on the Certified List, he was not "selected" by the Secretary, as required under § 5.1.<sup>5</sup> This section further supports the fact that the Secretary has the discretionary power when selecting an applicant from the List, and is not "duty bound" to do so, as argued by Panuelo.

---

<sup>5</sup> § 5.1 in its entirety states

Certification of Eligibles. For the purpose of filling vacancies in the Public Service, Department and agency heads shall request in writing a list of eligible from the Personnel Officer, unless they elect to fill a position by transfer or demotion. Requests for eligibles shall be made on forms prescribed by the Personnel Officer and shall clearly identify the position to be filled, including its position number. The Personnel Officer shall respond to such request by certifying from the appropriate eligible list the five (5) highest available eligible, or such lesser number as are available.

No person shall report to work nor receive a salary unless he has been previously certified on an appropriate eligible list by the Personnel Officer or his authorized representative, and selected by a Department or agency head."

Therefore, based on the evidence submitted, the arguments by the parties during the hearing, and the analysis above, Panuelo's claim for declaratory relief under 6 F.S.M.C. 1501 and 17 F.S.M.C. 111 is invalid.

#### *Due Process Claim*

Panuelo's second cause of action is a claim for violation of both procedural and substantive due process, pursuant to FSM Const. art. IV, § 3.<sup>6</sup> Plaintiff's Complaint at 3. In order to assert due process, one must point to a property or liberty interest of one's own that is subject to due process. Louis v. Kurta, 8 FSM Intrm. 228, 230 (Chk. 1998).

Government employment that is "property" within the meaning of the Due Process Clause cannot be taken without due process. To be property protected under the Constitution, the employment right must be supported by more than merely the employee's own personal hope. There must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. Sultan v. FSM (III), 1 FSM Intrm. 339, 351-52 (Pon. 1983).

During the hearing, the Government argued that because Panuelo was never hired as an employee, his property right under due process had never vested, therefore his claim for due process is invalid. The court finds merit in this argument.

The full rights of continued employment vest upon appointment, subject to divestment upon periodic review only after a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements. Pipkin v. Board of Supervisors, 147 Cal. Rptr. 502 (Cal. Ct. App. 1978).

Here, although he was interviewed, Panuelo was not selected from the certified list, was never appointed to the position he applied for, nor was there ever an agreement for employment entered into between the parties. Panuelo was never an employee, as defined in 52 F.S.M.C. 112(6), therefore, his rights under due process never vested.<sup>7</sup>

#### *Violation of Civil Rights*

The final cause of action in Panuelo's Complaint is a claim for violation of civil rights, pursuant to 11 F.S.M.C. 701(1). Pl.'s Compl. at 3-4. Chapter 7 of Title 11 of the FSM Code creates a statutory cause of action for individuals whose constitutional rights have been violated. It was enacted to safeguard the rights guaranteed to all FSM citizens under Article IV of the FSM Constitution. Ladore v. Panuel, 17 FSM R. 271, 275 (Pon. 2010).

Where a plaintiff has alleged his due process rights were violated but it is proven otherwise, the plaintiff cannot recover under the civil rights statute. Nena v. Kosrae, 5 FSM R. 417, 425 (Kos. S. Ct. Tr. 1990).

In the current matter, because this court has ruled that Panuelo did not have a vested property

---

<sup>6</sup> FSM Constitution article IV, § 3 states "A person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws."

<sup>7</sup> 52 F.S.M.C. 112(6) states "'Employee' means a person holding a position in the public service, whether permanently or otherwise."

right to employment under the due process clause, his claim for civil rights, specifically for attorney fees under 11 F.S.M.C. 701(3), must be denied.

*Specific Performance*

In his Opposition to Motion for Judgment on the Pleadings filed on September 15, 2014, Panuelo states a claim for specific performance. Pl.'s Opp'n to J. on the Pleadings at 2-3.<sup>8</sup>

The equitable remedy of specific performance is one where the court orders a breaching party to do that which he has agreed to do, thereby rendering the non-breaching party the exact benefit which he expected. The remedy is available when money damages are inadequate compensation for the plaintiff, when damages cannot be computed or when a substitute cannot be purchased. Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 126 (Pon. 1993).

Specific performance is a contract remedy that is available only when the usual measures of damages, expectancy, restitution, or reliance money damages, are inadequate compensation or cannot be computed or when a substitute cannot be purchased. FSM v. GMP Hawaii, Inc., 16 FSM Intrm. 601, 606 (Pon. 2009).

By ordering the promisor to render the promised performance, the court attempts to produce, as nearly as is practicable, the same effect as if the contract had been performed. A court will not order a performance that has become impossible, unreasonably burdensome, or unlawful, nor will it issue an order that can be frustrated by the defendant through exercise of a power of termination or otherwise. E. ALLAN FANSWORTH, CONTRACTS § 12.5 (1982).

In the present matter, Panuelo argues that the remedy of specific performance is available because although no contract exists, the Black's Law Dictionary definition as cited *supra* allows the court to require the Secretary to fulfill her legal obligation by hiring Panuelo. Because specific performance is a remedy in equity under contracts law, and no valid agreement exists between Panuelo and the Government, Panuelo's claim for specific performance is unenforceable. Further, for the court to order the Secretary to hire Panuelo based on an invalid contract, through specific performance, would be unlawful and a violation of public policy.

V. CONCLUSION

In viewing the facts and inferences in the light most favorable to the non-moving party, the defendant's Motion for Judgment on the Pleadings is HEREBY GRANTED. The Clerk of Court is instructed to enter judgment in favor of the defendant.

\* \* \* \*

---

<sup>8</sup> Panuelo cites the 8th Black's Law Dictionary which defines Specific Performance as "a court-ordered remedy that requires fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate . . . . Specific performance is an equitable remedy that lies within the court's discretion to award whenever the common-law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established."