

FSM SUPREME COURT TRIAL DIVISION

THE STATE OF POHNPEI,

Plaintiff,

vs.

M/V PING DA 7, *in rem*, its engines, masts,
bowsprits, boats, anchors, chains, cables,
rigging, apparel, furniture, and all necessities
thereunto pertaining,

In Rem Defendant,

NEW SHIPPING CO., LTD., FRANK CHAN,
CAPTAIN LI DING HAI, HONG KONG RUN JIU
SHIPPING LIMITED OF HONG KONG CHINA,
YU ZHUYI, and JIANG HAI PING,

In Personam Defendants.

CIVIL ACTION NO. 2013-040

ORDER AMENDING DEFAULT JUDGMENT

Ready E. Johnny
Acting Chief Justice

Decided: June 23, 2015

APPEARANCE:

For the Plaintiff:

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HEADNOTES

Civil Procedure – Motions – For Reconsideration

When the court's earlier denial of a request for a further \$4 million default judgment was not a final judgment, the court may readily reconsider that denial. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 78 (Pon. 2015).

Civil Procedure – Default and Default Judgments

When Pohnpei did not plead a salvage cause of action under Title 19, either specifically, or in the facts it alleged, it cannot recover any salvage damages in a default judgment because a judgment by default cannot be different in kind from or exceed in amount that prayed for in the demand for judgment. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 78 (Pon. 2015).

Admiralty – Salvage

FSM salvage contract law applies to all salvage contracts performed in the FSM regardless of whether any party pled the statute. This is because it is well established that with admiralty jurisdiction comes the application of substantive admiralty law. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 78 (Pon. 2015).

Admiralty – Salvage

Substantive admiralty law, whether FSM statute or general maritime law, rewards a successful salvage, not a salvage that has not yet occurred. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 78 (Pon. 2015).

Remedies; Torts – Trespass

Under a trespass cause of action, the trespasser is liable for his intentional failure to remove from the land a thing he has a duty to remove. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 78 (Pon. 2015).

Torts – Damages; Torts – Trespass

The usual remedy for trespass to land (and when applicable nuisance and negligence claims are based on similar facts) is either a judgment for an amount equal to the diminution in the land's value or a judgment for an amount that would be needed to restore the land to its previous condition, whichever is the lesser amount. To award both would constitute an impermissible double recovery. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 78-79 (Pon. 2015).

Costs

Costs are not synonymous with a party's expenses since only certain types of expenses are cognizable as costs. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Costs – Allowed

Since notice by advertisement in newspapers is required for *in rem* actions against vessels, those expenses will be allowed as costs when adequately documented. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Costs – Allowed

Costs for service of process and service of subpoenas are routinely allowed to the prevailing party under Civil Rule 54(d). Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Costs – Allowed

When adequately documented and both reasonable and necessary, a corporation search fee will be allowed as a cost since it is important that the correct parties be named as defendants. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Costs – Allowed; Translation

Translation expenses are generally allowed as costs. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Civil Procedure – Depositions; Costs – Allowed

A prevailing party will usually be allowed costs for depositions unless they are shown to be unnecessary. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Costs – Allowed; Costs – Disallowed

Generally, expert witness fees and research expenses are not taxable costs, but successful litigants may be awarded their out-of-pocket expenses for an expert witness when the expert witness

was an indispensable part of the trial and was crucial to the ultimate resolution of the issues and the costs were appropriate and not excessive, but when an expert's research and testimony went to support claims that the court rejected, that expert's research expenses for those claims are disallowed. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015).

Costs – Allowed

When the experts' research and reports were necessary and indispensable for the plaintiff to establish and the court to grant a default judgment and the fees were appropriate and not excessive, they will be allowed as taxable costs. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79-80 (Pon. 2015).

Costs – Disallowed

When an expert's fee was for an affidavit prepared in support of only a rejected damages claim, it will be disallowed. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 80 (Pon. 2015).

Admiralty – Salvage; Costs – Disallowed

The court cannot award, disguised as costs, what are damages for an unsuccessful salvage contract cause of action that was neither pled nor tried. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 80 (Pon. 2015).

Civil Procedure – Default and Default Judgments; Costs – Disallowed

Government expenses as a result of a ship grounding are not a cost of litigation and when they were neither pled as a cause of action nor prayed for as relief, these expenses are not recoverable either as costs or as damages in a default judgment since a default judgment cannot be different in kind from or exceed in amount that prayed for in the demand for judgment. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 80 (Pon. 2015).

Admiralty; Costs – Allowed; Judgments – Interest

Since injured parties in admiralty and maritime tort cases are typically awarded prejudgment interest, when the plaintiff pled a claim for prejudgment interest, the 9% statutory interest will start on the damages award on the day the vessel ran aground. The 9% statutory interest will start on the costs award on the day the amended judgment is entered. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 80 (Pon. 2015).

Civil Procedure – Dismissal – Lack of Prosecution

Failure to proceed against the remaining *in rem* defendant can lead to its dismissal for want of prosecution. Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 81 (Pon. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

On February 4, 2015, a default judgment was entered in the favor of the plaintiff, State of Pohnpei, against defendants New Shipping Co., Ltd., Frank Chan, Captain Li Ding Hai, Hong Kong Run Jiu Shipping Limited of Hong Kong, China, Yu Zhuyi, and Jiang Hai Ping, jointly and severally, for \$13,419,000 for damage to the coral reef caused by the grounding of the M/V *Ping Da 7*. Pohnpei's request for a further default judgment for \$4,000,000 for that vessel's salvage/removal was denied because salvage damages cannot be awarded when there has been no salvage or rendering harmless operation and no salvage costs have been incurred since the right to payment for salvage presumes that salvage operations have been conducted to a beneficial result and Pohnpei had not furnished any

evidence that it had conducted any salvage operations to a useful and beneficial result. Pohnpei v. M/V Ping Da 7, 20 FSM R.1, 3 (Pon. 2015). Partial final judgment was then entered in Pohnpei's favor for the \$13,419,000. FSM Civ. R. 54(b).

The court then gave notice that if Pohnpei had incurred any costs in conducting salvage operations on the M/V *Ping Da 7* to a beneficial result, either for the rescue of maritime property in peril or for the protection of the marine environment, *cf. Adams Bros. Corp. v. SS Thorfinn*, 19 FSM R. 1, 10 (Pon. 2013), it should submit evidence of those claims and file its request for judgment on those claims. Otherwise the remainder of this case would be dismissed without prejudice to any future salvage claims arising from any future salvage efforts.

On April 1, 2015, Pohnpei filed Plaintiff's Motion for Modification to Damages on Default Judgment; and/or Relief from Order or Reconsideration with supporting exhibits and affidavit. And on April 8, 2015, Pohnpei filed Plaintiff's Amended Motion for Modification to Damages on Default Judgment; and/or Relief from Order or Reconsideration with supporting affidavit. Pohnpei again seeks the \$4 million plus an additional \$538,180.34 in various costs and expenses.

I. \$4 MILLION CLAIM

Pohnpei contends that the court should reconsider its earlier denial of its request for a further \$4 million default judgment. Since that denial was not a final judgment, the court may readily do so. FSM Civ. R. 54(b).

Pohnpei notes that it pled three causes of action – trespass, nuisance, and maritime negligence. Pohnpei asserts that it did not plead a salvage cause of action and that salvage law was not dispositive and therefore the court's denial of its \$4 million claim was in error.

Pohnpei is correct that it did not plead a salvage cause of action under Title 19, either specifically, or in the facts it alleged. As such, it cannot recover any salvage damages in a default judgment because "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." FSM Civ. R. 54(c). Nonetheless, the FSM statute concerning salvage, 19 F.S.M.C. 913 *et seq.*, may apply because statutory FSM salvage contract law applies to all salvage contracts performed in the FSM regardless of whether any party pled the statute. SS Thorfinn, 19 FSM R. at 8. "This is because it is well established that with admiralty jurisdiction comes the application of substantive admiralty law." *Id.* Substantive admiralty law, whether FSM statute or general maritime law, rewards a successful salvage, not a salvage that has not yet occurred. See People of Fauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM R. 623, 628 & n.2 (Yap 2013).

Pohnpei contends that its \$4 million is not a salvage claim but a permissible remedy for the common law claims it pled. In particular, Pohnpei correctly points out that under a trespass cause of action, the trespasser is liable for his intentional failure to remove from the land a thing he has a duty to remove. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM R. 94, 100 (Pon. 2002); Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM R. 528, 534 (Pon. 1998). Pohnpei then argues that it is entitled, based on its trespass claim, to additional damages, beyond the \$13,419,000 already awarded for the damage to the coral reef, for the estimated expense involved to remove the trespassing article – the M/V *Ping Da 7* – and to thus (partially, at least) restore the reef to its prior condition even though the vessel has not been removed and, even if this \$4 million claim were awarded and collected, might still not even then be removed.

Pohnpei overlooks one thing. The usual remedy for trespass to land (and when applicable nuisance and negligence claims are based on similar facts) is either a judgment for an amount equal to

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20 FSM R. 75 (Pon. 2015)

the diminution in the land's value or a judgment for an amount that would be needed to restore the land to its previous condition, whichever is the lesser amount. *DAN B. DOBBS, LAW OF REMEDIES* § 5.1, at 312-18 (1973); *see also e.g., Osborne v. Hurst*, 947 P.2d 1356, 1359 (Alaska 1997). In this case, the court has already awarded a sum based on the coral reef's diminution in value – \$13,419,000 – a much greater sum than the restoration-based \$4 million now sought. To award both would constitute an impermissible double recovery. *See M/V Kyowa Violet v. People of Rull ex rel. Mafel*, 16 FSM R. 49, 63 (App. 2008); *see also FSM v. Koshin 31*, 16 FSM R. 350, 355 (Pon. 2009).

Accordingly, the additional \$4 million request is denied. The court notes that the \$13,419,000 already awarded should be more than enough to finance a successful salvage of the M/V *Ping Da 7*, and that once that is accomplished, Pohnpei may be in position to pursue a salvage award.

II. COSTS AND EXPENSES

Pohnpei also asks that the judgment be amended to include various expenses, totaling \$538,180.34, it contends are recoverable as costs. A prevailing party is entitled to its costs. FSM Civ. R. 54(d). Costs, however, are not synonymous with a party's expenses since only certain types of expenses are cognizable as costs. *George v. Sigrah*, 19 FSM R. 210, 219 (App. 2013); *People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III*, 17 FSM R. 198, 206 n.3 (Yap 2010); *Amayo v. MJ Co.*, 10 FSM R. 371, 385 (Pon. 2001).

Pohnpei asks for an award of \$395 for a January 14, 2014 advertisement in the *Pacific Daily News* and \$100 for a January 27, 2014 advertisement in the *Kaselehlie Press*. Both advertisements gave notice of the M/V *Ping Da 7*'s arrest and the inception of this court case against it and others. Since such notice is required for *in rem* actions against vessels, FSM Mar. R. C(4), and since Pohnpei has adequately documented those expenses, they are allowed as costs. *M/C Jumbo Rock Carrier III*, 17 FSM R. at 206. Claimed and documented service expenses of \$50 are also allowed. Costs for service of process and service of subpoenas are routinely allowed to the prevailing party under Civil Rule 54(d). *Berman v. Pohnpei*, 17 FSM R. 360, 374 (App. 2011). Pohnpei also asks for \$2.32 to reimburse a Hong Kong \$18 charge for an ICRIS corporation search. Since it is important that the correct parties be named as defendants, this adequately documented expense seems both reasonable and necessary and is thus allowed as a cost.

Pohnpei also seeks \$1785 for translation expenses and \$454 for deposition appearances and transcripts. Translation expenses are generally allowed as costs. *See M/C Jumbo Rock Carrier III*, 17 FSM R. at 206; *Rawepi v. Billimon*, 2 FSM R. 240, 241 (Truk 1986). A prevailing party will usually be allowed costs for depositions unless they are shown to be unnecessary. *Lippwe v. Weno Municipality*, 14 FSM R. 347, 354 (Chk. 2006); *Damarlane v. United States*, 7 FSM R. 468, 470 (Pon. 1996); 20 AM. JUR. 2d *Costs* § 56, at 44 (1965). Since the deposition and transcript charges were for a deposition of Captain Li Ding Hai fairly early in the litigation, the court must presume that the deposition was necessary and indispensable. These translation, deposition, and transcript costs are allowed.

Pohnpei seeks \$1,344.40 as allowable costs for expert research, consultation, and reports. Generally, expert witness fees and research expenses are not taxable costs, but successful litigants may be awarded their out-of-pocket expenses for an expert witness when the expert witness was an indispensable part of the trial and was crucial to the ultimate resolution of the issues and the costs were appropriate and not excessive, although when an expert's research and testimony went to support claims that the court rejected, that expert's research expenses for those claims are disallowed. *People of Rull ex rel. Ruepong v. M/V Kyowa Violet*, 15 FSM R. 53, 75 (Yap 2007). In this case, there was no trial. A default judgment was entered. The expert research and reports done by Jorg Anson and

by the Conservation Society of Pohnpei were necessary and indispensable for Pohnpei to establish and the court to grant the February 4, 2015, \$13,419,000 default judgment. The \$100 fee charged by Anson and the \$994.40 charged by the Conservation Society were appropriate and not excessive. Therefore, that \$1,094.40 will be allowed as taxable costs. The \$250 fee for Captain Will Naden and his affidavit supporting Pohnpei's claim that it would require \$4 million to remove the M/V *Ping Da 7* from the reef is disallowed because it was prepared in support of only a rejected damages claim. M/V Kyowa Violet, 15 FSM R. at 75.

In its amended motion, Pohnpei seeks the allowance of various additional government expenses. It seeks the reimbursement of \$435,000 spent on a contract with Adams Brothers Corporation. That contract "engaged tugboat services in order to attempt to save, rescue and salvage the Ping Da 7 after the grounding on Pohnpei State's reef." Aff. Daniel J. Berman para. 6 (Apr. 8, 2015). In other words, it was a salvage contract and an unsuccessful one at that. As such, Pohnpei cannot recover this expense. Furthermore, the court does not believe that it can award, disguised as costs, what are damages for a cause of action that was neither pled nor tried.

Pohnpei also seeks \$99,049.62 in expenses it says it incurred as a result of the *Ping Da 7* grounding. Pohnpei claims that between December 11, 2013, and February 28, 2014, seven of its agencies incurred \$78,374.26 in expenses related to the M/V *Ping Da 7* for items described simply as "Overtime"; "Supply"; "Fuel"; or "Meal" without further explanation, and from March through May 2014, its Department of Public Safety incurred a further \$20,675.36 in overtime and fuel expenses. These are not a cost of litigation. Neither was reimbursement of government expenses plead as a cause of action nor prayed for as relief. Since this is a default judgment, it cannot "be different in kind from or exceed in amount that prayed for in the demand for judgment." FSM Civ. R. 54(c). These expenses are therefore not recoverable either as costs or as damages.

Accordingly, a total of \$3,880.72 in costs are allowed Pohnpei under Rule 54(d). The rest are disallowed.

III. AMENDED JUDGMENT

The clerk will therefore enter an amended judgment in the State of Pohnpei's favor against defendants New Shipping Co., Ltd., Frank Chan, Captain Li Ding Hai, Hong Kong Run Jiu Shipping Limited of Hong Kong, China, Yu Zhuyi, and Jiang Hai Ping, jointly and severally, for the sum of \$13,422,880.72, with 9% per annum interest thereon. For the \$13,419,000 damages judgment, the 9% interest will start on December 11, 2013, the date the M/V *Ping Da 7* ran aground on Pohnpei reef since Pohnpei pled a claim for prejudgment interest and since injured parties in admiralty and maritime tort cases are typically awarded prejudgment interest. People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn. Bhd., 18 FSM R. 165, 175 (Yap 2012); People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM R. 403, 420 (Yap 2006). The 9% statutory interest on the \$3,880.72 costs award will start on the day the amended judgment is entered. Adams v. Island Homes Constr., Inc., 14 FSM R. 473, 475-76 (Pon. 2006).

IV. DEFENDANT M/V PING DA 7

With this order, full and final judgments will have been entered against all of the *in personam* defendants on all claims. That leaves, as the remaining defendant, the *in rem* defendant, the M/V *Ping Da 7*. Pohnpei's complaint asks that the vessel be condemned and sold and Pohnpei given a preferred maritime lien status for claims to the sale proceeds. However, considering the present circumstances, a successful sale does not seem likely right now.

Accordingly, the State of Pohnpei shall, no later than July 21, 2015, file with the court its proposal on how it intends to proceed against the defendant M/V *Ping Da 7*. Failure to proceed can lead to a dismissal for want of prosecution. FSM Civ. R. 41(b).

V. CONCLUSION

There being no just cause for delay, the clerk IS HEREBY EXPRESSLY DIRECTED to enter an amended default judgment, FSM Civ. R. 54(b), for the plaintiff against the defaulting defendants, jointly and severally, for the sum of \$13,422,880.72, with 9% interest per annum thereon, starting December 11, 2013, for the \$13,419,000, and starting on the date of the amended judgment for the \$3,880.72 in costs. Pohnpei shall inform the court, no later than July 21, 2015, how it intends to proceed against the remaining defendant, the M/V *Ping Da 7*.

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FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHUIT SOAP COMPANY,

Plaintiff,

vs.

ERINE McVEY and DO IT BEST HARDWARE,
a business organization, and BOARD OF TRUSTEES
OF THE POHNPEI STATE PUBLIC LANDS TRUST,

Defendants.

CIVIL ACTION NO. 2005-007

ORDER AWARDING FEES AND COSTS

Ready E. Johnny
Acting Chief Justice

Decided: June 25, 2015

APPEARANCES:

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