

Accordingly, the Defendants' Motion to Stay Pending Rule 60(b) is DENIED.

c. Motion for Substitution of Land Sales Agent

In the December 24, 2013 Order in Aid of Judgment, an individual was appointed by the Court to serve as Plaintiff's Representative for Land Sales and in said capacity, was expected to oversee the specific tasks delineated within the Order which spoke to advertising the subject property, as well as the imminent sale. With the passing of this Land Sales Agent, the Plaintiff's proposed replacement would undertake the predecessor's Court-Ordered duties and responsibilities. Defendants have failed to cite any legal authority in support of their opposition to this proposed successor. In addition, as the proposed replacement is familiar with the operative facts of this case and an employee of the FSMDB, the contemplated services would require no additional compensation.

In light of the existing Order in Aid of Judgment, coupled with an implicit need to have an individual appointed by the Court to orchestrate the requisite action items, to ensure an orderly sale of the subject mortgaged property, Rendy Abraham is hereby appointed to serve as Plaintiff's Representative for Land Sales. This Land Sales Agent will assume all responsibilities of the predecessor, as set forth in the December 24, 2013 Order in Aid of Judgment.

Accordingly, Plaintiff's Motion for Substitution of Land Sales Agent is GRANTED.

* * * *

FSM SUPREME COURT TRIAL DIVISION

JOHN PALASKO,)	CIVIL ACTION NO. 2010-030
)	
Plaintiff,)	
)	
vs.)	
)	
POHNPEI GOVERNMENT and KITTI)	
GOVERNMENT,)	
)	
Defendants.)	
_____)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Beauleen Carl-Worswick
Associate Justice

Decided: July 17, 2015

APPEARANCES:

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

91
Palasko v. Pohnpei
20 FSM R. 90 (Pon. 2015)

For the Defendant: Ira Shiflett, Esq.
(Pohnpei) Assistant Attorney General
Pohnpei Department of Justice
P.O. Box 1555
Kolonia, Pohnpei FM 96941

For the Defendant: Stephen V. Finnen, Esq.
(Kitti) P.O. Box 1450
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Civil Procedure – Summary Judgment

When a motion to dismiss presents matters outside the pleadings and the court does not exclude those matters, the motion will be treated as one for summary judgment and will be disposed of as provided in Rule 56, once all parties have been given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Palasko v. Pohnpei, 20 FSM R. 90, 93 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Palasko v. Pohnpei, 20 FSM R. 90, 93 (Pon. 2015).

Civil Rights – Remedies and Damages

An FSM statute, 11 F.S.M.C. 701(3), creates a private right of action against any person, including governmental entities, for the violation of rights guaranteed by the Constitution. Palasko v. Pohnpei, 20 FSM R. 90, 94 (Pon. 2015).

Jurisdiction

A suit for any damage allegedly caused by a neighbor's pigs would have to be made against the pigs' owner or custodian, and, unless there was diversity of citizenship between the plaintiff and the pigs' owner (an unlikely occurrence), the FSM Supreme Court would not have any jurisdiction over such a claim. Palasko v. Pohnpei, 20 FSM R. 90, 95 (Pon. 2015).

Agriculture

The Pohnpei stray livestock statute does not create any property rights in impounded stray pigs. It does not grant the person impounding the stray animal the right to hold on to that animal until he is compensated. To the contrary, the statute creates a right for the person impounding the stray animal to "just compensation for its keep from the owner." Palasko v. Pohnpei, 20 FSM R. 90, 95 (Pon. 2015).

Agriculture

The Pohnpei stray livestock statute does not authorize a person to hold onto stray pigs until he receives just compensation for the pigs' upkeep and it certainly does not create a lien for the value of any damaged crops. It does not authorize anyone to hold onto the pigs once the livestock's owner has been identified. Nor does it authorize compensation from the stray pigs' owner for any damage the pigs may have caused or any crops that may have been destroyed. The right to compensation for destroyed crops exists outside the statute. Palasko v. Pohnpei, 20 FSM R. 90, 95 (Pon. 2015).

Agriculture

The Pohnpei stray livestock statute requires that the impoundment of stray pigs be reported within three days. Palasko v. Pohnpei, 20 FSM R. 90, 96 (Pon. 2015).

Constitutional Law – Due Process; Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause

An arrest based upon probable cause does not violate the constitutional right to due process. Palasko v. Pohnpei, 20 FSM R. 90, 96 (Pon. 2015).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause

An individual suspected of a crime must be released from detention unless the government can establish "probable cause" to hold that individual. The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. Palasko v. Pohnpei, 20 FSM R. 90, 96 (Pon. 2015).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause; Torts – False Imprisonment

The police had probable cause to arrest a person and that arrest was lawful when they knew that he had someone else's pigs and that he would not release them to their owner. Since his arrest was lawful, the resulting overnight detention was lawful and was not false imprisonment. Palasko v. Pohnpei, 20 FSM R. 90, 96 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Civil Rights – Acts Violating

When the plaintiff's claims for false imprisonment, for destruction of standing in community, and for wrongful invasion of privacy – false light were all predicated on his mistaken supposition that he was entitled to retain another person's pigs until compensated and that therefore his arrest was unlawful, the defendants are entitled to summary judgment on these claims as well as summary judgment on his civil rights violations claims insofar as those claims are predicated on his arrest being unlawful. Palasko v. Pohnpei, 20 FSM R. 90, 96 (Pon. 2015).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Exclusionary Rule

The usual remedy for a person's failure to be informed of his rights is the suppression of any evidence against him that resulted from that failure. Palasko v. Pohnpei, 20 FSM R. 90, 97 (Pon. 2015).

Torts – Trespass

One is subject to liability to another for trespass, irrespective of whether he causes harm to any legally protected interest of the other if he 1) intentionally and without consent enters land in the other's possession, or causes a thing or person to do so, or 2) intentionally and without consent remains on the other's land, or 3) intentionally fails to remove from the land a thing which he is under a duty to remove. Palasko v. Pohnpei, 20 FSM R. 90, 97 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Trespass

The defendants are entitled to summary judgment on a plaintiff's trespass claim when unrebutted affidavit evidence defendants shows that the plaintiff told the police to get the pigs from his land and return them and shows that a resident of the property was there and gave him permission to enter the land and retrieve the pigs. Palasko v. Pohnpei, 20 FSM R. 90, 97 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

A plaintiff's allegation supported with his own affidavit, that he was physically injured when he

was arrested by police officers, although not very specific, remains genuinely at issue when it was not rebutted by the defendants. Palasko v. Pohnpei, 20 FSM R. 90, 97 (Pon. 2015).

Criminal Law and Procedure – Arrest and Custody

In effecting an arrest, a police officer may employ no more force than he reasonably believes to be necessary. Palasko v. Pohnpei, 20 FSM R. 90, 97 (Pon. 2015).

Torts – Use of Excessive Force

Since a police officer may employ no more force than he reasonably believes to be necessary to effect the arrest, the tort of use of excessive force (which may constitute a battery) results from the arrest by a person having the authority to do so but accomplished by the use of unreasonable force. An arrestee has a civil right to be free of excessive force when being detained. Palasko v. Pohnpei, 20 FSM R. 90, 97 (Pon. 2015).

Torts – Infliction of Emotional Distress

Physical injury to the plaintiff or the plaintiff's physical manifestation of emotional distress is a necessary element that must be proven for an award for infliction of emotional distress. Palasko v. Pohnpei, 20 FSM R. 90, 98 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Infliction of Emotional Distress

When the plaintiff did not plead any physical manifestation of emotional distress but did plead a physical injury – a battery – in connection with his arrest, whether that physical injury (battery) occurred (and also whether any emotional distress was inflicted) are a genuine issues of material fact precluding summary judgment on this claim. Palasko v. Pohnpei, 20 FSM R. 90, 98 (Pon. 2015).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

This comes before the court on 1) defendant Pohnpei government's Motion to Dismiss with supporting exhibits, filed December 8, 2010; 2) defendant John Palasko's Opposition to Motion to Dismiss with supporting affidavit, filed December 20, 2010; 3) defendant Kitti Government's Joinder in Motion to Dismiss, filed January 7, 2010; 4) defendant John Palasko's Opposition to Motion to Dismiss with supporting affidavit, filed January 20, 2011; 5) Pohnpei's Supplement to Motion to Dismiss and Reply to Plaintiff's Response with supporting affidavit, filed February 4, 2011; 6) Kitti's Supplement to Motion to Dismiss, or in the Alternative Motion for Summary Judgment with supporting affidavit, filed February 22, 2011; and 7) Kitti's Response to Court Order, filed June 24, 2011.

The defendants' motions to dismiss and the various supplements contain matter outside the pleadings. The court will not exclude that matter. The court will thus consider the motions as ones for summary judgment since when a motion to dismiss presents matters outside the pleadings and the court does not exclude those matters, the motion will be treated as one for summary judgment and will be disposed of as provided in Rule 56, once all parties have been given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Sorech v. FSM Dev. Bank, 18 FSM R. 151, 155 (Pon. 2012); Arthur v. Pohnpei, 16 FSM R. 581, 593 (Pon. 2009). The parties have had that opportunity. Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 569 (Pon. 2011).

Summary judgment is, for the most part, granted for the defendants. The court's reasoning follows.

I. BACKGROUND

John Palasko felt that a neighbor's pigs had been wandering freely and had been eating his crops and causing unsanitary conditions for his family. He alleges that his reports and complaints to the pigs' owners, to the Kitti municipal authorities, and to the Pohnpei state police substation in Kitti were futile. On November 14, 2009, Palasko caught three small pigs wandering on his land and confined them in his own pigpen. Palasko asserts that, when he did so, he was acting in conformance with 28 Pon. C. §6-102, a Pohnpei statute allowing persons to impound stray livestock that are found to be damaging property. Palasko, however, did not report that he had impounded the pigs to either the Kitti municipal chief executive or to the Pohnpei state police.

The pigs' owner complained to the police that the pigs were missing and had been captured and had not been returned. The police investigated. An officer went to Palasko's land; spoke to Palasko's sister who told him that Palasko had captured the pigs because they had been eating Palasko's yams. The officer viewed the pigs in a pigpen on Palasko's land and looked for signs that Palasko's crops had been despoiled, but did not see any.

According to the supporting affidavits of a Pohnpei state police officer and a Kitti municipal police officer, Palasko kept the pigs and refused to return them to the pigs' owner. Palasko avers that he did not intend to keep the pigs permanently but was keeping them until he received compensation for his despoiled crops.

On November 30, 2009, a Pohnpei and a Kitti police arrested Palasko in Kolonia Town. The Kitti officer, with Palasko's permission, retrieved the three small pigs and restored them to their owner. Palasko was held overnight and questioned about the pigs the next day. He was released after the questioning. No charges were filed against him.

Palasko then filed suit against both the Pohnpei state and Kitti municipal governments. In his "Complaint for Civil Rights Violations," he pled as his causes of action: false imprisonment; trespass to land; battery; failure to read constitutional rights to accused; destruction of standing in community; wrongful invasion of privacy – false light; infliction of emotional distress; violation of statute; and civil rights violations.

These facts are essentially undisputed.

II. JURISDICTION

The core of this case is Palasko's claim that the two defendant governments violated his civil rights by wrongfully arresting and detaining him. The numerous state law claims pled all arise from Palasko's arrest or from the return of the pigs Palasko had captured. Palasko contends that his arrest violated his right to due process of law guaranteed by the FSM Constitution. An FSM statute, 11 F.S.M.C. 701(3), creates a private right of action against any person, including governmental entities, for the violation of rights guaranteed by the Constitution. See Berman v. Pohnpei, 16 FSM R. 567, 577 (Pon. 2009) (when a complaint alleges that the plaintiff was denied equal protection of the laws, the suit will be deemed a 11 F.S.M.C. 701 private cause of action for violation of civil rights guaranteed by the FSM Constitution even if the statute is not cited in the complaint).

Palasko does not, in this case, make a claim for any damage allegedly caused by his neighbor's pigs. Such a suit would have to be made against the pigs' owner or custodian and, unless there was diversity of citizenship between the plaintiff and the pigs' owner (an unlikely occurrence), the FSM Supreme Court would not have any jurisdiction over such a claim. Here, Palasko's central claim is that he was wrongfully arrested and all of his state law causes of action against the governmental entities whose police officers arrested him flow from that allegedly wrongful arrest and are essentially based on a common nucleus of operative fact.

III. DISCUSSION

A. Was Palasko's Arrest Wrongful?

Palasko contends that he was unlawfully arrested and detained and that when he was unlawfully arrested he was treated improperly. The defendants contend that the arrest was lawful because there was probable cause to arrest Palasko and that the statute on which Palasko relies did not authorize him to take the actions he did.

1. Palasko's Rights under Section 6-102

The relevant statute reads:

Any stray livestock may be impounded by any person if such livestock is found doing damage to property . . . and that person shall notify the chief executive of the local jurisdiction . . . or Chief of the Division of Police and Security or their duly appointed representatives within three days of the capture. The person impounding a stray animal may claim just compensation for its keep from the owner, or may keep the animal if no owner appears within 60 days.

28 Pon. C. § 6-102. The statute does not create any property rights in the impounded pigs. It does not grant the person impounding the stray animal the right to hold on to that animal until he is compensated. To the contrary, the statute creates a right for the person impounding the stray animal to "just compensation for its keep from the owner." In other words, the statute gave Palasko the right to compensation for caring for the pigs – the pigs' upkeep (for instance, the cost of pig feed) – until their owner appeared to claim the pigs.

The statute would make no sense if it authorized a person (such as Palasko) to hold onto the stray pigs until he was first compensated for the cost of holding on to the pigs because the longer the impounder held on to the impounded pigs, the greater would be his compensation for taking care of the pigs. The impounder can only keep the stray pigs if after 60 days no owner appears. Here, the owner appeared and complained to the police that he could not get his pigs back.

Furthermore, the statute does not even authorize Palasko to hold onto the pigs until he receives just compensation for the pigs' upkeep. The statute certainly does not create a lien for the value of any damaged crops. It does not authorize anyone to hold onto the pigs once the livestock's owner has been identified. Nor does it authorize compensation from the stray pigs' owner for any damage the pigs may have caused or any crops that may have been destroyed.

The right to compensation for destroyed crops exists outside the statute. The court does not doubt that Palasko would have a common law cause of action against the pigs' owner for any damages the three small pigs may have caused when they allegedly strayed and damaged his crops, but that is not what the statute authorizes and that is not this case. Palasko is not suing the pigs' owner for any

alleged crop damage. He is suing Pohnpei and Kitti for violating his rights to due process by allegedly unlawfully arresting him.

Palasko pleads a cause of action for "violation of statute" in which he asserts that Section 6-102 authorized his actions and that the defendants' actions in arresting him and allowing the owner to retrieve the impounded pigs deprived Palasko of property rights in Section 1-602 liens he had on the impounded pigs until the pigs' owner compensated him for his destroyed crops. Since the statute does not authorize the actions Palasko took or create any liens for crop damage, the defendants are entitled to summary judgment on the "violation of statute" cause of action. Pohnpei and Kitti did not violate 28 Pon. C. § 1-602. Palasko did. He did not report his impoundment of the three pigs within three days as Section 1-602 requires. He also misunderstood what rights to compensation he had under the statute.

2. *Probable Cause*

An arrest based upon probable cause does not violate the constitutional right to due process. Pohnpei and Kitti contend that they had probable cause to arrest and detain Palasko because he was holding onto someone else's pigs and would not return them to the owner. The court agrees.

An individual suspected of a crime must be released from detention unless the government can establish "probable cause" to hold that individual. *In re Anzures*, 18 FSM R. 316, 324 (Kos. 2012). The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. *Id.*; *FSM v. Zhong Yuan Yu No. 621*, 6 FSM R. 584, 588 (Pon. 1994).

Since the police had probable cause to arrest Palasko, the arrest was lawful. They knew that Palasko had someone else's pigs and that he would not release them to their owner. Since Palasko's arrest was lawful, the resulting overnight detention was lawful and was not false imprisonment.

Accordingly, the defendants are entitled to summary judgment on Palasko's civil rights violations claims insofar as those claims are predicated on the Palasko's arrest being unlawful. Since Palasko's claims for false imprisonment, for destruction of standing in community, and for wrongful invasion of privacy – false light are all predicated on the Palasko's mistaken supposition that he was entitled to retain another person's pigs until compensated and that therefore his arrest was unlawful, the defendants are entitled to summary judgment on these claims as well.

B. *Palasko's Other Claims*

1. *Failure to Read Rights to Accused (Palasko)*

Palasko contends that he was not read his constitutional rights after he was arrested and that he is entitled to civil damages for that omission. Pohnpei contends that Palasko was read his rights and provides an advice of rights form signed by Palasko and dated December 1, 2009. Pohnpei further contends that even if Palasko had not been read his rights, it cannot be subjected to civil liability for that omission because the remedy for such an omission is the suppression in any criminal case against the defendant of the use of any evidence obtained because of the omission. Pohnpei notes that Palasko was never charged with any crimes.

In response, Palasko does not dispute that he signed the advice of rights. He merely avers that he was not read his rights until the day after he was arrested. Furthermore, he does not claim that his

custodial interrogation took place before he was advised of his rights. Palasko concedes that he was read his rights. He appears to have abandoned this claim.

Even if he has not, he cannot prevail. The court is aware that in one instance a person was awarded "nominal damages in the amount of one dollar (\$1) for the police's failure to inform her of her rights regarding access to legal counsel as governed by 62 Pon. C. § 2-118(2)(b) and (c)." Berman v. Pohnpei, 16 FSM R. 567, 573 (Pon. 2009). The appellate court ruled it lacked jurisdiction to review Pohnpei's challenge of that award because Pohnpei had neglected to file a cross-appeal. Berman v. Pohnpei, 17 FSM R. 360, 372-73 (App. 2011). Nevertheless, the usual remedy for a person's failure to be informed of his rights is the suppression of any evidence against him that resulted from that failure. *Cf.* FSM v. Benjamin, 19 FSM R. 342, 348 (Pon. 2014) (any statement made by the defendant on questioning by the police before being read his rights will be suppressed). At any rate, Palasko cannot show he suffered any damage from Pohnpei's failure to read him his rights earlier than it did.

2. *Trespass*

Palasko asserts a cause of action for trespass to land. Palasko's complaint alleges that after they arrested him, the arresting officers entered his land without consent or privilege and took the impounded pigs. Compl. ¶ 13 (Nov. 18, 2010). One is subject to liability to another for trespass, irrespective of whether he causes harm to any legally protected interest of the other if he 1) intentionally and without consent enters land in the other's possession, or causes a thing or person to do so, or 2) intentionally and without consent remains on the other's land, or 3) intentionally fails to remove from the land a thing which he is under a duty to remove. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM R. 94, 99-100 (Pon. 2002).

Kitti provides the affidavit of its police officer who avers that Palasko told him to get the pigs from his land and return them. Aff. Saimon Eperiam ¶ 4 (Feb. 21, 2011). The affiant further avers that when he went to Palasko's property, Sabi Palasko, a resident of the property, was there and gave him permission to enter the land and retrieve the pigs. This evidence is un rebutted. Since there is no other allegation of trespass and since there was consent to enter Palasko's land, the defendants are entitled to summary judgment on Palasko's trespass claim.

3. *Civil Rights and Battery*

Palasko alleges, and supports with his own affidavit, that he was physically injured when he was arrested in Kolonia Town on November 30, 2009, by Pohnpei state police officer Molten Henley and Kitti police officer Solomon Eperiam. Although, this factual allegation is not very specific, it is not rebutted by the defendants. It thus remains at issue.

In effecting an arrest, a police officer may employ no more force than he reasonably believes to be necessary. Nena v. Kosrae, 14 FSM R. 73, 82 (App. 2006). The tort of use of excessive force (which may constitute a battery) results from the arrest by a person having the authority to do so but accomplished by the use of unreasonable force and an arrestee has a civil right to be free of excessive force when being detained. *See* Conrad v. Kolonia Town, 8 FSM R. 183, 191 (Pon. 1997); Atesom v. Kukun, 10 FSM R. 19, 22 (Chk. 2001).

There remains a genuine issue of material fact about whether Palasko was physically injured when he was arrested. Thus, the defendants are not entitled to summary judgment on Palasko's battery claim and his claim for violation of civil rights insofar as the civil rights claim is for use of excessive force during the arrest.

4. *Infliction of Emotional Distress*

The defendants contend that Palasko’s claim for infliction emotional distress should be dismissed because Palasko failed to plead a necessary element of the tort – a physical injury. Palasko retorts that there was a physical injury and that he pled it.

Physical injury to the plaintiff or the plaintiff’s physical manifestation of emotional distress is a necessary element that must be proven for an award for infliction of emotional distress. Nakamura v. FSM Telecomm. Corp., 17 FSM R. 41, 48 (Chk. 2010). The movants correctly note that Palasko did not plead any physical manifestation of emotional distress. He did, however, plead a physical injury – a battery – in connection with his arrest. Since whether that physical injury (battery) occurred (and also since whether any emotional distress was inflicted) are a genuine issues of material fact, summary judgment cannot be granted on this claim either.

IV. CONCLUSION

Accordingly, the defendants are granted summary judgment on all of John Palasko’s claims except his claim that his civil rights were violated when he was physically injured during his arrest on November 30, 2009, and that he suffered emotional distress as a result.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2007-1008
)	
Plaintiff,)	
)	
vs.)	
)	
CHRISTOPHER CORPORATION, PATRICIA)	
(PEGGY) SETIK, MARIANNE B. SETIK, THE)	
ESTATE OF MANNEY SETIK, ATANASIO SETIK,)	
VICKY SETIK IRONS, IRENE SETIK WALTER,)	
MARLEEN SETIK, JUNIOR SETIK, ELEANOR)	
SETIK SOS, JOANITA SETIK PANGELINAN,)	
MERIAM SETIK SIGRAH, CHRISTOPHER JAMES)	
SETIK, GEORGE SETIK, individually and d.b.a.)	
CHRISTOPHER STORE,)	
)	
Defendants.)	
)	

ORDER

Lourdes F. Materne*
Temporary Justice

Decided: July 17, 2015

*Associate Justice, Palau Supreme Court, Koror, Palau