

FSM SUPREME COURT TRIAL DIVISION

SASAKI L. GEORGE, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CANNEY PALSIS, individually and in his capacity )  
as Directing Attorney for Kosrae MLSC; LEE )  
PLISCOU, in his capacity as the Executive )  
Director of MLSC; and MICRONESIAN LEGAL )  
SERVICES CORPORATION; )  
 )  
Defendants. )  
 )

CIVIL ACTION NO. 2013-2004

ORDER GRANTING RULE 41(b) MOTION FOR DISMISSAL AT THE CLOSE OF PLAINTIFF'S CASE

Ready E. Johnny  
Acting Chief Justice

Trial: May 19, 20, and 21, 2015  
Decided: July 28, 2014

APPEARANCES:

For the Plaintiff: Yoslyn G. Sigrah, Esq.  
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For the Defendants: Stephen V. Finnen, Esq.  
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HEADNOTES

Civil Procedure – Affidavits; Evidence

An affidavit, not introduced at trial and which the defendants never had the opportunity to address or to cross-examine a witness concerning its contents, will be stricken as evidence since the opposing party cannot properly examine or counter evidence offered after trial and since the burden is on the party offering the evidence to demonstrate good cause why the evidence should be admitted. George v. Palsis, 20 FSM R. 111, 114 (Kos. 2015).

Civil Procedure – Affidavits; Evidence

Just because an affidavit was filed while the court was considering cross motions for summary judgment does not mean that it is automatically admitted into evidence at the later trial. To be evidence that the court can consider, the affidavit should be offered at trial in the usual manner. Then it might be admitted in the usual manner, or it might be objected to and the objection sustained, or the affiant

himself might instead be called to testify. George v. Palsis, 20 FSM R. 111, 114 (Kos. 2015).

Civil Procedure – Dismissal – After Plaintiff’s Evidence

Under Civil Procedure Rule 41(b), once a plaintiff has finished presenting evidence during the plaintiff’s case-in-chief, a defendant may, without waiving its right to present evidence if the motion is not granted, move for a dismissal on the ground that upon the facts and the law the plaintiff has not shown any right to relief. The court, as the fact-finder, may then either determine the facts and render judgment against the plaintiff or it may decline to render any judgment until the close of all the evidence. George v. Palsis, 20 FSM R. 111, 115 (Kos. 2015).

Civil Procedure – Dismissal – After Plaintiff’s Evidence

When a defendant has moved for dismissal after the plaintiff has completed its evidence, the court, in determining whether the plaintiff has shown a right to relief, is not required to view the facts in the light most favorable to the plaintiff but can draw permissible inferences, and if the court determines that the plaintiff has not made out a prima facie case, the defendant is entitled to have the plaintiff’s case dismissed. George v. Palsis, 20 FSM R. 111, 115 (Kos. 2015).

Civil Procedure – Dismissal – After Plaintiff’s Evidence

Even if the plaintiff has made out a prima facie case, the court, as the trier of fact, may weigh the evidence, resolve any conflicts in the evidence, and decide for itself where the preponderance of the evidence lies and, based on where the preponderance lies, grant a Rule 41(b) motion to dismiss. The court must view the evidence with an unbiased eye, without any attendant favorable inferences and must sift and balance the evidence and give it such weight as it deems fit. George v. Palsis, 20 FSM R. 111, 115 (Kos. 2015).

Employer-Employee – Wrongful Discharge

When an employee failed to discharge his duties in a prompt and efficient manner, and he was insubordinate; when the failure to discharge one’s duties in a prompt and efficient manner constitutes just cause for termination from the employer; and when insubordination is also just cause, the employer did not materially breach the employee’s employment contract (the employee manual) by terminating him since just cause for termination existed. George v. Palsis, 20 FSM R. 111, 116 (Kos. 2015).

Civil Procedure – Dismissal – After Plaintiff’s Evidence; Employer-Employee – Wrongful Discharge

When the plaintiff had the burden to prove by a preponderance of the evidence that his employer’s termination of his employment was not for just cause and he failed to do so, he has not shown upon the facts and the law a right to relief and the defendants’ motion to dismiss will therefore be granted. George v. Palsis, 20 FSM R. 111, 116 (Kos. 2015).

Contracts – Damages; Evidence – Burden of Proof

A plaintiff has the burden to persuade the court, with competent evidence, as to the amount of his damages. Parties have the responsibility to put forward the evidence to support their case. This is not the court’s responsibility. George v. Palsis, 20 FSM R. 111, 117 (Kos. 2015).

Contracts – Damages; Evidence – Burden of Proof

A plaintiff must introduce his evidence during his case-in-chief so the defendants will have an opportunity to address it, or to stipulate to it, or to challenge it and to cross-examine witnesses about it, and where, if the defendants feel the need, they can introduce evidence to counter it when it their turn comes. George v. Palsis, 20 FSM R. 111, 117 (Kos. 2015).

Contracts – Damages – Mitigation of; Evidence – Burden of Proof

Since the defendants pled the plaintiff’s failure to mitigate damages as an affirmative defense,

if the plaintiff had put on evidence of his damages, the burden would have shifted to the defendants to prove that the plaintiff failed to mitigate his damages or to prove to what extent he did mitigate his damages. But since the plaintiff put on no evidence about the amount of his damages, the burden of proof about damages never shifted to the defendants. George v. Palsis, 20 FSM R. 111, 116 (Kos. 2015).

Evidence

A court cannot award damages based on matter "introduced" during argument after the presentation of evidence has ended. George v. Palsis, 20 FSM R. 111, 117 (Kos. 2015).

Civil Procedure – Dismissal – After Plaintiff's Evidence;

A plaintiff has failed to present even a prima facie case when, although necessary elements of his causes of action were that a wrongful act caused damages in some amount that the court can reasonably calculate, he did not proffer any evidence about the amount of damages he allegedly suffered on any of his asserted causes of action. Reasonably calculable damages must be shown as part of a prima facie case. George v. Palsis, 20 FSM R. 111, 117 (Kos. 2015).

Civil Rights – Remedies and Damages

In a civil rights case, even if the plaintiff has failed to prove any actual damages, the court can award nominal damages because of the importance of vindicating certain fundamental rights, but when there was no evidence introduced from which the court could draw the inference that the plaintiff's termination was the result of religious discrimination, there was thus no prima facie case made out on the civil rights claim. George v. Palsis, 20 FSM R. 111, 117 (Kos. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This case came on for trial before the court on May 19, 2015. The plaintiff, Sasaki L. George, presented his case-in-chief on May 19, 20, and 21, 2015. And on May 22, 2015, he filed Plaintiff's Supplement to Earlier Submission on April 29, 2015 on Statement of the Law.

On May 21, 2015, at the close of George's evidence, the defendants moved orally for what they called a "directed verdict" – for a Rule 41(b) "dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The court asked the defendants to submit the motion in writing; gave George time to submit a written response; and, since the defendants were the movants, gave them an opportunity for a reply. The defendants filed their written motion on May 22, 2015. George filed his opposition on June 1, 2015, and the defendants filed their reply on June 8, 2015. The matter was then considered submitted for decision.

Also before the court are certain related filings – the defendants' Motion to Strike Non-Admitted Exhibits, filed May 22, 2015; the Plaintiff's Opposition to Defendants' Motion to Strike Non-Admitted Exhibits, filed June 4, 2015; the defendants' Motion to Strike Portions of Opposition to Motion for Directed Verdict, filed June 5, 2015; and Plaintiff's Opposition to Defendants' Motion to Strike Portions of Oppositions to Motion for Directed Verdict, filed June 22, 2015 – that should be decided before turning to the Rule 41(b) motion to dismiss.

## I. RELATED FILINGS

The defendants assert that George attached two "exhibits" to his May 22, 2015 filing which were not testified to or offered in evidence during trial and therefore should be stricken. George responds that one "exhibit" is merely a flow chart authored by counsel and that the other is an affidavit that was earlier made part of the record during the summary judgment motion phase of the litigation and therefore should be considered and not stricken.

The motion is denied as to the "flow chart." The court will consider it merely written argument presented in a form more graphic than usual. The motion to strike is granted as to Palikkun Shrew's affidavit. It was not introduced at trial and the defendants never had the opportunity to address its contents or to cross-examine a witness concerning its contents. It is hereby stricken. Since an opposing party cannot properly examine or counter evidence offered after trial, the burden is on the party offering the evidence to demonstrate good cause why the evidence should be admitted. Pacific Skylite Hotel v. Penta Ocean, 19 FSM R. 265, 269 (Pon. 2014). That burden was not met. Just because that same affidavit had been filed while the court was considering cross motions for summary judgment does not mean that it is automatically admitted into evidence at the later trial. The affidavit should have been offered at trial in the usual manner. Then it might have been admitted in the usual manner, or it might have been objected to and the objection sustained, or the affiant himself might instead have been called to testify. It is not evidence that the court can now consider.

The defendants also move to strike the flow chart in George's written opposition to their Rule 41(b) motion to dismiss (styled as motion for a directed verdict) and to strike the argument and chart about damage amounts on pages 21 to 22 of the opposition because no evidence was introduced during George's case-in-chief on the subject of damages. George responds that the defendants have all the history of his earnings and fringe benefits and contends that the defendants did not or cannot dispute that he suffered damages.

Again, as above, the motion to strike is denied as to the "flow chart" on page 11 of George's opposition since it is merely further textual argument presented in a form more graphic than usual. Since damages is an element of George's causes of action, the court will address the part of the defendants' motion to strike about damages calculation when analyzing the defendants' motion to dismiss below.

## II. PROCEDURAL BACKGROUND

Plaintiff Sasaki L. George was an employee of defendant Micronesia Legal Services Corporation's Kosrae office, starting as a trial counselor in 1996 and becoming a staff attorney in 1999. On March 5, 2013, George was given a proposed notice of termination. On March 27, 2013, MLSC Executive Director Lee Pliscou approved the termination. On July 18, 2013, the MLSC Interim Executive Committee upheld the Executive Director's decision.

On December 23, 2013, George filed suit alleging wrongful termination. On September 23, 2015, the court disposed of many of George's claims and a number of defendants when it ruled on the parties' summary judgment motions. George v. Palsis, 19 FSM R. 558 (Kos. 2014). On May 19, 2015, George's remaining causes of action – 1) a civil rights claim for religious discrimination that George had been terminated because he had become a Mormon; 2) a claim that he had been terminated by MLSC in breach of contract; and 3) a claim that MLSC had breached the covenant of good faith and fair dealing – came before the court for trial.

III. RULE 41(b) MOTION

Under Civil Procedure Rule 41(b), once a plaintiff has finished presenting evidence during the plaintiff's case-in-chief, a defendant may, without waiving its right to present evidence if the motion is not granted, move for a dismissal on the ground that upon the facts and the law the plaintiff has not shown any right to relief. Roosevelt v. Truk Island Developers, 17 FSM R. 207, 210 (Chk. 2010). The court, as the fact-finder, may then either determine the facts and render judgment against the plaintiff or it may decline to render any judgment until the close of all the evidence. *Id.*

When a defendant has moved for dismissal after the plaintiff has completed its evidence, the court, in determining whether the plaintiff has shown a right to relief, is not required to view the facts in the light most favorable to the plaintiff but can draw permissible inferences, and if the court determines that the plaintiff has not made out a prima facie case, the defendant is entitled to have the plaintiff's case dismissed. Nakamura v. FSM Telecomm. Corp., 17 FSM R. 41, 46 (Chk. 2010). But even if the plaintiff has made out a prima facie case, the court, as the trier of fact, may weigh the evidence, resolve any conflicts in the evidence, and decide for itself where the preponderance of the evidence lies and, based on where the preponderance lies, grant the Rule 41(b) motion to dismiss. Nakamura, 17 FSM R. at 46. The court must view the evidence with an unbiased eye, without any attendant favorable inferences and must sift and balance the evidence and give it such weight as it deems fit. *Id.*

Accordingly, the court makes the following factual findings.

III. FACTUAL FINDINGS

The MLSC Personnel Manual ("Manual") served as George's employment contract while he was employed at MLSC. The Manual provided that "[e]mployees may be warned, suspended or terminated for just cause, which includes but is not limited to the following: failure to discharge duties in a prompt and efficient manner . . . [and] failure to discharge the responsibilities and adhere to the standards set forth in one's job description." Manual pt. A(3)(a).

Each MLSC office prepares for submission to the MLSC central office on Saipan an annual priorities report about which types of cases MLSC should be handling. The report, which is the Directing Attorney Canney Palsis's ultimate responsibility, involves, among other things, soliciting the views of the community and determining what sort of cases MLSC should be handling. To assist in the report's preparation, input is sought by interviewing various elected officials. At a Kosrae MLSC staff meeting in mid-November 2012, at which George was present, the responsibility for doing these interviews was divided between Directing Attorney Palsis, staff attorney George, and staff trial counselor Charlton Timothy. The deadline for completing these interviews was January 4, 2013.

George had not done any of these interviews when a month and a half later on January 2, 2013, he took sick leave, approved by Palsis. George never did any of the interviews he was assigned. Assisting in the annual priorities determination process is part of an MLSC staff attorney's job description. George had previously been disciplined by being put on probation in 2012 for, among other things, "failure to participate appropriately in the annual priorities review." Defs.' Ex. 28.

Whether the Directing Attorney managed to conduct all of the interviews assigned to himself is irrelevant as to whether George conducted any of his assigned interviews. Also not particularly relevant is George's contention that the priorities discussed in the annual reports showed little or no change over the years. This is because it was only by doing the interviews MLSC could determine if the community's needs or its sentiment about what priorities MLSC should pursue had changed or not.

On April 21, 2012, MLSC received \$10 from a client to cover the fee for filing a probate case in Kosrae State Court because the client was leaving the jurisdiction soon and wanted the case filed before she left. The client was given a receipt for the money. The money was physically received either by George or by the office secretary, each later insisting that it was the other who had actually received the \$10. The \$10 could not be located. George wrote a memo to the secretary on February 6, 2013 about the issue. On February 8, 2013, after meeting with George and the secretary, Palsis resolved the issue by requiring each to provide \$5 so the client's probate case could be finally be filed, and instructed George that, since the papers had been prepared, to file the probate case no later than February 20, 2013, and, immediately after filing it, to provide Palsis with a filed copy of the probate petition. Defs.' Ex. 2 Attach. George did file the probate petition by February 20, 2013, but did not provide Palsis with a copy. When Palsis asked him for a copy, George verbally assured him that the petition had been filed but did not give him a copy. This was insubordination.

When he was terminated, George had around twice the caseload (about 130 cases) of each of the other two practitioners (about 60 cases each) in the Kosrae MLSC office. This was not because he had been assigned more cases than anyone else. The cases were divided up equally between the three legal practitioners in the office. It was because George was slow in bringing the cases assigned to him to a resolution. After George was terminated, his pending cases were divided between the Kosrae MLSC office's Directing Attorney and its trial counselor. Each of their caseloads were thus increased substantially. Nonetheless, they were able to reasonably manage their new caseload and conclude many of the cases. Trial counselor Timothy's current caseload is about 70 cases.

There was no evidence introduced from which the court could draw an inference that MLSC had terminated George because he had converted to the Church of the Latter Day Saints (Mormon).

After his termination, George handled, in private practice, some cases for clients. No evidence was introduced about the amount he was paid for his services. In January 2015, George became an elected member of the Kosrae Legislature. If he had still been employed by MLSC he would have had to terminate his position there because MLSC policy barred employees from holding political office.

#### IV. CONCLUSIONS OF LAW

Based on the above, the court concludes that George failed to discharge his MLSC duties in a prompt and efficient manner, and he was insubordinate. The failure to discharge one's duties in a prompt and efficient manner constitutes just cause for termination from MLSC. Manual pt. A(3)(a). Insubordination is also just cause. Since just cause for termination from MLSC existed, MLSC did not materially breach George's employment contract (the employee manual) by terminating him. Since there was just cause and MLSC was thus within its rights to terminate George, MLSC did not breach any covenant of good faith and fair dealing, if that covenant is applicable to an employment contract, an issue the court does not decide here.

Sasaki George had the burden to prove by a preponderance of the evidence that MLSC's termination of his employment was not for just cause. He failed to do so. George has not shown upon the facts and the law a right to relief. The defendants' motion to dismiss will therefore be granted.

Furthermore, George did not present even a minimal amount of evidence on at least one element of his breach of contract (and thus also his breach of covenant of good faith and fair dealing) claim. George did not present any evidence on damages. He did put a damages calculation in his written opposition to the Rule 41(b) dismissal motion. That is not competent evidence.

The defendants move, as mentioned above, to strike those damages figures and calculations on

pages 21 and 22 of George's written opposition because no testimony or other evidence was presented on damages during George's case-in-chief. George contends that the defendants cannot object to the amount of the damages he claims in his written opposition because the defendants have the complete history of his earnings and fringe benefits of when he worked at MLSC and he further contends that the defendants did not dispute that George suffered damages.

Whether the defendants are aware of George's earnings history is not particularly germane to the discussion. A plaintiff has the burden to persuade the court, with competent evidence, as to the amount of his damages. "[T]he parties have the responsibility to put forward the evidence to support their client's case. This is not the court's responsibility." George v. George, 15 FSM R. 270, 275 (Kos. S. Ct. Tr. 2007). The plaintiff must introduce evidence during his case-in-chief so the defendants will have an opportunity to address it, or to stipulate to it, or to challenge it and to cross-examine witnesses about it, and where, if the defendants feel the need, they can introduce evidence to counter it when it their turn comes. The defendants pled George's failure to mitigate damages as an affirmative defense. If George had put on evidence of his damages, the burden would have shifted to the defendants to prove that George failed to mitigate his damages or to prove to what extent he did mitigate his damages. See Manuel v. FSM, 19 FSM R. 382, 391 (Pon. 2014). But since George put on no evidence about the amount of his damages, the burden of proof about damages never shifted to the defendants.

A court cannot award damages based on matter "introduced" during argument after the presentation of evidence has ended. Livaie v. Weilbacher, 13 FSM R. 139, 144 (App. 2005) (statements made during closing argument do not constitute evidence). And a plaintiff has failed to present even a prima facie case when on none of his asserted causes of action, did he proffer any evidence about the amount of damages he allegedly suffered although necessary elements of the plaintiff's causes of action were that a wrongful act caused damages in some amount that the court can reasonably calculate. Hauk v. Lokopwe, 14 FSM R. 61, 65 (Chk. 2006). Reasonably calculable damages must be shown as part of a prima facie case. *Id.* They were not.

In a civil rights case, even if the plaintiff has failed to prove any actual damages, the court can award nominal damages because of the importance of vindicating certain fundamental rights. Robert v. Simina, 14 FSM R. 438, 444 (Chk. 2006). In this case, however, as mentioned above, there was no evidence introduced from which the court could draw the inference that George's termination was the result of religious discrimination. Thus no prima facie case was made out on the civil rights claim.

#### V. CONCLUSION

Accordingly, the defendants' motion to dismiss made after the close of the plaintiff's evidence is granted. The clerk shall enter judgment in the defendants' favor. The defendants may have their costs of action.

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