

HEIRS OF DONALD JONAH and MCDONALD JONAH, in his capacity as Administrator of the ESTATE OF DONALD JONAH, deceased,

Plaintiffs,

vs.

DEPARTMENT OF TRANSPORTATION AND INFRASTRUCTURE, KOSRAE STATE GOVERNMENT, PACIFIC ADAPTATION TO CLIMATE CHANGE (PACC), and SIMPSON ABRAHAM,

Defendants.

Hearing: July 30, 2015
Decided: August 6, 2015

APPEARANCES:

For the Plaintiffs: Snyder H. Simon, Esq.
P.O. Box 1017
Tofol, Kosrae FM 96944

For the Defendants: Lorrie Johnson-Asher, Esq. (motion)
Attorney General
Jeffrey S. Tilfas (pro hac vice) (argued)
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HEADNOTES

Civil Procedure – Service

Service of a summons and complaint can be made by any person who is not a party and is not less than 18 years of age. Heirs of Jonah v. Department of Transp. & Infrastructure, 20 FSM R. 118, 120 (Kos. 2015).

Civil Procedure – Service

Service of the complaint and summons, with one exception, may not be effected by the plaintiff

Heirs of Jonah v. Department of Transp. & Infrastructure
20 FSM R. 118 (Kos. 2015)

himself, but generally must be made by some authorized, disinterested person. The only method by which a plaintiff may himself serve a complaint and summons is by registered or certified mail, return receipt requested and delivery restricted to the addressee. Heirs of Jonah v. Department of Transp. & Infrastructure, 20 FSM R. 118, 120 (Kos. 2015).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Service

When the plaintiff's attorney served the summons and complaint, service of process of those documents was insufficient under Rule 4(c)(1) because the attorney is deemed as a party to the action. The failure to effect service of the summons and complaint on the defendant makes the case subject to dismissal under Rule 12(b)(5), but because dismissal under Rule 12(b)(5), unlike most Rule 12(b) dismissals, is without prejudice and with leave to renew, often the service will be quashed instead of dismissing the action. That way only the service need be repeated. Heirs of Jonah v. Department of Transp. & Infrastructure, 20 FSM R. 118, 120 (Kos. 2015).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. BACKGROUND

The Summons and Complaint in this matter was filed on October 23, 2014. A Request for Default and Motion for Default Judgment was filed by the plaintiff on February 5, 2015, and Default was entered by the Clerk of Court on February 12, 2015. On February 16, 2015 the defendant filed a Motion to Set Aside Default. On June 8, 2015, the plaintiff filed a Renewed Motion for Default Judgment.

A hearing on all pending motions was held on July 30, 2015. Snyder H. Simon (herein "Simon"), Esq., appeared on behalf of the plaintiff, Heirs of Donald Jonah and McDonald Jonah (collectively as "Jonah"). Appearing *pro hac* vice for the defendants, Department of Transportation and Infrastructure, Kosrae State Government, Pacific Adaptation to Climate Change (PACC), and Simpson Abraham (collectively as "Kosrae State") was Acting Attorney General for the State of Kosrae, Jeffrey S. Tilfas.

II. DISCUSSION

Kosrae State raises the following three (3) issues in its Motion to Set Aside Default entered on February 16, 2015: 1) Improper service of the summons and complaint, 2) Lack of a sum certain, and 3) the State of Kosrae's immunity against default.

Pursuant to FSM Civil Rule 4(c)(1), Kosrae State argues improper service of the Summons and Complaint because the documents were served by Simon, in his capacity as plaintiff's counsel, as indicated in a Certificate of Service filed on January 13, 2015.¹ Rule 4(c)(1) states: "Service of a summons and complaint shall be made by any person who is not a party and is not less than 18 years of age except as provided in subdivision (c)(2) of this rule."

¹ The Certificate of Service was filed on January 13, 2015, although actual service of the Summons and Complaint on the defendants was made on November 5, 2014.

Heirs of Jonah v. Department of Transp. & Infrastructure
20 FSM R. 118 (Kos. 2015)

Rule 4(c)(1) of the FSM Rules of Civil Procedure provides that service of a summons and complaint shall be made by any person *who is not a party* and is not less than 18 years of age. Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

Service of the complaint and summons, with one exception, may not be effected by the plaintiff himself, but generally must be made by some authorized, disinterested person. The only method by which a plaintiff may himself serve a complaint and summons is by registered or certified mail, return receipt requested and delivery restricted to the addressee. Lee v. Lee, 13 FSM Intrm. 252, 256 (Chk. 2005).

The defendants claim that service of the Summons and Complaint was improper because Simon, as attorney for the plaintiff, is a "party" to the suit. Simon argues that he is not a party, rather an officer of the court authorized to effectuate service of the Summons and Complaint on the defendant.

In Nelson v. Chittenden, 53 Colo. 30, 38, 123 P. 656, 659 (Colo. 1912), the Supreme Court of Colorado held

The only consistent conclusion that we can come to is that the words, "or by any person not a party to the action," were intended to mean any other person competent to make the service, which, of necessity, *excludes the attorneys in the case*, they being incompetent, for that reason minors, as held by the Supreme Court of South Dakota, etc., or that, under the circumstances in which the language is used, *the attorney is to be considered to that extent as being a party to the action*.

(emphasis added).

Some cases hold invalid the service of a summons by the plaintiff's attorney, either because the attorney is incompetent at common law or because he must be considered a party to the action. 62 AM. JUR. 2d *Process* § 134, at 845 (1990) (citing Rutherford v. Moody, 27 S.W. 230 (Ark. 1894)).

Here, because Simon served the Summons and Complaint, as reflected in the Certificate of Service submitted before the court, service of process of those documents is insufficient under Rule 4(c)(1) because he is deemed as a party to the action. Failure to effect service of the summons and complaint on Kosrae State makes the case subject to dismissal under Rule 12(b)(5). Dorval Tankship Pty. Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

Because dismissal under Rule 12(b)(5), unlike most Rule 12(b) dismissals, is without prejudice and with leave to renew, courts will often quash service instead of dismissing the action. That way only the service need be repeated. Dorval Tankship Pty. Ltd., 8 FSM Intrm. at 115.

III. CONCLUSION

THEREFORE, service of the Summons and Complaint performed by the plaintiff on November 5, 2014 is HEREBY QUASHED. The plaintiff may reserve the Summons and Complaint on all defendants.

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