

FSM SUPREME COURT TRIAL DIVISION

FUJI ENTERPRISES, ) CIVIL ACTION NO. 2014-044  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SALVADOR S. JACOB in his official capacity as )  
the Assistant Secretary of Customs and Tax )  
Administration, Government of the Federated )  
States of Micronesia; KENSLEY IKOSIA, in his )  
official capacity as the Secretary of Finance, )  
Government of the Federated States of Micronesia; )  
FSM NATIONAL GOVERNMENT, and BANK OF )  
THE FEDERATED STATES OF MICRONESIA, )  
 )  
Defendants. )  
\_\_\_\_\_ )

ORDER DISMISSING PARTY AND ORDER OF DISMISSAL NISI

Ready E. Johnny  
Acting Chief Justice

Decided: August 7, 2015

APPEARANCES:

For the Plaintiff: Yoslyn G. Sigrah, Esq.  
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Kolonias, Pohnpei FM 96941

For the Defendants: Joses R. Gallen, Esq.  
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For the Defendant: Stephen V. Finnen, Esq.  
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HEADNOTES

Civil Procedure – Judgment on the Pleadings

A motion for judgment on the pleadings can only be made after the pleadings are closed, and the pleadings are not closed when the defendant has not pled by filing an answer. Fuji Enterprises v. Jacob, 20 FSM R. 121, 124 (Pon. 2015).

Civil Procedure – Summary Judgment – Procedure

A summary judgment motion may be made at any time by a party against whom a claim is asserted. Thus, a defendant can make a summary judgment motion even though it has not yet filed an answer. Fuji Enterprises v. Jacob, 20 FSM R. 121, 124 (Pon. 2015).

Civil Procedure; Civil Procedure – Summary Judgment

Although the court must first look to FSM sources of law and circumstances rather than begin with a review of other courts' cases, when an FSM court has not previously construed an FSM Civil Procedure Rule 56(b) which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 n.1 (Pon. 2015).

Debtors' and Creditors' Rights – Tax Liens

Since, by statute, all taxes imposed or authorized under Title 54, chapter 1 are a lien upon any property of the person or business obligated to pay those taxes and since, by statute, those taxes may be collected by levy upon such property in the same manner as the levy of an execution, the statute does not require a court-issued writ of execution or a court judgment before issuance. Instead, it permits a levy in the same manner as the levy of an execution. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 (Pon. 2015).

Debtors' and Creditors' Rights – Tax Liens; Statutes – Construction

The addition of the language "in the same manner as the levy of an execution" in 54 F.S.M.C. 153 shows that a different meaning was intended than if the statute had read "by writ of execution." Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 (Pon. 2015).

Statutes – Construction

Statutes are to be interpreted as the legislature intended and a statute's words are the best indication of what the legislature intended. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 (Pon. 2015).

Statutes – Construction

It is presumed that words included in a statute are not meaningless surplusage because it is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 (Pon. 2015).

Debtors' and Creditors' Rights – Tax Liens

Since 54 F.S.M.C. 153 authorizes a tax levy to be made "in the same manner as the levy of an execution," it does not require a court-issued writ of execution. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 (Pon. 2015).

Debtors' and Creditors' Rights – Tax Liens; Taxation

The statutory scheme grants the national government the authority to determine the amount of tax due and to collect those taxes. Under 54 F.S.M.C. 152(3), the Secretary of Finance's assessment of the tax amount is presumed correct unless and until it is proven incorrect. The statutory scheme also permits a tax levy on the lien created by 54 F.S.M.C. 153. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125-26 (Pon. 2015).

Banks and Banking; Debtors' and Creditors' Rights – Tax Liens; Statutes – Construction

Since the nation's statutes are presumed to be constitutional, a bank is not required to challenge, on a depositor's behalf, the tax lien statute's constitutionality. The bank may rely on the statute. Fuji Enterprises v. Jacob, 20 FSM R. 121, 126 (Pon. 2015).

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Banks and Banking; Debtors' and Creditors' Rights – Tax Liens; Taxation

It is not a bank's duty to challenge the tax authorities' assessment of the amount of tax due from a taxpayer depositor. It is the taxpayer's responsibility to dispute any tax assessed that it disagrees with and for the taxpayer to resolve the issue with the FSM tax authorities. It also is not the bank's responsibility to challenge the constitutionality of 54 F.S.M.C. 153 or the FSM's interpretation of that statute. Fuji Enterprises v. Jacob, 20 FSM R. 121, 126 (Pon. 2015).

Banks and Banking; Debtors' and Creditors' Rights – Tax Liens

As long as the notice of levy and execution from the Division of Customs and Tax Administration is regular on its face, a bank is obligated to honor it. Fuji Enterprises v. Jacob, 20 FSM R. 121, 126 (Pon. 2015).

Constitutional Law – Due Process – Notice and Hearing; Debtors' and Creditors' Rights – Tax Liens; Taxation

Usually, notice and an opportunity to be heard is given prior to deprivation, but a government does not need to follow this in the case of taxes. The government must, however, provide a post-deprivation opportunity to challenge the tax and a clear and certain remedy. Fuji Enterprises v. Jacob, 20 FSM R. 121, 126 (Pon. 2015).

Banks and Banking; Civil Procedure – Dismissal – Before Responsive Pleading; Contracts – Illegality

A bank depositor's complaint against a bank fails to state a claim on which it can obtain relief and will be dismissed when the bank honored, in conformance with 54 F.S.M.C. 153, a Division of Customs and Tax Administration Notice of Levy and Execution that was regular on its face since that is not an unauthorized withdrawal from the depositor's account or the result of the bank's negligence of any kind and since it cannot be a breach of any contract between the depositor and the bank because the bank cannot contract to violate FSM law or statutes. Fuji Enterprises v. Jacob, 20 FSM R. 121, 126 (Pon. 2015).

Civil Procedure – Service

To effect valid service of process on a national government officer or agency, that officer or agency must be served with the complaint and summons and the national government must also be served a complaint and summons, and to effect service of process on the national government, the FSM Attorney General must be served (as well as any non-party officer or agency whose action or omission is being challenged). Fuji Enterprises v. Jacob, 20 FSM R. 121, 127 (Pon. 2015).

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

When the FSM Attorney General was never served, service of process has not been effected on the FSM national government nor has service of process been effected on the national government officers on whom the complaint and summons were served because the additional service on the FSM Attorney General was not made. Failure to satisfy this service requirement makes the case against FSM defendants subject to dismissal under Rule 12(b)(5). Fuji Enterprises v. Jacob, 20 FSM R. 121, 127 (Pon. 2015).

Civil Procedure – Dismissal – Before Responsive Pleading

Because, unlike most Rule 12(b) dismissals, a Rule 12(b)(5) dismissal 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. Fuji Enterprises v. Jacob, 20 FSM R. 121, 127 (Pon. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This comes before the court on the Motion to Dismiss by Bank of the Federated States of Micronesia, filed May 6, 2015; FSM Defendants' Motion to Dismiss, filed May 12, 2015; Memorandum in Opposition to FSM Defendants' Motion to Dismiss, filed July 6, 2015; Memorandum in Opposition to Defendant Bank of the FSM's Motion to Dismiss, filed July 8, 2015; and Reply Supporting Motion to Dismiss by Bank of the Federated States of Micronesia, filed July 16, 2015. The Bank's motion is granted and the FSM defendants' motion is granted nisi.

I. BACKGROUND

As the result of a tax audit, the Division of Customs and Tax Administration, on October 25, 2013, issued Koji Akinaga d/b/a Fuji Enterprises a Notice of Demand for Payment of Taxes for business gross revenue taxes for the years 2006, 2007, and 2008, in the amount of \$7,540.95, which included penalties and interest computed through October 31, 2013. Akinaga did not pay. On November 25, 2013, the Division of Customs and Tax Administration served a Notice of Levy and Order of Execution on the Bank of the FSM and on the Bank of Guam for money up to \$7,540.95 in their possession that was the property of "Fuji Enterprises owned by Mr. Koji Akinaga."

On the same day, the Bank of the FSM ("bank") sent Fuji Enterprises ("Fuji") written notice that it had been served the tax levy, that, if Fuji had any objection, Fuji should take the matter up with FSM Division of Customs and Tax Administration, and that the bank would honor the levy. On November 28, 2013, the bank paid \$6,676.10 to the FSM national treasury, leaving nothing in Fuji's bank account.

On November 12, 2014, Fuji filed suit against the Assistant Secretary of Customs and Tax Administration, the Secretary of Finance, the FSM national government, and the bank, alleging that the tax assessment, the levy, and the bank's payment of the \$6,676.10 to the FSM Treasury were all improper, illegal, and unconstitutional.

II. BANK OF THE FSM'S MOTION TO DISMISS

A. *Nature of Motion*

The bank moves, under Civil Procedure Rule 12(b)(6), to dismiss the causes of action directed toward it – unauthorized withdrawal, gross negligence, and breach of contractual agreement – and to dismiss itself as a party. The bank asserts that Fuji's complaint fails to state a claim upon which relief can be granted. In the alternative, the bank brings the motion as a Rule 12(c) motion for judgment on the pleadings or as a Rule 56(c) motion for summary judgment.

As Fuji correctly notes, a motion for judgment on the pleadings can only be made "[a]fter the pleadings are closed," FSM Civ. R. 12(c), and the pleadings on the claims against the bank are not closed since the bank has not pled by filing an answer. However, a summary judgment motion may be made "at any time" by "[a] party against whom a claim . . . is asserted." FSM Civ. R. 56(b). The bank is a party against whom Fuji asserts claims. Thus, the bank could bring this motion as one for summary judgment even though it has not filed an answer. *See, e.g., Greene v. CCDN, LLC*, 853 F. Supp. 2d 739, 744 (N.D. Ill. 2011) ("While it is unusual, a motion for summary judgment may be made and ruled upon before an answer is filed."); *Techrite Copy Servs., Inc. v. Federal Deposit Ins. Corp.*, 968 F. Supp. 324, 327 n.2 (N.D. Tex. 1997); *Tavares ex rel. Guitierrez v. Barbour*, 790 A.2d 1110,

1111 (R.I. 2002); Whaley v. Park City Mun. Corp., 190 P.3d 1, 20 n.13 (Utah Ct. App. 2008).<sup>1</sup>

B. *Fuji's Claim Against the Bank*

The basis of Fuji's claim against the bank is that the bank should not have honored the levy because it was not a writ of execution issued by a court to enforce payment of a court judgment. The bank contends that it had no choice but to honor the levy because its duty is to comply with the relevant FSM statutes and that since the bank complied with the relevant statute, Fuji has no claim against it.

The relevant statute provides that, "[a]ll taxes imposed or authorized under this chapter shall be a lien upon any property of the person or business obligated to pay said taxes and may be collected by levy upon such property in the same manner as the levy of an execution." 54 F.S.M.C. 153. Fuji contends that the phrase "in the same manner as the levy of an execution" means that the FSM tax authorities had to proceed pursuant to the FSM statutes governing writs of execution. Fuji thus reasons that before the FSM tax authorities could levy on Fuji's bank account, the FSM had to file suit against Fuji, and then had to obtain a judgment against Fuji, and, once it had a judgment against Fuji, only then could it seek a writ of execution as provided in 6 F.S.M.C. 1407, to enforce that civil judgment by a levy pursuant to 6 F.S.M.C. 1408.

The bank also argues that if it does not comply with the 54 F.S.M.C. 153 notice of levy, it runs afoul of FSM law and risks being subjected to the penalty provisions of 54 F.S.M.C. 154 ("[a]ny . . . business convicted under . . . this chapter shall be fined not more than \$1,000") or 54 F.S.M.C. 901 ("any person who willfully violates any of the provisions of this title, or any license, rule, or regulation issued thereunder, shall upon conviction be . . . fined not more than \$500").

The court must reject Fuji's interpretation of 54 F.S.M.C. 153. Section 153 does not require a court-issued writ of execution or a court judgment before issuance. If it did, it would say so. Instead, 54 F.S.M.C. 153 permits a "levy . . . in the same manner as the levy of an execution." The addition of the language "in the same manner as the levy of an execution" shows that a different meaning was intended than if the statute had read "by writ of execution." Statutes are to be interpreted as the legislature intended and a statute's words are the best indication of what the legislature intended. Rodriguez v. Bank of the FSM, 11 FSM R. 367, 379 (App. 2003); FSM Social Sec. Admin. v. Kingtex (FSM) Inc., 8 FSM R. 129, 131 (App. 1997). And it is presumed that words included in a statute are not meaningless surplusage because "[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06, at 119 (5th ed. 1992). The statute thus authorizes a tax levy to be made "in the same manner as the levy of an execution" and does not require a court-issued writ of execution.

The statutory scheme grants the national government the authority to determine the amount of

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<sup>1</sup> Although the court must first look to sources of law, FSM Const. art. XI, § 11, and circumstances in the FSM rather than begin with a review of other courts' cases, Alaphonso v. FSM, 1 FSM R. 209, 214 (App. 1982), when an FSM court has not previously construed an FSM civil procedure rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. *See, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM R. 582, 589 n.1 (App. 2008); Arthur v. FSM Dev. Bank, 14 FSM R. 390, 394 n.1 (App. 2006); Tom v. Pohnpei Utilities Corp., 9 FSM R. 82, 87 n.2 (App. 1999); Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 444 (App. 1994). The court has not previously construed Civil Procedure Rule 56(b).

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tax due and to collect those taxes. Under 54 F.S.M.C. 152(3), the Secretary of Finance's assessment of the tax amount is presumed correct unless and until it is proven incorrect. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM R. 24, 31 (Pon. 2001). The statutory scheme also permits a tax levy on the statutory lien created by 54 F.S.M.C. 153.

The bank thus complied with the FSM's tax statutes. Since the nation's statutes are presumed to be constitutional, Jano v. FSM, 12 FSM R. 569, 572-73 (App. 2004); Rodriguez, 11 FSM R. at 382, the bank is not required to challenge 54 F.S.M.C. 153's constitutionality on a depositor's behalf and may rely on the statute.

Fuji contends that the bank has a fiduciary and a contractual duty to retain its depositor's money, even in the face of a tax levy from the national government, and that the "bank was obligated to examine the authenticity, validity, and legality of the Notice of Levy and should have consulted with its customers, allow time for its customers [to] respond to the notice before turning over the customers' funds." Compl. at 16, para. 61 (Nov. 12, 2014).

The court must reject this contention. The bank has no such duty. It is not the bank's duty to challenge the tax authorities' assessment of the amount of tax due from a taxpayer depositor. It is the taxpayer's responsibility to dispute any tax assessed that it disagrees with and for the taxpayer to resolve the issue with the FSM tax authorities. It also is not the bank's responsibility to challenge the constitutionality of 54 F.S.M.C. 153 or the FSM's interpretation of that statute. As long as the notice of levy and execution from the Division of Customs and Tax Administration was regular on its face, the bank was obligated to honor it.

Usually, notice and an opportunity to be heard is given prior to deprivation, but a government does not need to follow this in the case of taxes. Chuuk Chamber of Commerce v. Weno, 8 FSM R. 122, 126 (Chk. 1997). "The government must, however, provide a post-deprivation opportunity to challenge the tax and a 'clear and certain remedy.'" *Id.*; see also Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013) (legislature can grant an administrative agency the power to levy in the manner of a levy of an execution for statutory liens held by the state so long as due process concerns were addressed by such mechanisms as a prompt post-levy hearing was available).

Here, Fuji was given prior notice of the statutory lien in October 2013 about a month before the bank was presented the Notice of Levy and Execution. After the levy, Fuji evidently had some sort of post-seizure hearing in front of the Division of Customs and Tax Administration. Compl. at 7-8, paras. 24-25 (Nov. 12, 2014). For the purpose of the bank's motion, the court does not need to decide now if that hearing passed constitutional muster.

Accordingly, Fuji's complaint against the bank fails to state a claim on which it can obtain relief. The bank honored, in conformance with 54 F.S.M.C. 153, a Division of Customs and Tax Administration Notice of Levy and Execution that was regular on its face. That is not an unauthorized withdrawal from Fuji's account or the result of the bank's negligence of any kind. It also cannot be a breach of any contract between Fuji and the bank because the bank cannot contract to violate FSM law or statutes.

The complaint against the bank must thus be dismissed and the bank's name stricken from the caption. Fuji's claims against the bank are without merit, but this has no bearing on whether its claims against the FSM defendants are meritorious. The bank may have summary judgment in its favor.

III. FSM DEFENDANTS' MOTION TO DISMISS

The FSM defendants (all defendants except the Bank of the FSM) move to dismiss the complaint against them under Civil Procedure Rule 12(b)(5), insufficiency of service of process, because the complaint and summons were not served on the FSM Attorney General. Only the Assistant Secretary of Customs and Tax Administration and the Secretary of Finance were served a complaint and summons. No one else (other than the President of the Bank of the FSM) was served a complaint and summons.

To effect valid service of process on a national government officer or agency, that officer or agency must be served with the complaint and summons and the national government must also be served a complaint and summons. FSM Civ. R. 4(d)(5). To effect service of process on the national government, the FSM Attorney General must be served (as well as any non-party officer or agency whose action or omission is being challenged). FSM Civ. R. 4(d)(4). Since the FSM Attorney General was never served, service of process has not been effected on the FSM national government nor has service of process been effected on the national government officers on whom the complaint and summons were served because the additional service on the FSM Attorney General was not made.

Failure to satisfy this service requirement makes the case against the FSM defendants subject to dismissal under Rule 12(b)(5). Because, unlike most Rule 12(b) dismissals, a Rule 12(b)(5) dismissal 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. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

Accordingly, the service on the Assistant Secretary of Customs and Tax Administration and on the Secretary of Finance is quashed. NOW THEREFORE IT IS HEREBY ORDERED that the complaint against the FSM defendants is dismissed UNLESS Fuji Enterprises effects, no later than August 24, 2015, service of process on the three FSM defendants – the Assistant Secretary of Customs and Tax Administration, the Secretary of Finance, and the FSM national government.

IV. CONCLUSION

Accordingly, the Bank of the FSM's motion is granted. The FSM defendants' motion to dismiss for insufficiency of process is also granted unless Fuji Enterprises has effected proper service of process on them by August 24, 2015.

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