

FSM SUPREME COURT TRIAL DIVISION

BERYSIN SALOMON and NANCY SALOMON,	)	CIVIL ACTION NO. 2014-023
	)	(consolidated in Civil Action No. 2014-021)
Plaintiffs,	)	
	)	
vs.	)	
	)	
ANNA MENDIOLA, individually and in her	)	
capacity as President and Chief Executive Officer	)	
of FSM Development Bank; SHINA LAWRENCE,	)	
individually and in her capacity as Chief Financial	)	
Officer of the FSM Development Bank; JOHN	)	
SOHL, in his official capacity as Chairman of the	)	
FSM Development Board Directors; and FSM	)	
DEVELOPMENT BANK,	)	
	)	
Defendants.	)	
	)	

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ORDER PARTIALLY DISMISSING CLAIMS

Ready E. Johnny  
Acting Chief Justice

Decided: August 31, 2015

APPEARANCES:

For the Plaintiffs:      Yoslyn G. Sigrah, Esq.  
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For the Defendants:    Nora E. Sigrah, Esq.  
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HEADNOTES

Interest and Usury

The general rule is that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment will be first applied to the interest due. Salomon v. Mendiola, 20 FSM R. 138, 140 (Pon. 2015).

Banks and Banking; Interest and Usury

At the start of a typical loan repayment, the installment payments are usually not much larger than the amount of interest accrued and due. The bulk of the installment payment is then applied to interest and the remaining amount goes to reducing the principal so that at the next installment payment, if made on time, a little less is needed to pay the accrued interest and a little more can go to

the reduction of principal. This does not constitute usury unless the interest rate itself is higher than permitted by statute. Salomon v. Mendiola, 20 FSM R. 138, 140-41 (Pon. 2015).

Banks and Banking; Interest and Usury

If the loan payments are late, more interest will accumulate and more of the payment will go to cover the interest and less will go to reducing the principal. Enough late payments or a missed payment and the next payment may end being applied all to accrued interest with nothing left over to apply to the principal. Salomon v. Mendiola, 20 FSM R. 138, 141 (Pon. 2015).

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

Title 30, which governs the FSM Development Bank, does not give rise to a private cause of action. Thus, even if the bank violated Title 30, a private party's claims based on Title 30 violations do not state a claim on which relief may be granted. Salomon v. Mendiola, 20 FSM R. 138, 141 (Pon. 2015).

Torts – Interference with Prospective Business Opportunity

The elements of a cause of action for interference with prospective business advantage or expectancy are 1) plaintiff's existing or reasonable expectation of economic benefit or advantage; 2) defendant's knowledge of that expectancy; 3) defendant's wrongful intentional interference with that expectancy; 4) reasonable probability that the plaintiff would have received anticipated economic benefit in absence of interference; and 5) damages resulting from interference. Salomon v. Mendiola, 20 FSM R. 138, 141 (Pon. 2015).

Torts – Interference with a Contractual Relationship

The elements of the cause of action for interference with contract are 1) a valid contract; 2) knowledge by the defendant of the contract; 3) intentional interference by the defendant which induces breach of the contract; 4) absence of justification on the part of the defendant; and 5) resulting damages. Salomon v. Mendiola, 20 FSM R. 138, 141 (Pon. 2015).

Banks and Banking; Torts – Interference with a Contractual Relationship; Torts – Interference with Prospective Business Opportunity

A bank's acts in trying to collect a loan repayment do not state a claim for relief under a cause of action for interference with prospective business advantage or expectancy or under a cause of action for interference with contract. Salomon v. Mendiola, 20 FSM R. 138, 141 (Pon. 2015).

Civil Procedure – Parties; Civil Procedure – Parties – Official Capacity

When all alleged acts by the defendants sued in their official and personal capacities were acts servicing the loan that they could only have done in their official capacities, the defendants, in their individual capacities, will be dismissed as parties. Salomon v. Mendiola, 20 FSM R. 138, 142 (Pon. 2015).

Civil Procedure – Consolidation; Courts

The general rule is that the lawsuit filed first has priority over any other case involving the same parties and issues, even if filed later before a court that would also have jurisdiction, but when the court has already ordered that the two cases be consolidated, the issue has become moot. Salomon v. Mendiola, 20 FSM R. 138, 142 (Pon. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This comes before the court on the Defendants' Motion to Dismiss the Complaint (in Civil Action No. 2014-023), filed on August 8, 2014; Plaintiffs' Opposition to Defendants' Motion to Dismiss the Complaint, filed September 29, 2014; and Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss the Complaint, filed September 30, 2014. The motion is granted in part. The reasons follow.

I. BACKGROUND

On July 8, 2003, the plaintiffs, Berysin Salomon and Nancy Salomon ("Salomons"), executed a loan with the FSM Development Bank for \$268,345 at 9% per annum with repayment to start on April 25, 2004, at \$2,731 a month for five years and then \$4,000 per month thereafter until paid in full (if all payments made on time) on December 25, 2013. The loan was for the Salomons to build and operate a medical clinic. Because of business difficulties, payments were not made as scheduled. A forbearance agreement was executed on September 9, 2008. The last loan payment was made November 27, 2013.

On June 13, 2014, the bank filed suit (Civil Action No. 2014-021) against the Salomons for the unpaid loan balance. On June 19, 2014, the Salomons filed this suit (Civil Action No. 2014-023) against the bank and against the bank's Chief Executive Officer, Anna Mendiola, and the bank's Chief Financial Officer, Shina Lawrence, individually and their official capacities, and against the Chairman of the bank's Board of Directors, John Sohl, in his official capacity, seeking relief and alleging that the loan's terms were unconscionable; that the loan's terms violated FSM Code Title 30 and public policy; that the loan violated the usury laws; that a forbearance agreement was forged; that they never requested an insurance premium refund; that the defendants violated a duty of good faith and fair dealing; that the bank officers were grossly negligent and violated the bank's fiduciary duty; and that the defendants' actions tortiously interfered with the Salomons' business. As relief, the Salomons pray that their loan documents be voided, that all liens on their property be voided, and that they be awarded consequential, expectation, and punitive damages and attorney's fees and costs.

The defendants move to dismiss the complaint against them because it fails to state a claim and because Civil Action No. 2014-021 was filed first, and the Salomons have pled their most of their claims in this case as affirmative defenses in that action. The defendants also move to dismiss Anna Mendiola and Sihna Lawrence, in their individual capacities because all of the allegations in the Civil Action No. 1994-023 complaint against Lawrence and Mendiola allege actions or omissions by them in their official capacities and fail to state a claim against them in their individual capacities.

II. CLAIMS

A. *Interest Allocation and Usury*

The Salomons allege that the bank committed usury or charged them "excessive interest" because the bulk of each installment payment they made was applied to interest and not to the loan principal. The Salomons do not claim that the 9% interest rate that their loan carries is usurious.

The general rule is that "[i]n applying partial payments to an interest-bearing debt which is due, . . . in the absence of an agreement or statute to the contrary, the payment will be first applied to the interest due." 45 AM. JUR. 2d *Interest and Usury* § 75 (rev. ed. 1999). At the start of a typical loan

repayment, the installment payments are usually not much larger than the amount of interest accrued and due. The bulk of the installment payment is then applied to interest and the remaining amount goes to reducing the principal so that at the next installment payment, if made on time, a little less is needed to pay the accrued interest and a little more can go to the reduction of principal. This does not constitute usury unless the interest rate itself is higher than permitted by statute. Eventually, the payments, if they have been made on time, cover more principal than interest. But if the payments are late, more interest will accumulate and more of the payment will go to cover the interest and less will go to reducing the principal. Enough late payments or a missed payment and the next payment may end being applied all to accrued interest with nothing left over to apply to the principal.

Thus the facts, as alleged by the Salomons, cannot, as a matter of law, constitute usury and the Salomons's usury claim thus fails to state a claim on which the court can grant relief. It is therefore dismissed.

#### B. *Title 30 Violation*

The Salomons allege that the bank violated Title 30, in particular, 30 F.S.M.C. 128(1), which states that "[t]he Bank shall exist and operate solely for the benefit of the public . . ." The Salomons allege that the bank's financial demands on their medical clinic, a business which does directly benefit the public, violate this statutory statement.

Title 30, which governs the FSM Development Bank, does not give rise to a private cause of action. See FSM Dev. Bank v. Jonah, 13 FSM R. 522, 523 (Kos. 2005); FSM Dev. Bank v. Mudong, 10 FSM R. 67, 76-77 (Pon. 2001). Thus, even if it were true that the bank violated Title 30, Salomon's claims based on Title 30 violations do not state a claim on which relief may be granted and must therefore be dismissed.

#### C. *Tortious Interference with Business Relations*

The Salomons also assert a claim for tortious interference with business relations or for lost business opportunities and profits.

The elements of a cause of action for interference with prospective business advantage or expectancy are 1) plaintiff's existing or reasonable expectation of economic benefit or advantage; 2) defendant's knowledge of that expectancy; 3) defendant's wrongful intentional interference with that expectancy; 4) reasonable probability that the plaintiff would have received anticipated economic benefit in absence of interference; and 5) damages resulting from interference. Ehsa v. Kinkatsukyo, 16 FSM R. 450, 457 (Pon. 2009). The elements of the cause of action for interference with contract are 1) a valid contract; 2) knowledge by the defendant of the contract; 3) intentional interference by the defendant which induces breach of the contract; 4) absence of justification on the part of the defendant; and 5) resulting damages. Jano v. Fujita, 16 FSM R. 323, 327 (Pon. 2009).

Since the only facts alleged by the Salomons involve the bank trying to collect a loan repayment, those facts do not state a claim for relief under a cause of action for interference with prospective business advantage or expectancy or under a cause of action for interference with contract. It accordingly is dismissed.

#### D. *Other Claims*

The Salomons' claims that the loan's terms were unconscionable; that a forbearance agreement was forged; that they never requested an insurance premium refund; and that the defendants violated

a duty of good faith and fair dealing, are all contract defenses (and possibly counterclaims) and therefore may be raised in the consolidated Civil Action No. 2014-021. They will not be dismissed here. To the extent that the Salomons' claim that the bank officers were grossly negligent and violated the bank's fiduciary duty is not dismissed by the dismissal of the Salomons' usury and Title 30 violation claims, it remains as a defense in Civil Action No. 2014-021.

### III. INDIVIDUAL CAPACITIES

The defendants move to dismiss Anna Mendiola and Sihna Lawrence as defendants in their individual capacities because all of the allegations in the Civil Action No. 1994-023 complaint against them allege actions or omissions in their official capacities and fail to state a claim against them in their individual capacities. The Salomons, in their opposition, assert that claims against Lawrence and Mendiola in their individual capacities should not be dismissed because Lawrence and Mendiola exhibited bad motives and intent to harm them in the servicing of the loan. The Salomons further assert that this must fall outside of their official capacities.

The court cannot agree. All alleged acts servicing the loan by Anna Mendiola and Sihna Lawrence were acts they could only have done in their official capacities. Accordingly, Anna Mendiola and Sihna Lawrence, in their individual capacities, are hereby dismissed as parties.

### IV. CASE FILED FIRST

The bank is correct that since Civil Action No. 2014-021 was filed first, this case should not have been filed separately. The general rule is that the lawsuit filed first has priority over any other case involving the same parties and issues, even if filed later before a court that would also have jurisdiction. Mori v. Hasiquchi, 16 FSM R. 382, 384 (Chk. 2009); Election Comm'r v. Petewon, 6 FSM R. 491, 498 (Chk. S. Ct. App. 1994). All of the Salomons' claims in this case should have been brought as affirmative defenses or counterclaims in Civil Action No. 2014-021. Since the court has already ordered that the two cases be consolidated, the issue has become moot.

### V. CONCLUSION

Anna Mendiola and Sihna Lawrence are dismissed as parties in their individual capacities. The Salomons' claims that the loan's terms violated FSM Code Title 30 and public policy; that the loan violated the usury laws; and that the defendants' actions tortiously interfered with the Salomons' business opportunity are dismissed. The Salomons' other claims may proceed as defenses or counterclaims in Civil Action No. 2014-021, with which this case (No. 2014-023) has been consolidated. All future filings will be under the caption and docket number for Civil Action No. 2014-021.

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