

Luen Thai Fishing Venture, Ltd. v. Pohnpei  
20 FSM R. 169 (Pon. 2015)

FSM SUPREME COURT TRIAL DIVISION

LUEN THAI FISHING VENTURE, LTD. and  
LIANCHENG OVERSEAS FISHERY (FSM)  
CO., LTD.,

Plaintiffs,

vs.

STATE OF POHNPEI, JOHN EHSA in his  
capacity as Governor, OFFICE OF FISHERIES  
AND AQUACULTURE, and MIJU MULSAN  
COMPANY, LTD.,

Defendants.

CIVIL ACTION NO. 2013-001

ORDER DENYING MOTION TO WITHDRAW

Arthur R. Barcinas  
Temporary Justice\*

Decided: September 18, 2015

\* Judge, Guam Superior Court, Hagatna Guam

APPEARANCES:

For the Plaintiffs: Stephen V. Finnen, Esq.  
P.O. Box 1450  
Kolonia, Pohnpei FM 96941

For the Defendants: Judah G. Johnny  
(Pohnpei, Ehsa, & Pohnpei Attorney General  
Office of Fisheries Pohnpei Department of Justice  
& Aquaculture) P.O. Box 1555  
Kolonia, Pohnpei FM 96941

For the Defendant: Joseph S. Phillip, Esq.  
(Miju Mulsan Co.) P.O. Box 464  
Kolonia, Pohnpei FM 96941

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HEADNOTES

Attorney and Client – Withdrawal of Counsel

An attorney's withdrawal from the legal representation of a client is governed by FSM MRPC R. 1.16. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 169 (Pon. 2015).

Attorney and Client – Withdrawal of Counsel; Attorney's Fees

The non-existence of a fee agreement between the attorney and client is not a basis for withdrawal. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172 (Pon. 2015).

Attorney and Client – Appearance; Attorney and Client – Withdrawal of Counsel

An attorney's claim that the client has not agreed to him representing the client in the matter is without merit when the attorney has served as counsel for over two years since the dispute's inception, which proves that an attorney-client relationship exists. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172 (Pon. 2015).

Attorney and Client – Appearance

While counsel may be engaged for only limited purposes, it is expected that the court and the other parties would be so informed on the record at the representation's start. If the court has not been so informed, the court and the other parties must presume that counsel is the counsel of record for all purposes whatsoever. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172 (Pon. 2015).

Attorney and Client – Withdrawal of Counsel

An attorney's withdrawal will not be permitted when he has not submitted any evidence to show that the client wishes to terminate his legal service in the matter and there is no indication that he has met the requirements under FSM MRPC R. 1.16(d) to protect the client's interest upon withdrawal. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172 (Pon. 2015).

Attorney and Client – Disqualification of Counsel

The test for a lawyer to determine whether a conflict of interest exists in representing more than one client is found in FSM MRPC Rule 1.7. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172 (Pon. 2015).

Attorney and Client – Disqualification of Counsel

A lawyer cannot represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172 (Pon. 2015).

Attorney and Client – Disqualification of Counsel; Attorney and Client – Withdrawal of Counsel

When, during a hearing, counsel argued against the State in defense of his attempt to depose the State's Assistant Attorney General and when counsel argues that a conflict of interest exists between the Governor and the Attorney General's Office because the Attorney General's Office is admitting liability on the State's behalf, and imputed that liability upon counsel's client, a tenant of the State, this issue of imputing liability from the State to counsel's client clearly shows a conflict of interest which would bar counsel from transferring his representation between the two defendants. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 172-73 (Pon. 2015).

Attorney and Client – Disqualification of Counsel; Attorney and Client – Withdrawal of Counsel

When counsel's representation of the State would be materially adverse to his current client's interest and no evidence was provided that would show otherwise and when there is no proof of consent by each of the defendants after consultation, counsel's motion to withdraw from his client will be denied and his notice of entry of appearance on the State's behalf will be stricken from the record as will his other filings on the State's behalf. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 173 (Pon. 2015).

Luen Thai Fishing Venture, Ltd. v. Pohnpei  
20 FSM R. 169 (Pon. 2015)

Attorney and Client – Disqualification of Counsel

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 20 FSM R. 169, 173 n.3 (Pon. 2015).

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COURT'S OPINION

ARTHUR R. BARCINAS, Temporary Justice:

I. BACKGROUND

The Complaint in this matter was filed by the plaintiff, Luen Thai Fishing Venture Ltd., Liancheng Overseas Fishery (FSM) Co. Ltd. (collectively as "Luen Thai") on January 23, 2013. On February 1, 2013, attorney Joseph Phillip (herein "Phillip") filed a Notice of Appearance and Motion to Dismiss on behalf of Muji Mulsan Co. Ltd. (herein "Mulsan").

The other defendants in this action are John Ehsa, in his capacity as Governor of the State of Pohnpei, the State of Pohnpei, and the Office of Fisheries and Aquaculture (collectively as "Pohnpei State"). Since the initiation of this matter, Phillip has appeared at all hearings, made numerous filings, and has received service of documents on behalf of Mulsan.

Pending before the court is a Motion to Withdraw as Counsel from legal representation of Mulsan filed by Phillip on April 29, 2015. An opposition to the withdrawal motion was filed by the Pohnpei State Attorney General's Office on May 1, 2015.

On May 4, 2015, Phillip entered a Notice of Entry of Appearance on behalf of Pohnpei State. Also on May 4, 2015, Phillip, on behalf of Pohnpei State, filed a Motion to Strike Response to Supplemental Brief on Damages Filed by the Attorney General Pohnpei State. Luen Thai filed its opposition to the withdrawal on May 5, 2015.

On May 13, 2015, Phillip, again on behalf of Pohnpei State, filed a Motion to Disqualify Judah C. Johnny, as Attorney General, and the entire Attorney General Office of Pohnpei State from Representing Pohnpei State and OFA. On May 15, 2015 Phillip filed an Opposition to Request for a Telephonic Hearing and Opposition to Plaintiff's Supplemental Brief for \$120,000 in Damages.

II. DISCUSSION

*Motion to Withdraw*

The withdrawal of an attorney from the legal representation of a client is governed by FSM MRPC R. 1.16. In applying this rule, this court considered a near similar situation involving the same attorney, Joseph Phillip, in Beal Bank S.S.B. v. Salvador, 11 FSM Intrm. 349 (Pon. 2003). In Beal Bank S.S.B., Phillip filed a Motion to Withdraw as counsel for the defendant, arguing that his appearance was limited to advising defendants during depositions, no fee agreement was in place between the parties, Phillip was not authorized to further appear on defendants' behalf, and the defendants have not communicated with him since the depositions.

In denying Phillip's Motion to Withdraw as counsel for the defendants, the court in Beal Bank

S.S.B.I., 11 FSM Intrm. at 350] held

Rule 1.16 of the Model Rules of Professional Conduct articulates the bases upon which an attorney may terminate his or her representation of clients. After careful review of that rule, the Court has concluded that none of the bases for terminating representation exist in the present case. First, the record contains no evidence that defendants discharged Mr. Phillip at the conclusion of depositions, or withdrew their authorization for him to represent them in all aspects of this proceeding. Second, a client's failure to contact counsel has no effect on representation especially where, as here, counsel has provided no evidence of his efforts to contact the clients. Third, counsel's failure to secure a fee agreement between himself and his clients is not a basis for terminating representation. Fourth, this case is apparently ready for trial, and withdrawal of counsel at this juncture would materially compromise defendants' interests.

Here, several of the factors mentioned in this court's findings above are present. In the supporting affidavit for his motion to withdraw, Phillip argues that a Mulsan representative sought his services, however, a retainer agreement with Mulsan was never signed. *Aff. of Joseph Phillip* at para. 3 (Apr. 29, 2015). In the holding *supra*, the non-existence of an agreement between the attorney and client is not a basis for withdrawal.

Phillip further argues that Mulsan has not agreed to Phillip representing them in this matter. *Id.* This claim is without merit because Phillip has served as counsel for over two (2) years since the inception of this dispute, which proves that an attorney-client relationship exists between the parties. See *Wong v. Aragona*, 815 F. Supp. 889, 896 (D. Md. 1993). While counsel may be engaged for only limited purposes, it is expected that the court and the other parties would be so informed on the record at the representation's start. If the court has not been so informed, the court and the other parties, must presume that counsel is the counsel of record for all purposes whatsoever. *Atesom v. Kukkun*, 11 FSM Intrm. 400, 402 (Chk. 2003).

Further, Phillip also has not submitted any evidence to show that Mulsan wishes to terminate his legal service in this matter, and there is no indication that the requirements under FSM MRPC R. 1.16(d) are met to protect the interest of Mulsan upon withdrawal.<sup>1</sup>

### *Conflict of Interest*

The pending motion also presents an issue on conflict of interest that arises in the representation of Pohnpei State and Mulsan. The test for a lawyer to determine whether a conflict of interest exists in representing more than one client is found in FSM MRPC Rule 1.7. *Nix v. Etscheid*, 10 FSM Intrm. 391, 396 (Pon. 2001).

"A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." FSM MRPC R. 1.7(a). Here, during the hearing held on April 17, 2015, Phillip argued against Pohnpei State in defense

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<sup>1</sup> FSM MRPC R. 1.16(d): Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

of his attempt to depose Pohnpei State Assistant Attorney General Clayton Lawrence. The subpoena to depose Lawrence was eventually quashed by the court.

In his May 13, 2015 filing, Phillip argues that a conflict of interest exists between Governor Ehsa and the Attorney General's Office because the Attorney General's Office is admitting liability on behalf of Pohnpei State, and imputed that liability upon Mulsan, a tenant of Pohnpei State. Mot. to Disqualify Judah C. Johnny at 3. This issue of imputing liability from Pohnpei State to Mulsan admitted by Phillip clearly shows a conflict of interest which would bar Phillip from transferring his representation between the two defendants.

Further, FSM MRPC Rule 1.7(b) governs the concurrent representation of parties whose interest may be adverse to each other.<sup>2</sup> The foregoing facts show that the representation of Pohnpei State by Phillip will be materially adverse to the interest of Mulsan, and no evidence is provided to the court that would show otherwise. MRPC 1.7(a)(1) and 1.7(b)(1). Further, there is no proof that there is consent by each of the defendants after consultation. FSM MRPC R. 1.7(a)(2) and R. 1.7(b)(2).<sup>3</sup>

### III. CONCLUSION

THEREFORE, Joseph Phillip's Motion to Withdraw as Counsel is HEREBY DENIED. Joseph Phillip's Notice of Entry of Appearance on behalf of Pohnpei State is HEREBY STRICKEN from the record.

Further, the following filings which Joseph Phillip filed on behalf of Pohnpei State are also STRICKEN from the record: 1) Motion to Strike Response to Supplemental Brief on Damages Filed by the Attorney General Pohnpei State filed on May 4, 2015, 2) Motion to Disqualify Judah C. Johnny, as Attorney General, and the entire Attorney General Office of Pohnpei State from Representing Pohnpei State and OFA filed on May 13, 2015, and 3) Opposition to Request for a Telephonic Hearing and Opposition to Plaintiff's Supplemental Brief for \$120,000 in Damages filed on May 15, 2015.

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<sup>2</sup> Comment under FSM MRPC R. 1.7: "Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). . . ." FSM MRPC R. 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

<sup>3</sup> Comment under FSM MRPC R. 1.7 states, "As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."