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 DENYING NEW TRIAL

Ready E. Johnny
Associate Justice

Decided: September 23, 2015

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 – New Trial; Judgments – Relief from Judgment

A Rule 59 motion for a new trial must be served not later than ten days after entry of the judgment, but a motion that purports to be a Rule 59(b) motion for a new trial will not be denied merely because it is untimely since a Rule 59 motion served after the ten days has expired will be, and can only be, considered a Rule 60(b) motion for relief from judgment. George v. Palsis, 20 FSM R. 174, 176 (Kos. 2015).

Civil Procedure – New Trial; Judgments – Relief from Judgment

A motion for a new trial or for relief from judgment will be denied when none of the purported "newly discovered evidence" that it relies upon qualifies as newly discovered evidence which by due diligence could not have been discovered earlier. George v. Palsis, 20 FSM R. 174, 176-77 (Kos. 2015).

Civil Procedure – Affidavits; Evidence

In the FSM, a "declaration under the penalty of perjury" is not the equivalent of an affidavit as it would be in the United States where a statute makes it so. George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015).

Civil Procedure – Affidavits; Evidence

Since, by its terms, a statute enacted by the U.S. Congress that permits declarations in place of affidavits affects only U.S. rules and regulations and since the FSM Congress has not enacted an equivalent statute and no procedural rule has been promulgated to bring about the same result, an unsworn declaration, even when the declarant avers or asserts that it is made "under the penalty of perjury," is not the equivalent of an affidavit required by the FSM rules. George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015).

Civil Procedure – New Trial; Judgments – Relief from Judgment

Evidence, that by its very nature, was in the plaintiff's possession the whole time cannot be considered "newly discovered" evidence especially when the motion for a new trial or relief from judgment does not address the plaintiff's complete failure to produce the evidence at trial. George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015).

Courts – Recusal – Bias or Partiality; Courts – Recusal – Judicial Statements or Rulings

Courts adhere to the rule that any alleged judicial bias and prejudice, to be disqualifying, must stem from an extrajudicial source, and that a judge's adverse rulings in a case do not create grounds for disqualification from that case. George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015).

Courts – Recusal

A reasonable disinterested observer would require more evidence than that the judge and staff stayed at the same hotel as a defendant and his counsel and speculation concerning the defendant's activities. George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015).

Employer-Employee – Wrongful Discharge

A plaintiff has not proven a material breach of his employment contract merely because he lost his job. George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015).

Employer-Employee – Wrongful Discharge

When the plaintiff produced no evidence from which the court could reasonably calculate a damages amount and when the plaintiff's termination was not a material breach of his employment contract, even if the plaintiff were permitted to proffer evidence now about the measure or the amount of his damages it would not help his case since he failed to prove a material breach and that failure is enough to bar any recovery. George v. Palsis, 20 FSM R. 174, 177-78 (Kos. 2015).

Civil Procedure – Dismissal – After Plaintiff's Evidence

If a plaintiff does not make out a prima facie case for all the elements of his cause of action during his own case-in-chief, then the defendants do not need to present any further evidence in order to be entitled to a Rule 41(b) dismissal at the close of the plaintiff's evidence. And, even if a prima facie case is presented but the preponderance of the evidence is such that judgment can only be awarded to the moving defendants, the defendants have no need to put on a case-in-chief. George v. Palsis, 20 FSM R. 174, 178 (Kos. 2015).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

Judgment for the defendants was entered in this case on July 28, 2015. On August 13, 2015, Sasaki George filed, and on August 14, 2015, served on defendants' counsel, Plaintiff's Motion for New Trial, with supporting affidavit of counsel filed August 18, 2015, which duplicated an unsworn declaration attached to the original motion. The motion seeks a new trial because of newly discovered evidence and because of manifest error of law and fact. The defendants filed their Opposition to Motion for New Trial on September 4, 2015. The motion is denied for the reasons that follow.

I. TIMELINESS

The defendants contend that the motion for a new trial should be denied as untimely. A Rule 59 motion for a new trial must "be served not later than 10 days after entry of the judgment." FSM Civ. R. 59(b). Nevertheless, a motion that purports to be a Rule 59(b) motion for a new trial will not be denied merely because it is untimely since a Rule 59 motion served after the ten days has expired will be, and can only be, considered a Rule 60(b) motion for relief from judgment. *See* Berman v. College of Micronesia-FSM, 15 FSM R. 582, 588 (App. 2008); McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649, 652-53 (5th Cir. 1986).

Rule 60(b) does permit relief for "(1) mistake, inadvertence, surprise, or excusable neglect; [and] (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," grounds similar to those grounds on which George based his purported Rule 59(a) motion. Thus, the motion's merits can be considered on somewhat the same grounds as if the motion for a new trial had been timely made.

II. NEWLY DISCOVERED EVIDENCE

George asserts that he has newly discovered evidence that warrants a new trial. He lists five items – evidence of the judge's incapacity, evidence of defendant Canney Palsis's lack of educational degrees, a declaration of Palikkun Shrew, evidence of the plaintiff's post-termination earnings, and evidence of bias. None of this qualifies as newly discovered evidence which by due diligence could not have been discovered earlier.

George's first "newly discovered evidence" is "evidence of incapacity" of the presiding judge. George's motion to disqualify the presiding judge on the same grounds listed as "newly discovered evidence" in this motion has already been denied and there is nothing "newly discovered" about this. [George v. Palsis, 20 FSM R. 157, 159 (Kos. 2015).] Further discussion is unnecessary.

George also asserts that when his counsel, while she was on Guam on July 21, 2015, called the University of Guam, a University staffer told her that the University database did not show that Palsis had graduated from the University. No reasons are given why this evidence could not have been, with due diligence, discovered earlier. Furthermore, it is not directly relevant to the issues at trial. Its use at trial would have limited to questioning Palsis further about his educational background when he was on the witness stand. It has no direct bearing on the central issue of this case – whether the defendants had just cause to terminate George's employment at Micronesian Legal Services Corporation ("MLSC"). Its only possible use would have been for impeachment purposes.

The next piece of newly discovered evidence is Palikkun Shrew's unsworn declaration, dated October 28, 2013, that Palsis did not interview him while he was Acting Speaker of the Kosrae

Legislature. This is obviously not evidence that was newly discovered. George attempted to introduce this same declaration in a post-trial filing on May 22, 2015, claiming that the court could consider it as evidence because it had been filed earlier during the summary judgment motion phase of the litigation. But, no reason is given why, if this evidence is relevant, the declarant could not have been called at trial or his testimony otherwise preserved before trial. The declaration itself does not carry the weight of an affidavit. In the FSM, a "declaration under the penalty of perjury" is not the equivalent of an affidavit as it would be in the United States where a statute makes it so. Since, by its terms, a statute enacted by the U.S. Congress that permits declarations in place of affidavits affects only U.S. rules and regulations and since the FSM Congress has not enacted an equivalent statute and no procedural rule has been promulgated to bring about the same result, an unsworn declaration, even when the declarant avers or asserts that it is made "under the penalty of perjury," is not the equivalent of an affidavit required by the FSM rules. People of Eauripik ex rel. Sarongelfeq v. F/V Teraka No. 168, 18 FSM R. 297, 300 & n.1 (Yap 2012). Shrew's declaration also has no direct bearing on whether the defendants had just cause to terminate George's employment with MLSC.

George also cites as newly discovered evidence, his counsel's affidavit about how much George earned after he was terminated from MLSC. This cannot be newly discovered evidence since this evidence, by its very nature, was in George's possession the whole time. It also does not address George's complete failure to produce evidence about how much he would have earned at MLSC if he had not been terminated, which would be central to and damages claim and which also cannot be "newly discovered."

George's last assertion of newly discovered evidence concerns bias. It is based the court's rulings and statements from the bench during trial and on the fact that defense counsel and defendant Lee Pliscou stayed at the same hotel on Kosrae as the judge and court staff.

Courts adhere to the rule that any alleged judicial bias and prejudice, to be disqualifying, must stem from an extrajudicial source, and that a judge's adverse rulings in a case do not create grounds for disqualification from that case. FSM v. Skilling, 1 FSM R. 464, 483-84 (Kos. 1984). George's claims thus do not constitute evidence of bias.

When determining whether the court's impartiality might reasonably be questioned, the test is whether a disinterested reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality. Jano v. King, 5 FSM R. 266, 270 (Pon. 1992); Skilling, 1 FSM R. at 475. Since a reasonable disinterested observer would require more evidence than that one of the parties was seen at hotel where the judge had checked in, Jano, 5 FSM R. at 270, a reasonable disinterested observer in this case would require more evidence than that the court and staff stayed at the same hotel as defendant Pliscou and his counsel and speculation concerning Pliscou's activities.

III. Manifest Error of Law and Fact

George also contends that the court committed manifest errors of law and fact when it concluded that MLSC did not materially breach his employment contract and that George failed to prove damages. George insists that a material breach was proven because he lost his job. However, that would have been a material breach only if MLSC did not have just cause to terminate George. George did not prove that MLSC lacked just cause to terminate him and MLSC did prove that it did have just cause for terminating George. There was thus no material breach by MLSC. Since there was no material breach, George's breach of employment contract and wrongful termination claims fail.

Besides material breach, the other element that George failed to prove, because he failed to proffer any evidence about it, was the amount of damages he suffered from his termination (the amount

of his lost pay minus any mitigating income). George produced no evidence from which the court could reasonably calculate a damages amount. He did not testify or produce documents about his income from his MLSC employment. Since George's termination was not a material breach, even if George were permitted to proffer evidence now about the measure or the amount of his damages it would not help his case since he failed to prove a material breach and that failure is enough to bar any recovery.

George also contends that the court was premature in concluding that there was no material breach because the defendants had not yet put on their case-in-chief. This is false. If a plaintiff does not make out a prima facie case for all the elements of his cause of action during his own case-in-chief, then the defendants do not need to present any further evidence in order to be entitled to a Rule 41(b) dismissal at the close of the plaintiff's evidence. Nakamura v. FSM Telecomm. Corp., 17 FSM R. 41, 46 (Chk. 2010). And, even if a prima facie case is presented but the preponderance of the evidence is such that judgment can only be awarded to the moving defendants, the defendants have no need to put on a case-in-chief. *Id.*

That happened here. The preponderance of the evidence presented during George's case-in-chief required judgment for the defendants. There was no manifest error of law or fact.

IV. Conclusion

Accordingly, Sasaki George's motion for a new trial is denied.

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FSM SUPREME COURT APPELLATE DIVISION

JOSEPH S. ITTU, Appellant, vs. STEPHINSIN S. ITTU, Appellee.	)	APPEAL CASE NO. K2-2014

OPINION

Argued: July 29, 2015
Decided: September 25, 2015

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Specially Assigned Justice, FSM Supreme Court*

* Chief Justice, Chuuk State Supreme Court, Weno, Chuuk