

People of Eauripik *ex rel.* Sarongelfeg v. Osprey Underwriting Agency, Ltd.
20 FSM R. 205 (Yap 2015)

dispose of all claims against all defendants, the court is willing to entertain a motion that the court make the statement required by Appellate Rule 5(a) that would permit a party to afterward ask the appellate division for permission to make an immediate interlocutory appeal. The People of Eauripik may file any such motion in the trial division within fourteen days of entry of this order.

III. CONCLUSION

Osprey Underwriting Agency, Ltd.'s motion to dismiss it for the lack of personal jurisdiction is granted. The plaintiffs, the People of Eauripik may move for the inclusion for the inclusion of an Appellate Rule 5(a) statement in this order so that permission may be sought from the appellate division to pursue an immediate interlocutory appeal.

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FSM SUPREME COURT TRIAL DIVISION

PACIFIC INTERNATIONAL, INC.,)	CIVIL ACTION NO. 2014-046
)	
Plaintiff,)	
)	
vs.)	
)	
THE NATIONAL GOVERNMENT OF THE)	
FEDERATED STATES OF MICRONESIA, by)	
and through its Agency, the FSM PROGRAM)	
MANAGEMENT UNIT (PMU),)	
)	
Defendant.)	
_____)	

ORDER DENYING INTERVENTION

Beauleen Carl-Worswick
Associate Justice

Decided: October 12, 2015

APPEARANCES:

For the Plaintiff:

Marstella E. Jack, Esq.
P.O. Box 2210
Kolonia, Pohnpei FM 96941

Thomas McKee Tarpley, Esq.
414 West Soledad Avenue, Suite 904
Hagatna, Guam 96910

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Pacific Int'l, Inc. v. FSM
20 FSM R. 214 (Pon. 2015)

For the Defendant:	Aaron L. Warren, Esq. Clayton M. Lawrence, Esq. Assistant Attorneys General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941
For the Would-be Intervenor: (State of Chuuk)	Sabino S. Asor, Esq. Attorney General Office of the Chuuk Attorney General P.O. Box 1050 Weno, Chuuk FM 96942
For the Proposed Third-Party Defendant: (Lyon Assocs.)	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonias, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Intervention

In order to qualify for intervention as a matter of right, a movant must make a three-part showing, *to wit*: an interest, impairment of same, and inadequate representation of that interest by the existing parties. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 217 (Pon. 2015).

Civil Procedure – Intervention; Constitutional Law – Case or Dispute – Standing

An intervention, whether as of right or permissive, hinges upon whether the court can properly recognize the would-be intervenor's alleged interest in the subject cause of action. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 218 (Pon. 2015).

Civil Procedure – Intervention; Constitutional Law – Case or Dispute – Standing; Contracts – Third-Party Beneficiary

To intervene to prosecute a third-party beneficiary claim when the movant lacks privity of contract and there is no existing statutory provision that the movant might be able to avail itself, the movant must make a showing that it has actually suffered a loss or injury, which would be capable of being redressed through its proposed intervention, and which is separate from the rights and claims asserted by the existing parties. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 218 (Pon. 2015).

Constitutional Law – Case or Dispute – Standing

Standing exists when a party has a direct pecuniary interest in the litigation's outcome. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 218 (Pon. 2015).

Civil Procedure – Intervention; Constitutional Law – Case or Dispute – Standing

In order to intervene under Rule 24, an applicant must have an interest which is of such a direct and immediate character, that the proposed intervenor will either gain or lose by the immediate operative effect of that judgment, but when the would-be intervenor has no direct pecuniary interest in the litigation's outcome, it lacks the requisite standing to intervene as an interested party. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 219 (Pon. 2015).

Civil Procedure – Intervention

Both intervention of right and permissive intervention must be upon timely application. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 219 (Pon. 2015).

Civil Procedure – Intervention

When the would-be intervenor contemplates joining a third-party defendant, prejudicing the existing parties and their ongoing settlement efforts; when a current party has a vested interest in the performance of the subject contract and consequently the movant's interests are presently being represented in an adequate manner; when the movant's depiction of its interest and the impairment thereof is nebulous at best and fails to demonstrate that a current party's representation is inadequate; and when there was a five-month lapse before intervention was sought, the motion to intervene will be denied. Pacific Int'l, Inc. v. FSM, 20 FSM R. 214, 219 (Pon. 2015).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

BACKGROUND

On May 13, 2015 Chuuk State (hereinafter referred to as Chuuk), through Attorney General Sabino S. Asor, filed a Motion to Intervene in the present matter, along with a Complaint. On May 25, 2015, the FSM, through Assistant Attorney General Aaron L. Warren, filed a Response to Chuuk's Motion to Intervene, as well as a Motion to Enlarge Date for [the] Status Conference (scheduled for June 3rd, which was the same day as mediation). On May 25, 2015, Attorney Stephen V. Finnen filed a Notice of Special Appearance, on behalf of Lyon Associates Inc. (Lyon) and an Opposition to Intervene. On May 27, 2015, Chuuk filed a Reply to the Opposition, concerning its Motion to Intervene, as well as the coveted continuance of the June 3rd Status Conference. On June 2, 2015, the Court issued an Order Granting [an] Enlargement for the Status Conference until July 1, 2015. On June 3, 2015, Plaintiff (hereinafter referred to as PII), through Attorney Marstella E. Jack, filed an Opposition to Motion to Intervene (after having been awarded an extension of time). On that same date, Chuuk filed a Motion to Lift [the] Stay and for [an] Injunction Against Mediation. On June 15, 2015, this Court issued an Order denying the Motion to Lift [the] Stay and for [an] Injunction Against Mediation and reserved ruling on the Motion to Intervene, until such time as it became privy to what the mediation efforts yielded.

The genesis of the present case was a Complaint filed on December 16, 2014, and brought by the general contractor of the Chuuk Roadway Project (CRP) against the FSM, alleging breach of contract; delay; interference; breach of warranty and wrongful termination. On February 13, 2015, a Stipulation and [Proposed] Order to Stay Litigation Pending Mediation was filed jointly by Counsel for both sides. On March 4, 2015, this Court affixed an imprimatur to the mutually coveted suspension of the proceedings and issued an Order to Stay the Litigation Pending Mediation. As noted above, the subject mediation was slated to commence on June 3, 2015 and therefore the originally scheduled Status Conference for that same date was continued until July 1, 2015.

On July 1, 2015, a Status Conference was held, at which, Assistant Attorney General Leonito M. Bacalando Jr. appeared on behalf of the FSM and Attorney Marstella E. Jack represented PII. Both parties acknowledged that a settlement agreement had been generated in the wake of the June 3rd Mediation. The FSM stated that the President-elect wanted to consult with Congress, given the large sum of money involved and as such, sought a continuance.

On July 15, 2015, the same Counsel appeared before the Court on behalf of their respective clients in another Status Conference. The FSM apprized this Court that he had not been able to discuss the matter with the President and asked for, yet another continuance. PII objected to this request and asked that the settlement agreement be enforced. On August 5, 2015, PII filed a Motion for Partial Summary Judgment to enforce [the] Settlement Agreement and to Compel Arbitration and the FSM's Opposition thereto, followed on August 26, 2015.

Finally, it is noteworthy that an Affidavit from the Secretary of Justice, affixed to the FSM's Opposition, denoted, *inter alia*, "The President has not approved any provision found within the signed June 3rd agreement [and] has rejected it as a whole." Against this backdrop, the Court now addresses Chuuk's pending Motion to Intervene.

Intervention

Rule 24 of the Rules of Civil Procedure speaks to Intervention and provides, in pertinent part:

(a) Intervention of Right. Upon timely application[,] anyone shall be permitted to intervene in an action: (1) when a statute of the Federated States of Micronesia confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated[,] that the disposition of the action may[,] as a practical matter[,] impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application[,] anyone may be permitted to intervene in an action: (1) when a statute of the Federated States of Micronesia confers a conditional right to intervene or (2) when an applicant's claim or defense and the main action have a question of law or fact in common In exercising its discretion[,] the [C]ourt shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties[,] as provided in Rule 5. The motion shall state the grounds [relied upon] and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Chuuk's Motion to Intervene claims an interest in the pending cause of action is present, as it is the "legal owner and intended beneficiary of the specific Amended Compact Infrastructure [monies used to underwrite the construction contract attendant to the subject CRP]." Chuuk further contends, that "Disposition of the matter[,] without Chuuk State's intervention[,] will impair Chuuk's ability to protect its ownership and beneficiary interest. . . [since] neither of the existing parties is defending Chuuk State's reimbursement interests." Chuuk's Mot. to Intervene at 2. In addition, as required by Rule 24(c), Chuuk simultaneously filed a Complaint and sought to join Lyon as a third party Defendant, because as design engineer, it allegedly submitted a defective work product to PMU.

Chuuk's Motion to Intervene is framed in the alternative (i.e. under either subsection (a) or (b) of Rule 24). Pursuant to the former, the movant must make a three (3) part showing, in order to qualify for intervention as a matter of right, *to wit*: an interest, impairment of same and inadequate representation of that interest by the existing parties. California Pac. Assocs. v. Alexander, UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 364-65 (Chk. 2003); Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001); 7 FSM Intrm. 198, 200 (Pon. 1995).

The interest to which Chuuk cites, is an "ownership right over the specific [Amended Compact] funds involved in the PII contract with the FSM." Chuuk's Reply at 4. Chuuk also claims, that it qualifies as an "intended beneficiary" of the CRP, given *inter alia*, the *situs* of the construction. *Id.* at 4-5. In addition to Chuuk's characterization of Lyon as an "indispensable party," which would need to be joined as a third party, it seeks "reimbursement and contributions from all of the parties;" hence maintaining the present representation by the existing sides is inadequate. *Id.* at 6-7, 9.

The intervention sought by Chuuk, as of right or permissive, under Rule 24(a) or (b) respectively, hinges upon whether the Court can properly recognize Chuuk's alleged interest in the subject cause of action. With respect to the claimed ownership of monies which were utilized to underwrite the CRP and therefore a pecuniary interest, this Court recently held Sector Grant funds appropriated to Chuuk's Department of Education constitute National Government property, over which, the National Government has standing to sue, since they are appropriated by the FSM Congress and managed by the FSM Secretary of Finance. FSM v. Muty, 19 FSM R. 453 (Chk. 2014).

Title 55, Chapter 2 of the FSM Code, sets forth the procedures for the FSM's Financial Management. Pursuant to 55 F.S.M.C. 216, "The authority to make allotments shall be vested in the President of the Federated States of Micronesia or his designee." Although the Muty Ruling implicitly recognizes FSM's dominion over Compact monies, the Court took no position on whether or under what circumstances, a State may have standing to bring a cause of action to recover said monies which were disbursed on a contract entered into by the National Government. Nevertheless, under these facts, Chuuk had no involvement with either the award or administration of the construction contract in issue. Furthermore, the allottee of the funds appropriated, via an infrastructure grant for the Chuuk Roadway Project, is the President of the FSM or his designee (PMU), as opposed to Chuuk. Accordingly, Chuuk lacks privity of contract and there is no existing statutory provision that Chuuk might be able to avail itself, in terms of the coveted intervention.¹

Chuuk also contends, that a cognizable interest exists, by virtue of its status as an "intended beneficiary" of the CRP, which implies third party standing. For intervention to prosecute a third party beneficiary claim, Chuuk must make a showing that it has actually suffered a loss or injury, which would be capable of being redressed through its proposed intervention, separate from the rights and claims asserted by the existing parties. Eighth Kosrae Legislature v. FSM Dev. Bank, 11 FSM Intrm. 491, 497 (Kos. 2003).

Although Chuuk notes the CRP will assist its inhabitants, with respect to inter-island transportation, this benefit is not one that redounds exclusively to Chuukese residents. Chuuk has similarly failed to demonstrate a recognizable pecuniary interest to warrant its coveted status as an "intended beneficiary." If the FSM were to ultimately obtain a monetary Judgment in a counter-claim brought against PII in the present case, Chuuk would not be entitled to recoup a proportionate share thereof. Conversely, should the FSM be ultimately found liable, in terms of a money Judgment due PII, Chuuk would be under no obligation to satisfy the sum, in whole or in part.

Standing exists when a party has a direct pecuniary interest in the litigation's outcome. People

¹ This Court is fully cognizant of the recent Bill for an Act (CA19-25 was passed by the FSM Congress on July 15, 2015), that repeals Public Law 14-48 (which added § 419 to Title 55 of the F.S.M.C.). Furthermore, on September 23, 2015, Congress overrode the Presidential veto of this Bill, thereby sounding the death knell to § 419. Whatever impact, if any, this promulgation may have on a State's respective implementation of an infrastructure development project that is supported by Compact Impact monies, it is irrefutable that enactment of this legislation will only have prospective application.

of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 414 (Yap 2006). In order to intervene under this Rule, an applicant must have an interest which is of such a direct and immediate character, that the proposed intervenor will either gain or lose by the immediate operative effect of that Judgment. Because Chuuk has no direct pecuniary interest in this litigation's outcome, it lacks the requisite standing to intervene as an interested party.

In addition, both intervention of right and permissive intervention must be "upon timely application." Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 88 (App. 1999); UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 364 (Chk. 2003); Moses v. Oynang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001). Although the Court issued an Order to Stay Litigation Pending Mediation, on March 4, 2015 and therefore an Answer or other responsive pleading has yet to be filed by the FSM, the subject Complaint was filed on December 16, 2014 and Chuuk did not file its Motion to Intervene until May 13, 2015.

Chuuk maintains that it was not privy to the instant civil action having been instituted until managing to secure a copy of the Complaint from an overseas attorney. Chuuk's Mot. to Intervene at 3. This delay in filing the subject Motion to Intervene, although prior to a responsive pleading from the FSM, would stymie ongoing negotiation efforts at this juncture and as a result, may not constitute a "timely application." Furthermore, if the intervention sought by Chuuk was allowed, an attendant delay would invariably ensue, given its respective Complaint contemplates joining a third party Defendant. The Court finds that this would prejudice the existing parties and their ongoing settlement efforts.

This Court finds equally suspect, that absent intervention, disposition of this action may impair Chuuk's ability to protect its "interest." The FSM has played a substantial role in the aspects pertaining to planning, designing and/or implementing the contractual performance. In other words, the FSM has hardly been relegated to simply a funding or oversight capacity, with respect to the CRP. The FSM has a vested interest in the performance of the subject contract, in order to ensure the construction project is thorough, proper and completed in a timely fashion, consequently the interests of Chuuk are presently being represented in an adequate manner.

In sum, this Court finds, that at best, a nebulous depiction of an interest by Chuuk State and/or concomitant impairment thereof, along with a failure to demonstrate the current representation by the FSM is inadequate. In addition, the Court harbors some misgiving with Chuuk's delay, in terms of the five-month lapse between the date when this cause of action was initiated and its Motion to Intervene was filed. Chuuk's less than punctual application portends prejudice to the existing parties, in that settlement negotiations had been conscientiously pursued at the time it sought to intervene and a successful application, which includes joining a third party Defendant, would have a deleterious effect on the current parties' endeavor to resolve the matter; especially given the negotiation efforts which have been undertaken.

Accordingly, this Court hereby DENIES Chuuk State's Motion to Intervene.

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