

acknowledged as filed on the intended date: September 22, 2014. The time limit for filing a notice of appeal, within the above-mentioned rules, cannot be circumvented, via the present attempt to obtain an order *nunc pro tunc*, which runs counter to the underlying purpose of such a motion. As set forth in People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 15 FSM R. 133, 134 (Yap 2007): "A court may issue an order *nunc pro tunc* to supply a record of an action previously done but omitted from the record through inadvertence or mistake, to have effect as of the former date." *Id.* (quoting Western Sales Trading Co. v. Ponape Federation of Coop. Ass'ns, 6 FSM R. 592, 593-94 (Pon. 1994)).

The "Amended Notice of Appeal" in issue hardly constituted a scenario, whereby this document was actually filed, yet a recording of same was absent from the record and therefore this omission should be corrected to reflect the filing date. As set forth above, the facts under this case are different, since the "Amended Notice" was never served, let alone filed and thus, not listed in the Certificate of Record for the underlying matter. Utilization of a *nunc pro tunc* entry, as sought by Abrams, would be improper, since it would require the court to antedate a document, the existence of which only came to light, within the appendix of Abrams' opening brief.

Accordingly, Abrams' motion for an order *nunc pro tunc* is HEREBY DENIED and given the absence of a timely filed appeal of a final decision, this court has no jurisdiction and the FSMDB's motion to dismiss the appeal is HEREBY GRANTED; thereby rendering moot the FSMDB's remaining motions to strike and to enlarge time.

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FSM SUPREME COURT TRIAL DIVISION

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|---|---|---------------------------|
| 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

Beauleen Carl-Worswick
Associate Justice

Decided: March 23, 2016

APPEARANCES:

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|--------------------|---|
| For the Plaintiff: | Marstella E. Jack, Esq. P.O. Box 2210 Kolonia, Pohnpei FM 96941 |
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347
Pacific Int'l, Inc. v. FSM
20 FSM R. 346 (Pon. 2016)

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HEADNOTES

Civil Procedure – Declaratory Relief; Civil Procedure – Summary Judgment

The court will consider a motion for emergency declaratory relief filed without an appropriate pleading under the requirements of a summary judgment motion. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 348 (Pon. 2016).

Attorney and Client; Foreign Investment Laws

Under the foreign investment laws requiring noncitizens "engaging in business" to hold a valid foreign investment permit, "engaging in business" includes providing professional services as an attorney for a fee. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349 (Pon. 2016).

Attorney and Client; Foreign Investment Laws

Someone providing professional services for a fee, such as an attorney, is not considered to be "engaging in business" unless he or she, while present in the FSM, performs his or her respective professional services for more than 14 days in any calendar year. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349 (Pon. 2016).

Attorney and Client; Foreign Investment Laws

A noncitizen attorney, licensed to practice in the FSM since 1985 and a member of the Bar in good standing but currently resident and practicing on Guam, is excepted from the foreign investment permit requirement when he works in tandem with an FSM citizen licensed to practice in the FSM and when his involvement in the case has been from a remote location and, as a result, he has not been present in the FSM rendering professional services for more than 14 days in any calendar year. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349 (Pon. 2016).

Attorney and Client; Foreign Investment Laws

Under 55 F.S.M.C. 419(1) and (2), no foreign investment permit is required of a noncitizen attorney when his representation directly involves "contract management activities" that relate to a public contract awarded for a civil works project to implement part of the Infrastructure Development Plan and that is supported by funds through the Amended Compact of Free Association Section 211. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 349-50 (Pon. 2016).

Civil Procedure – Summary Judgment – Grounds

A moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining and that it is entitled to judgment as a matter of law. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 350 (Pon. 2016).

Attorney and Client: Foreign Investment Laws

An attorney cannot be said to come within the ambit of the 32 F.S.M.C. 204, which otherwise would require a foreign investment permit, when his legal representation, to date, has been conducted *in absentia*, and thus cannot be said to have rendered his professional services "while present in the FSM for more than 14 days in any calendar year" and when the present action involves an Infrastructure Development Plan project and the construction by his client was undertaken pursuant to a contract underwritten with Compact monies. Pacific Int'l, Inc. v. FSM, 20 FSM R. 346, 350 (Pon. 2016).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On February 19, 2016, Plaintiff's Motion and Memorandum for Emergency Declaratory Relief was filed. The impetus for movant's filing, was a referenced communiqué from Defense Counsel, which challenged the representation of Plaintiff by Attorney Tarpley. This subject noncitizen Attorney has a practice in Guam and Defense Counsel maintained that the former's legal representation constituted "engaging in business" within the FSM; thereby necessitating a Foreign Investment Permit. Without the requisite Foreign Investment Permit, the aforementioned correspondence from Defense Counsel requested Attorney Tarpley withdraw from representing Plaintiff in this matter. In response to Plaintiff's instant motion coveting emergency declaratory relief, Defendant filed a Motion to Strike on February 29, 2016. The relevant Motion to Strike maintained, that Plaintiff's February 19th filing, which requested declaratory relief from this Court, did not constitute a Pleading, as required by FSM Civil Rule of Procedure 57.

A. *Motion for Declaratory Relief*

Plaintiff's filing in issue is captioned: "Plaintiff's Motion for Emergency Declaratory Relief." FSM Civil Rule 57, entitled Declaratory Judgment, states, in pertinent part: "In case of [an] actual controversy within its jurisdiction, the [C]ourt, upon the filing of an appropriate [P]leading, may declare the right and other legal relations of any interested party seeking such declaration"

Albeit, within the context of a Bar applicant's Complaint, which alleged *inter alia*, the Pohnpei Foreign Investment Permit Act was preempted by the Foreign Investment Act of the FSM (32 F.S.M.C. §§ 201-209), Berman v. Pohnpei, 5 FSM R. 303 (Pon. 1992), is instructive, in terms of its characterization of the filing before that Court. In Berman, although a Motion for Declaratory Judgment had been filed, the Court treated the movant's filing as a Motion for Summary Judgment and as such, followed the mandate of FSM Civil Rule 56. Berman, 5 FSM R. at 307. Accordingly, this Court will similarly consider the relevant filing of Plaintiff under the requirements of a Motion for Summary Judgment, concerning the propriety of legal representation by a noncitizen Attorney (i.e. "engaging in business" within the FSM), without a Foreign Investment Permit.

Engaging in Business

32 F.S.M.C. 204 provides:

A noncitizen may not conduct any activity in the FSM that amounts to "engaging in business," as defined in section 203 of this [C]hapter, unless that noncitizen holds a valid Foreign Investment Permit[,] authorizing that noncitizen to conduct that activity,

except as provided in section 419 of [C]hapter 4 of [T]itle 55 of this [C]ode.

32 F.S.M.C. 203(5) states: "'engaging in business' means carrying out any activity relating to the conduct of a business and shall include the activities enumerated in subsection (5)(a) of this section." Finally, subsection (5)(a) sets forth, "'engaging in business' shall include:" *[inter alia]*: (ix) "providing professional services[,] as an [A]ttorney . . . for a fee"

In Carlos v. FSM, 4 FSM R. 17 (App. 1989), the Court addressed the issue of noncitizen Attorneys practicing in the FSM, against the backdrop of the Foreign Investment Act. The Carlos Court found: "[S]ince Congress did not give any consideration to, or make any mention of, article XIII, section 1 services" in enacting the Foreign Investment Act, the avoidance of potential conflict with the Constitution "calls for [a] conclusion that Congress did not intend for the Foreign Investment Act to apply to noncitizen attorneys." *Id.* at 30.

In response to the Carlos Decision, Congress enacted and the President approved, an Act designated Public Law 5-134. In so doing, the practice of law was specifically included within the penumbra of "engaging in business" by noncitizens; thus requiring a Foreign Investment Permit. Michelsen v. FSM, 5 FSM R. 249, 254 (App. 1991).

Nevertheless, 32 F.S.M.C. 203(5)(a)(ix), includes an exception to the requirement of a Foreign Investment Permit by a noncitizen Attorney, *to wit*:

(a): "engaging in business" shall include: (ix): providing professional services[,] as an [A]ttorney . . . for a fee; provided however that such a professional shall not be considered to be "engaging in business" unless he or she, while present in the FSM, performs his or her respective professional services for more than 14 days in any calendar year.

In the case at hand, the noncitizen Attorney in issue, has been licensed to practice in the FSM since 1985 and is a member of the Bar in good standing. As previously noted, Counsel is currently a resident of Guam, which is where his practice is located. The Court notes that the subject noncitizen Attorney works in tandem with co-counsel Marstella Jack (an FSM citizen, licensed to practice in this jurisdiction) on behalf of Plaintiff. In sum, the involvement of this noncitizen Attorney in the case at hand has been from a remote location and as a result, Counsel has not been "present in the FSM [rendering] . . . professional services for more than 14 days in any calendar year."

Furthermore, the last clause of 32 F.S.M.C. 204 references an exemption to the requirement for a Foreign Investment Permit by a noncitizen "engaging in business" within the FSM, *to wit*: "except as provided in section 419 of [C]hapter 4 of [T]itle 55 of this [C]ode."

55 F.S.M.C. 419(2) states: "Notwithstanding section 205 of [T]itle 32 of this [C]ode [which speaks to the various categories of economic sectors that are subject to foreign investment regulation], no Foreign Investment Permit shall be required to conduct any activity referred to in subsection (1) of this section."

Furthermore, 55 F.S.M.C. 419(1) sets forth:

Notwithstanding any provision of law to the contrary, the National Government shall have jurisdiction, in coordination with the respective [S]tate, over activities relating to any public contract that is or may be awarded for a civil works project to implement any part of the Infrastructure Development Plan and that is supported by funds through

Section 211 of the Amended Compact of Free Association, as that Plan may be amended from time to time, including but not limited to all contract management activities, all bidding and pre-bidding procedures for such public contracts and all activities performed by any citizen and noncitizen contractor or subcontractor[,] pursuant to any such public contract."

As acknowledged within the Court's October 12, 2015 Order: "This Court has previously recognized that the Regulations for Infrastructure Development Plan Contracts (IDP Regulations), which apply to the contract in issue, were promulgated under the authority of 55 F.S.M.C. 419 and 17 F.S.M.C. 101 *et seq.*" [Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224 (Pon. 2015).] Consequently, this Chuuk Roadway Project constituting an "Infrastructure Development Plan," which was "supported by funds through the Amended Compact of Free Association" and the representation of Plaintiff by the subject noncitizen Attorney, concerning "contract management activities" (i.e. compliance with the terms and conditions set forth therein), falls within the ambit of 55 F.S.M.C. 419(2).

In short, "no Foreign Investment Permit shall be required" by this noncitizen Attorney, under § 419(2), since his representation directly involves "contract management activities," as delineated within § 419(1). As a result, § 419(1) and (2), in tandem, provide safe harbor for Plaintiff's noncitizen Attorney in the present matter, in terms of his legal representation without a Foreign Investment Permit.

B. *Summary Judgment*

"A moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining and that it is entitled to Judgment as a matter of law." Peniknos v. Nakasone, 18 FSM R. 470, 478 (Pon. 2011). The holding in Michelsen is distinguishable from the instant action, as it involved review of an Administrative Decision, whereby a resident (i.e. "present in the FSM") expatriate Attorney was denied the right to practice in a particular island State, without a Foreign Investment Permit. In the case at bar, the Court notes that the Complaint was filed on December 16, 2014 and although Attorney Tarpley has been co-Counsel of Record since the inception of this action, as noted above, this Court is not privy to him having been "present in the FSM." Unlike Michelsen, the Attorney in issue is hardly a resident and the legal representation, to date, has been conducted *in absentia*. As such, Counsel herein cannot be said to have rendered his professional services "while present in the FSM for more than 14 days in any calendar year."

Furthermore, the present action involves an Infrastructure Development Plan project and the construction by Plaintiff was undertaken pursuant to a contract which was underwritten with Compact monies. Hence, the exemption from procuring a Foreign Investment Permit, as set forth in 55 F.S.M.C. 419(2), with respect to the subject noncitizen Attorney representing the contractor/Plaintiff, concerning "contract management activities" (as per § 419(1)), is triggered. This Court finds that, *a fortiori*, this Attorney cannot be said to come within the ambit of the 32 F.S.M.C. 204; which otherwise would require a Foreign Investment Permit and therefore no issue of genuine material fact remains, with respect to the ability of Attorney Tarpley to represent Plaintiff within the FSM, regarding the case at bar.

Accordingly, the Court hereby **ALLOWS** Attorney Tarpley to continue his representation of Plaintiff in this matter and **DENIES** Defendant's Motion to Strike.

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