

FSM SUPREME COURT TRIAL DIVISION

MARIANO GILMETE, individually and as Chief Engineer of FSM vessel Caroline Voyager,)	CIVIL ACTION NO. 2015-030
)	
Plaintiff,)	
)	
vs.)	
)	
PATRICK PECKALIBE in his capacity as ship master or captain of FSM vessel Caroline Voyager, and in his individual capacity, LEO LOKOPWE, individually and his capacity as the Assistant Secretary of the FSM Division of Marine Transportation, and the DEPARTMENT of TC & I of the FSM Government, and the FSM NATIONAL GOVERNMENT,)	
)	
Defendants.)	
)	

ORDER DENYING MOTION TO DISMISS

Beauleen Carl-Worswick
Associate Justice

Hearing: October 27, 2015
Decided: May 26, 2016

APPEARANCES:

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HEADNOTES

Admiralty – Seamen

The owner or master of a vessel must enter into a written employment agreement (called shipping articles) with each and every seaman employed on board. Gilmete v. Peckalibe, 20 FSM R. 444, 447 n.1 (Pon. 2016).

Civil Procedure – Dismissal – Before Responsive Pleading

In evaluating a motion to dismiss, a court must accept the complaint's allegations as true and

should grant the motion only if it appears certain that no relief could be granted under any facts which could be proven in support of the claim. Gilmete v. Peckalibe, 20 FSM R. 444, 447 (Pon. 2016).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Summary Judgment

If, on a motion to dismiss, matters outside the pleading are presented to and not excluded by the court, the motion shall then be treated as one for summary judgment. Gilmete v. Peckalibe, 20 FSM R. 444, 447 (Pon. 2016).

Admiralty – Seamen; Jurisdiction – Exclusive FSM Supreme Court

A seaman's contract claim against the owner of the vessel on which he served falls within the FSM Supreme Court's exclusive admiralty and maritime jurisdiction. Gilmete v. Peckalibe, 20 FSM R. 444, 448 & n.3 (Pon. 2016).

Admiralty – Seamen; Jurisdiction – Exclusive FSM Supreme Court

Cases involving claims for wages by seamen are maritime cases. Gilmete v. Peckalibe, 20 FSM R. 444, 448 (Pon. 2016).

Admiralty; Federalism – Abstention; Jurisdiction – Exclusive FSM Supreme Court

The exclusive nature of the national court jurisdiction is such that the FSM Supreme Court does not have the power to abstain from admiralty and maritime cases. Gilmete v. Peckalibe, 20 FSM R. 444, 448 (Pon. 2016).

Admiralty – Seamen

A seaman is a person (including the master and officers) engaged or employed in any capacity on board a vessel other than a pilot, supercargo, or a person temporarily employed on board the vessel while it is in port, and shipping articles are the written employment contract between a vessel's owner or master and a seaman to be employed on board, setting forth the terms and conditions of employment. Gilmete v. Peckalibe, 20 FSM R. 444, 448-49 n.5 (Pon. 2016).

Admiralty – Seamen

Under 19 F.S.M.C. 606(4), shipping articles are limited to a period of no longer than one year. Gilmete v. Peckalibe, 20 FSM R. 444, 449 (Pon. 2016).

Admiralty – Seamen; Jurisdiction – Exclusive FSM Supreme Court

Since the FSM Supreme Court has jurisdiction over all cases which are maritime in nature including all maritime contracts, torts, and injuries, it has jurisdiction over a seaman's claims for breach of contract and negligence. Gilmete v. Peckalibe, 20 FSM R. 444, 449 (Pon. 2016).

Admiralty – Seamen; Public Officers and Employees

When a person's employment is established pursuant to shipping articles, which is a contract between the FSM national government and seamen, it is unlike employment positions protected under the Public Service System, since there is no continued expectation of employment because the shipping articles have a one-year duration, and may be renewed upon expiration. Gilmete v. Peckalibe, 20 FSM R. 444, 450 (Pon. 2016).

Administrative Law – Exhaustion of Remedies; Admiralty – Seamen; Public Officers and Employees

A seaman employed by the FSM is a contract employee and therefore does not fall under the purview of Title 52 and would not be required to have his grievance reviewed at the administrative level before filing suit in the FSM Supreme Court. Gilmete v. Peckalibe, 20 FSM R. 444, 450 (Pon. 2016).

Administrative Law – Exhaustion of Remedies; Admiralty – Seamen; Jurisdiction – Exclusive FSM Supreme Court; Public Officers and Employees

Although an aggrieved seaman, employed by the FSM, may file a petition at the administrative level, he, as a contract employee not covered under the FSM Public Service System, is free instead, to file suit in the FSM Supreme Court, which has exclusive jurisdiction over admiralty and maritime claims. Gilmete v. Peckalibe, 20 FSM R. 444, 451 (Pon. 2016).

Administrative Law – Exhaustion of Remedies

In cases where exhaustion of remedies is not required by statute, the exhaustion requirement is discretionary with the courts, rather than an absolute bar to judicial consideration, and must be applied in each case with an understanding of its purposes and of the particular administrative scheme involved. Where justification for invoking the doctrine of exhaustion of administrative remedies is absent, the doctrine's application is unwarranted and will be waived. Gilmete v. Peckalibe, 20 FSM R. 444, 451 (Pon. 2016).

Administrative Law – Rules and Regulations; Admiralty – Seamen

The regulations that cover termination of shipping articles, do not afford the seaman the right to an administrative hearing before termination. Gilmete v. Peckalibe, 20 FSM R. 444, 451 (Pon. 2016).

Administrative Law – Exhaustion of Remedies; Admiralty – Seamen; Jurisdiction – Exclusive FSM Supreme Court; Public Officers and Employees

Because of the unique classification of seamen and their rights as employees, along with the limitations when it comes to the termination of their employment, and because this class of FSM national government employees is distinct, and in line with FSM Constitution Article XI, § 6(a), the FSM Supreme Court should exercise its exclusive jurisdiction over the matter rather than confer authority to an administrative body. Gilmete v. Peckalibe, 20 FSM R. 444, 451 (Pon. 2016).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. BACKGROUND

A Summons and Complaint was filed in this matter by the plaintiff, Mariano Gilmete (herein "Gilmete"), on July 30, 2015. The Complaint was amended on August 7, 2015. The defendants, Patrick Peckalibe et al. (herein collectively as "Peckalibe"), entered a Motion to Dismiss or, in the alternative, to Stay Proceedings on August 24, 2015.

On September 3, 2015 an Opposition to Motion to Dismiss was filed by Gilmete. A Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss was entered on September 15, 2015, and a Response to Defendant's Reply was filed on September 21 2015. A hearing on all pending motions was held on October 27, 2015.

II. FACTS

Gilmete was employed as Chief Engineer of *Caroline Voyager* by the FSM Department of Transportation, Communication and Infrastructure (FSM DTC&I) under an employment agreement

referred to as shipping articles.¹ Gilmete claims that his shipping article expired and was renewed on December 24, 2014. Three days after renewal, Gilmete was not allowed to board the *Caroline Voyager*, as instructed by Peckalibe.

A meeting was held on January 4, 2015 between Gilmete, Peckalibe, and Leo Lokopwe (Assistant Secretary of TC&I), Gilmete was advised during the meeting to resign because his services has drastically deteriorated as a result of his physical condition. On January 6, 2015, Peckalibe issued a Notice of Intent to Terminate Shipping Article, which asked for Gilmete's resignation.

A response letter was submitted by Gilmete on February 6, 2015, where he tendered his resignation effective May 2, 2015, however, he requested severance pay for a sixty (60) day period, and if granted, his resignation would be in effect on April 6, 2015. Gilmete also noted that this was a forced resignation. The Complaint was subsequently filed on July 30, 2015.

III. STANDARD OF REVIEW

In evaluating a motion to dismiss, a court must accept as true the allegations in the complaint. Relief should be granted only if it appears certain that no relief could be granted under any facts which could be proven in support of the complaint. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM R. 281, 291 (Pon. 1998). A motion to dismiss should not be granted unless it appears to a certainty that no relief could be granted under any state of facts that can be proved in support of the claim. Nahnken of Nett v. United States, 7 FSM R. 581, 586 (App. 1996).

A motion to dismiss is not to be granted unless it appears to a certainty that the non-moving party is entitled to no relief under any state of facts which could be proved in support of the claim, and if on the motion to dismiss matters outside the pleading are presented to and not excluded by the court, the motion shall then be treated as one for summary judgment. Etscheit v. Adams, 6 FSM R. 365, 386 (Pon. 1994).

IV. DISCUSSION

Court's jurisdiction over seaman covered under shipping articles

The first issue presented before the court is the exercise of the court's jurisdiction over disputes involving seamen whose employment are governed by shipping articles. Gilmete argues that pursuant to FSM Constiyution Article XI, § 6(a), the FSM Supreme Court has exclusive jurisdiction over the claims as set forth in the Complaint.² Pl.'s Opp'n to Mot. to Dismiss at 1-2. On the other hand, Peckalibe claims that this court does not have jurisdiction because plaintiff did not exhaust his administrative remedies prior to filing his claims with the court. Def.'s Mot. to Dismiss at 5-7.

In Lonno v. Trust Territory (I), 1 FSM R. 53 (Kos. 1982), the court ruled on a seaman's contract claim as within the admiralty and maritime jurisdiction of the FSM Supreme Court. In Lonno, the court

¹ 19 F.S.M.C. 606(1): "The owner or master of a vessel shall enter into a written employment agreement with each and every seaman employed on board, which agreement shall be called Shipping Articles."

² FSM Const. art. XI, § 6(a): "The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, *admiralty or maritime cases*, and in cases in which the national government is a party except where an interest in land is at issue. *Id.* (emphasis added).

held

The United States Constitution employs language similar to that of the Constitution of the Federated States of Micronesia, stating that the "Judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2, cl. 1. Employing this language, United States federal courts have long asserted jurisdiction over cases involving the rights of seamen. See Isbrandtsen Co. v. Johnson, 343 U.S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294 (1952). Indeed, the federal courts of the United States have looked upon seamen as favored objects or wards of the law of admiralty. Warner v. Goltra, 293 U.S. 155, 162, 55 S. Ct. 46, 49, 79 L. Ed. 254 (1934); Bainbridge v. Merchants & Miners Transp. Co., 287 U.S. 278, 53 S. Ct. 159, 77 L. Ed. 302 (1932). These authorities establish that a case such as the present one, involving a seaman's contract claim against the owner of the vessel upon which he served, would be regarded as falling within the admiralty and maritime jurisdiction of the United States federal courts. This is a powerful indication that the framers intended the Constitution of the Federated States of Micronesia, containing the same words, to yield that result also.

Lonno (I), 1 FSM R. at 70-71.³

Peckalibe argues that because the decision in *Lonno* was rendered during the Trust Territory period, the court's findings are outdated and that specific statutes have been passed since that period which should apply to the present matter. Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss at 4.

The FSM Congress ratified the "National Maritime Act" under Public Law No. 10-76 enacted in 1998 and codified as Title 19 of the FSM Code.⁴ 19 F.S.M.C. 105 establishes the jurisdiction of this court in admiralty and maritime matters, in line with FSM Constitution Article XI, § 6(a), which states: "The Supreme Court of the Federated States of Micronesia shall have exclusive, original jurisdiction in maritime and admiralty matters and in all matters pertaining to this title and regulations." [19 F.S.M.C. 105.]

Cases involving claims for wages by seamen are maritime cases. 2 AM. JUR. 2D *Admiralty* § 72, at 759-60 (1962); Federal Business Dev. Bank v. S.S. Thorfinn, 4 FSM R. 367, 374 (App. 1990). The exclusive nature of the national court jurisdiction is such that the FSM Supreme Court Appellate Division has held that it does not have the power to abstain from admiralty and maritime cases. M/V Hai Hsiang # 36 v. Pohnppei, 7 FSM R. 456, 459 (App. 1996).

Here, Gilmete falls within the definition of a seaman pursuant to 19 F.S.M.C. 106(32), whose employment is covered by shipping articles under 19 F.S.M.C. 106(34).⁵ The shipping articles between

³ A seaman's contract claim against the owner of the vessel upon which he served would be regarded as falling within exclusive admiralty and maritime jurisdiction of FSM Supreme Court. FSM Const. art. XI, § 6(a). Lonno (I), 1 FSM R. at 68-71.

⁴ Title 19 of the FSM Code, Editor's Note: The former provisions of chapters 1 to 12 of this title were repealed in their entirety by PL 10-76 § 1 and replaced by the provisions of PL 10-76, the "National Maritime Act, 1997" codified at chapters 1 to 13 of this title. FSM Public Law No. 10-76 took effect April 1, 1998.

⁵ 19 F.S.M.C. 106(32): "Seaman" means a person engaged or employed in any capacity on board a vessel other than a pilot, supercargo, or a person temporarily employed on board the vessel while it is in port,

Gilmete and the FSM Government is an employment contract pursuant to 19 F.S.M.C. 606. The shipping articles were signed and effectuated on December 24, 2014. 19 F.S.M.C. 606(4) limits the contract to a period of no longer than one (1) year, the supposed ending date on December 24, 2015. The shipping articles provide further details of the terms of Gilmete's employment as a Chief Engineer.

By virtue of Gilmete's employment as a seaman, specifically as a Chief Engineer on a vessel owned and operated by the FSM within the FSM exclusive economic zone and beyond, this matter is proper before the court. Accordingly, based on the shipping articles, the applicable statutes and case laws *supra*, the FSM Supreme Court has exclusive jurisdiction to hear the current dispute.

Further, Gilmete's Amended Complaint sets forth, *inter alia*, claims for breach of contract and negligence. The FSM Supreme Court has jurisdiction over all cases which are maritime in nature including all maritime contracts, torts and injuries. S.S. Thorfinn, 4 FSM R. at 374.

Shipping articles and the exhaustion of remedies doctrine

Peckalibe argues that if the court exercises jurisdiction over this matter, the proceeding should be stayed because Gilmete must first exhaust his administrative remedies prior to the court's review, under Title 52 of the FSM Code, which governs public employment. Def.'s Mot. to Dismiss or, in the alternative, to Stay Proceedings at 5-7.

52 F.S.M.C. 117 lists positions of employment within the FSM national government that are not subject to, in other words are *exempt*, from the National Public Service System. In relation to the current matter, 52 F.S.M.C. 117(12) states

The National Public Service System shall apply to all employees of and positions in the central Government of the Federated States of Micronesia now existing or hereafter established and to all personnel services performed for that Government except the following, unless this chapter or provisions thereof are specifically made applicable to them:

...

(12) *persons presently under contract of employment* not included in subsection (11) of this section, during the life of such contract. No contract of employment shall be entered into, renewed, or amended after the effective date of this chapter, except in accordance with the provisions of this chapter;⁶

[52 F.S.M.C. 117] (emphasis added).

and includes the master and officers.

19 F.S.M.C. 106(34): "Shipping articles means the written employment contract between the owner or master of a vessel and a seaman to be employed on board the vessel setting forth the terms and conditions of employment."

⁶ 52 F.S.M.C. 117(11):

persons or organizations retained by contract when the Personnel Officer has certified that the service to be performed is special or unique and nonpermanent and is essential to the public interest, and that, because of the degree of expertise or special knowledge required and the nature of the services to be performed, it would not be practical to obtain personnel to perform such services through normal public service recruitment procedures;

Here, as discussed *infra*, Gilmete's employment is established pursuant to shipping articles, which is a contract between the FSM national government and seamen. Unlike employment positions protected under the Public Service System, there is no continued expectation of employment because the shipping articles have a one (1) year duration, and may be renewed upon expiration.

The Kosrae State Court dealt with a similar issue in Allen v. Kosrae, 13 FSM R. 325 (Kos. S. Ct. Tr. 2005). In Allen, the Kosrae State Court held, "There are no limitations on the "contract employees" exemption: all contract employees are exempt from application of the Public Service System under Kosrae State Code, Title 18." 13 FSM R. at 331.⁷

In the present case, the court finds that Gilmete is a contract employee, therefore, he would not fall under the purview of Title 52 and would not be required to have this matter reviewed at the administrative level prior to filing suit with the FSM Supreme Court. Further, a review of Gilmete's contractual and statutory remedies is warranted.

Seaman's remedies

Section 12 of the shipping articles that is submitted into evidence governs the termination of the agreement. As it applies to the matter before the court, section 12(c)(i) states: "This agreement may be terminated: by the master acting on behalf of the employer, where the employee is: incompetent or negligent in the performance of his duties."

This section applies because the facts show that Gilmete was asked to resign because of his declining health.⁸ No sections in the shipping articles cover administrative review of terminations. However, section 16 of the agreement incorporates Chapter 6 of Title 19 of the FSM Code into the shipping articles.⁹ 19 F.S.M.C. 608 lists the circumstances in which shipping articles may be terminated, however, no other provision within Chapter 6 of Title 19 provides for an administrative review of shipping articles upon termination.¹⁰

Further, the FSM adopted its administrative procedures under Title 17 of the FSM Code. FSM Supreme Court finds within Administrative Procedures Act, 17 F.S.M.C. §§101-113, the necessary flexibility to expedite review of an administrative proceeding. Olter v. National Election Comm'r, 3 FSM R. 123, 128 (App. 1987).

17 F.S.M.C. 108 affords aggrieved individuals the right to have their dispute heard at the administrative level. This section states: "Any person aggrieved by agency action is entitled to a hearing before the highest administrative official of the department or office of which the agency is a

⁷ Allen also cites Cornelius v. Kosrae, 8 FSM Intrm. 345 (Kos. S. Ct. Tr. 1998), where the court held, "This Court has specifically recognized a "group of employees who do not have the specified rights given permanent employees, who serve for a contract term, and whose compensation is determined by those contracts." *Id.* at 352.

⁸ Section 14 also applies because it states: Where the employment of an employee is terminated under Section 12 of this agreement, the employee shall be paid the wage due to him within 24 hours of the time his employment is terminated.

⁹ Chapter 6 of Title 19 of the FSM Code is titled "Employment and Welfare of Seamen."

¹⁰ 19 F.S.M.C. 638 does provide for review of disciplinary action, but not termination.

part. Hearings shall be initiated by the submission of a petition to such administrative official."

Here, Gilmete did not initiate this remedy by filing a petition at the administrative level, instead, the present matter was filed with the FSM Supreme Court, which Gilmete was free to do as a contract employee not covered under the FSM Public Service System, and by virtue of the FSM Supreme Court's exclusive jurisdiction over admiralty and maritime claims.

In cases where exhaustion of remedies is not required by statute, exhaustion requirement is discretionary with the courts, rather than an absolute bar to judicial consideration, and must be applied in each with an understanding of its purposes and of the particular administrative scheme involved. Where justification for invoking the doctrine of exhaustion of administrative remedies is absent, application of the doctrine is unwarranted and will be waived. 2 AM. JUR. 2D *Administrative Law* § 510 (1994).

The court also considers the applicable regulations to Chapter 6 of Title 19 titled "The Seafarer Employment Regulations," which were enacted on March 1, 2002. Sections 2.7 and 2.8 of the regulations cover termination of shipping articles, however, the regulations do not afford the employee the right to an administrative hearing prior to termination.¹¹

The court recognizes the unique classification of seamen and their rights as employees, along with the limitations when it comes to the termination of their employment. Because this class of employees of the FSM national government is distinct, and in line with FSM Constitution Article XI, § 6(a), the court should exercise exclusive jurisdiction over this matter, rather than confer authority to an administrative body.

V. CONCLUSION

THEREFORE, the defendant's Motion to Dismiss is HEREBY DENIED. The defendants shall file an Answer in this matter within twenty (20) days of the entry of this Order.

* * * *

¹¹ § 2.7 requires 48 hour notice to the seafarer prior to termination, and § 2.8 requires consent of the Principal Shipping Officer of the termination.