IV. Conclusion

There being no just cause for delay, the clerk is expressly directed to enter a final judgment, in the amounts set forth above in the table on page 489, against the State of Chuuk, on the nine municipal plaintiffs' conversion (and unlawful misappropriation) claims and in the state government's favor on the civil rights claim. FSM Civ. R. 54(b).

Since partial summary judgment and a Rule 54(b) final judgment was previously entered on twelve municipal plaintiffs' breach of contract claim, Eot Municipality v. Elimo, 20 FSM R. 7, 12 (Chk. 2015), and since, unless the court is mistaken, the plaintiffs do not seek any further relief having obtained sufficient accounting to prevail on their claims to recover missing CIP funds, the court, unless informed otherwise within 28 days of entry of this order, will consider all of the plaintiffs' claims resolved. The court notes that there is a cross-claim by the national government against the state government, which as a result of this decision may have become moot. The court will therefore ask the parties to submit, no later than July 21, 2016, their views on whether this case can be closed.

* * * *

FSM SUPREME COURT TRIAL DIVISION

POHNPEI TRANSFER & STORAGE, INC., d/b/a POHNPEI TRAVEL, Plaintiff, vs. PERCY SHONIBER, Defendant.	)	CIVIL ACTION NO. 2011-011

ORDER DENYING MOTION TO RECUSE;
ORDER GRANTING MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Beauleen Carl-Worswick
Associate Justice

Trial: April 22, 2016
Decided: June 30, 2016

APPEARANCES:

For the Plaintiff: Erick B. Divinagracia, Esq.
Ramp & Mida Law Firm
P.O. Box 1480
Kolonia, Pohnpei FM 96941

For the Defendant: Salomon M. Saimon, Esq.
Directing Attorney
Micronesian Legal Services Corporation
P.O. Box 129
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Courts – Recusal – Bias or Partiality

In determining whether a judge'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. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 495 (Pon. 2016).

Courts – Recusal – Bias or Partiality

The normal situation in which recusal may be required is when a judge's extrajudicial knowledge, relationship, or dealings with a party or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartially. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 495 (Pon. 2016).

Courts – Recusal – Close Relationship

The Code of Judicial Conduct requires that a justice be disqualified when the judge is within the third degree relationship to one of the parties. The term third degree relationship as defined in the Code does not include cousin. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 495 (Pon. 2016).

Courts – Recusal – Close Relationship

There are various degrees of familial relationships and not every family relationship requires disqualification. The FSM Judiciary Act of 1979 requires disqualification of a justice on the basis of "close relationship," not just any relationship, to a person involved in litigation. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 495 (Pon. 2016).

Courts – Recusal – Close Relationship

When the familial relationship relied upon by the movant is too remote to cause any conflict of interest, the motion to recuse will be denied. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 496 (Pon. 2016).

Civil Procedure – Motions – Unopposed

Although the absence of opposition is generally deemed consent, a court still needs good grounds before it can grant an unopposed motion. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 496 (Pon. 2016).

Civil Procedure – Pleadings – Amendment

By its terms, Rule 15(b) applies after evidence has been introduced, either at an evidentiary hearing held in connection with a pretrial motion, in the course of trial, after the close of testimony, after the return of the verdict or entry of judgment, or on rehearing or on remand following an appeal. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 496 (Pon. 2016).

Civil Procedure – Pleadings – Amendment

Even if a Rule 15(b) motion were made after trial, the court could still permit the amendment of the pleadings despite the defendants' objection because if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the action's merits will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 496-97 (Pon. 2016).

Civil Procedure – Pleadings – Amendment

When the defendant was not prejudiced because, although someone was not named in a list in the complaint, the amount of his ticket was calculated into the damages set forth in the complaint; when, if the name of were added to the complaint, the damages amount would remain the same; when it is unlikely that a defendant will be prejudiced where the facts underlying a claim sought to be added are substantially similar to those underlying the original claim; when the name's omission in the complaint was an oversight; and when there is no apparent bad faith, leave to amend the complaint will be granted since mere delay is not enough of itself to bar an amendment. The amendment will relate back to the original pleading and will conform to the evidence as presented during trial. Pohnpei Transfer & Storage, Inc. v. Shoniber, 20 FSM R. 492, 497-98 (Pon. 2016).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. Background

On April 20, 2016, the defendant, Percy Shoniber (herein "Shoniber"), filed a Motion to Recuse the undersigned Justice in this matter. An opposition to the motion was filed by the plaintiff, Pohnpei Transfer and Storage, Inc., d/b/a Pohnpei Travel (herein "PT&S") on the same day.

Trial was held on April 22, 2016, and as a preliminary matter, the court considered Shoniber's motion, along with an oral motion by PT&S to amend its complaint, which was submitted in writing on April 26, 2016.

II. Discussion

Motion to Recuse

The court considered the motion as a preliminary matter on the day of Trial. The basis of the motion is that Shoniber's grandfather's sister is the grandmother of the undersigned Justice.[1] Aff. of Percy Shoniber at 1. Also, the motion argues that Joe Vitt, general manager of PT&S, is married to Ichiko, who is a first cousin of Takuro Akinaga, who is married to the sister/cousin (Elmery Carl) of the undersigned counsel. *Id.*

---

[1] The undersigned Justice does admit a degree of relationship with Shoniber, however, there is some uncertainty as to the extent of the relationship, which is beyond the third (3rd) degree.

4 F.S.M.C. 124 governs the disqualification of Supreme Court Justices in judicial matters.[2] As argued by Shoniber, the applicable section of the statue is 4 F.S.M.C. 124(2)(e)(i), (iii), (iv), which states

> (2) He shall also disqualify himself in the following circumstances:
>
> (e) where he or his spouse, or a person within a close relationship to either of them, or the spouse of such a person is:
>
> (i) a party to the proceeding, or an officer, director, or trustee of a party;
>
> . . .
>
> (iii) known by the Justice to have an interest that could be substantially affected by the outcome of the proceeding; or
>
> (iv) to the Justice's knowledge likely to be a material witness in the proceeding.

In determining whether a judge'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 Intrm. 266, 270 (Pon. 1992); FSM v. Skilling, 1 FSM Intrm. 464, 475 (Kos. 1984).

The normal situation in which recusal may be required is when a judge's extrajudicial knowledge, relationship or dealings with a party or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartially. In re Main, 4 FSM Intrm. 255, 260 (App. 1990).

Here, the familial relationship as argued by Shoniber is too remote to cause any conflict of interest as it is beyond the third degree. Canon 3E(1) of the Code of Judicial Conduct, as adopted by Kosrae State Code, section 6.201, requires that a justice be disqualified in certain cases, including those cases where the judge is within the third degree relationship to one of the parties. The term third degree relationship is defined in the Code of Judicial Conduct and does not include cousin. Sigrah v. Kosrae State Land Comm'n, 9 FSM Intrm. 89, 92 (Kos. S. Ct. Tr. 1999).

The Justice is confident that an impartial decision will be rendered despite any relationship that may exist with the parties or witnesses. There are of course various degrees of familial relationships and Micronesian legislative bodies have consistently instructed the courts that not every family relationship requires disqualification. For example, the FSM Judiciary Act of 1979 requires disqualification of a justice on the basis of "close relationship," not just any relationship, to a person involved in litigation. 4 F.S.M.C. 124(2)(e). Mongkeya v. Mackwelung, 3 FSM Intrm. 92, 100 (Kos. S. Ct. Tr. 1987).

---

[2] 4 F.S.M.C. 122: "Justices of the Supreme Court shall adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule. The Chief Justice may by rule prescribe stricter or additional standards." ABA Model Code of Judicial Conduct 2.4 (B): "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."

Accordingly, the undersigned Justice finds that any familial relationship with the parties or witnesses is remote, and an impartial decision will be rendered in this matter. The defendant's Motion to Recuse is denied.

Motion to Amend Complaint

PT&S filed a Motion for Leave to File Second Amended Complaint on April 26, 2016.[3] No response was filed by Shoniber. Although the absence of opposition is generally deemed consent, a court still needs good grounds before it can grant an unopposed motion. FSM Dev. Bank v. Paul, 18 FSM Intrm. 149, 150 (Pon. 2012).

PT&S's motion is made pursuant to FSM Civil Rule 15(a), which governs amendments to pleadings. However, because the amendment was made on the day of Trial, and Trial commenced while the motion was still pending, the court will apply FSM Civil Rule 15 (b) and (c). These rules state, in part,

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
>
> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

By its terms, Rule 15(b) applies after evidence has been introduced, either at an evidentiary hearing held in connection with a pretrial motion, in the course of trial, after the close of testimony, after the return of the verdict or entry of judgment, and on rehearing or on remand following an appeal. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 7 (Pon. 2004).

Even if a motion were brought under Rule 15(b) and had been made after trial, the court could still permit the amendment of the pleadings despite the defendants' objection because if evidence is

[3] The issue of amending the complaint, along with the motion to recuse, were argued prior to the commencement of Trial on April 22, 2016.

objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. Arthur, 13 FSM Intrm. at 8.

When the amendments sought arose out of conduct, transaction, or occurrence of events between same plaintiff and defendants at different intervals and are inextricably linked, FSM Civil Rule 15(c) provides for the relation back of claims asserted in an amendment even if a different theory of recovery is presented. Ramp v. Panuelo, 18 FSM Intrm. 256, 260 (Pon. 2012).

In the present matter, PT&S seeks a second amendment to its complaint to add Benry William to the list of individuals who were alleged to use the tickets in question to travel to South Carolina from Pohnpei. PT&S argues that not adding Benry William in the initial complaint was an oversight, and there is no prejudice to Shoniber if the court were to grant this addition because although Benry William's name was not added, the amount of his ticket was calculated into the total amount of PT&S's claim against Shoniber since the inception of this case.

Shoniber claims that PT&S's failure to include Benry William when the case was filed in 2011 constitutes undue delay, the request to amend the complaint is untimely because it is made on the day of Trial, and if the court allows the amendment, Benry William will have to go undergo the discovery process.

This court ruled on a similar issue in Ramp v. Panuelo. In Panuelo, the court held,

> In addressing timeliness of the filing of the motion to amend, the Court finds no apparent bad faith and that mere delay is not enough of itself to bar an amendment. Furthermore, the FSM Rules of Civil Procedure prescribe no limitation of time for the amendment of pleading. The court in Arthur v. FSM Dev. Bank, 14 FSM Intrm. 390, 395 (App. 2006), in resolving undue delay, rations that "[t]his does not mean that a showing of undue delay, for example, means that a court should deny leave to amend. Prejudice to the opposing party, not the diligence of the moving party, is the crucial factor in determining whether or not to grant leave to amend the complaint." *Id.* (citing Smith v. Costa Lines, Inc., 97 F.R.D. 451, 453 (N.D. Cal. 1983)). "[I]f the court is persuaded that no prejudice will accrue, the amendment should be allowed." *Id.* (citing 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1487 (2d ed. 1990); Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980) (delay without resulting prejudice or obvious design to harass the opponent is insufficient to justify a denial of leave to amend), *cert. dismissed*, 448 U.S. 911).

18 FSM R. at 261.

Here, there is no prejudice to Shoniber because although Benry William was not named in the list in the complaint, the amount of his ticket was calculated into the damages as set forth by PT&S since this case was filed. If the court were to grant the motion, the name of Benry William would be added to the complaint, however, the amount of damages would remain the same. It is unlikely that a defendant will be prejudiced where the facts underlying a claim sought to be added are substantially similar to those underlying the original claim. *Id.* at 260.

The court finds that the omission of Benry William in the complaint by PT&S was an oversight

and was not made in bad faith. When there is no apparent bad faith, mere delay is not enough of itself to bar an amendment. *Id.* at 261. Accordingly, leave is hereby granted for PT&S to amend its first amended complaint, and PT&S's motion to amend the complaint is granted.

III. CONCLUSION

The defendant's Motion to Recuse is DENIED. The plaintiff's Motion for Leave to File Second Amended Complaint is GRANTED. The amendment relates back to the original pleading and shall conform to the evidence as presented during Trial. The court's Findings of Fact and Conclusions of Law will follow this Order.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

PEDRUS I. EHSA and TIMAKYO I. EHSA a/k/a TIMAKIO I. EHSA, Appellants, vs. FSM DEVELOPMENT BANK, Appellee.	)	APPEAL CASE NO. P3-2013 Civil Action No. 2007-035

OPINION

Argued: October 8, 2014†
Decided: July 1, 2016

BEFORE:

Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Aliksa B. Aliksa, Specially Assigned Justice, FSM Supreme Court**
Hon. Camillo Noket, Specially Assigned Justice, FSM Supreme Court***

*Chief Justice, State Court of Yap, Colonia, Yap
**Chief Justice, Kosrae State Court, Tofol, Kosrae
*** Chief Justice, Chuuk State Supreme Court, Weno Chuuk

† An Order was issued by the Appellate Panel on July 31, 2015, requesting further briefing

APPEARANCES:

For the Appellants: Benjamin M. Abrams, Esq.
12 Jalan Gunung Payung
Desa Kutuh, Ungasan
Bali 80361 Indonesia