

FSM SUPREME COURT TRIAL DIVISION

DERRICK HELGENBERGER,)
)
 Plaintiff,)
)
 vs.)
)
 HYOJONG CHUNG, individually in his Capacity)
 as General Manager, Best & Best Motors Inc.,)
)
 Defendants.)
)

CIVIL ACTION NO. 2016-007

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE

Dennis K. Yamase
Chief Justice

Decided: May 11, 2016

APPEARANCES:

For the Plaintiff: Derrick Helgenberger, pro se
Kolonias, Pohnpei FM 96941

For the Defendant: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonias, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Motions – Unopposed

Failure to oppose a motion is deemed consent to the motion, but even without opposition, the court will not grant the motion unless it is well grounded in fact and law. Helgenberger v. Chung, 20 FSM R. 519, 520 (Pon. 2016).

Civil Procedure – Filings; Civil Procedure – Service

All papers after the complaint that are required to be served on a party must be filed with the court, in duplicate, either before service or within a reasonable time thereafter and must be accompanied by certificate of service of copies on all other parties. Helgenberger v. Chung, 20 FSM R. 519, 521 (Pon. 2016).

Civil Procedure – Service

The principal importance of the certificate of service is to provide the court with clear proof that service has been accomplished. Helgenberger v. Chung, 20 FSM R. 519, 521 (Pon. 2016).

Civil Procedure – Filings; Civil Procedure – Service

A certificate of service must be filed with the court when the relevant paper is filed, and the

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Helgenberger v. Chung
20 FSM R. 519 (Pon. 2016)

court must rely on a certificate of service attached to a filing and presume that it is correct, but that may be rebutted by admissible evidence. Helgenberger v. Chung, 20 FSM R. 519, 521 (Pon. 2016).

Civil Procedure – Service

The rules do not authorize electronic service via e-mail. Helgenberger v. Chung, 20 FSM R. 519, 521 (Pon. 2016).

Civil Procedure – Service

When the actual service of an answer is not contested, there is little point to invalidating that pleading for lack of a certificate of service because that invalidation would serve no purpose except to fruitlessly extend the litigation's length. Helgenberger v. Chung, 20 FSM R. 519, 522 (Pon. 2016).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

The Complaint was filed against the defendants on February 2, 2016 in the Pohnpei Supreme Court. The answer was due on February 17, 2016. Instead of filing an answer, on February 16, 2016, defendant filed a Petition for Removal to the FSM Supreme Court based on diversity of citizenship under Article XI, Section 6(b) of the FSM Constitution. The petition was timely pursuant to GCO 1992-2.

Thereafter, on February 26, 2016, plaintiff, appearing pro se, filed a Motion for an Entry of Default. The record indicates the clerk had not entered default to date. On March 21, 2016, defendants filed a Motion for Enlargement of Time and Opposition to Plaintiff's Motion for Entry of Default. On March 28, 2016, defendants filed their Answer and Affirmative Defenses. On April 1, 2016, plaintiff filed his Opposition to the Motion to Enlarge and a Motion to Strike. The court issued an order granting defendants' motion to enlarge time on April 8, 2016.

On April 12, 2016, plaintiff filed an Objection to Defendants' Mode of Service of Answer and Enlargement and for an Order to Strike. This motion is presently pending before the court.

Plaintiff contests defendants' mode of service of the Answer and Motion for an Enlargement of Time. In his motion, plaintiff states that "on or about April 5, 2016 [he] noticed defendants' unfiled copy of their answer in his inbox mail in his computer." Pl.'s Obj. to Def.'s Mode of Service of Answer and Enlargement and for an Order to Strike at 1. On this ground, plaintiff objects to defendants' service of their answer on the grounds that service was not made in compliance with FSM Civil Rule 5(a) and (b).

Defendants have not filed an opposition to the instant motion. Failure to oppose a motion is deemed consent to the motion. Clarence v. FSM Social Sec. Admin., 13 FSM Intrm. 34, 25 (Kos. 2004); Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 495 (Chk. 2004); Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 95 (Pon. 1995). Even without opposition, however, the court will not grant the motion unless it is well grounded in fact and law. Kyowa Shipping Co., 7 FSM Intrm. at 95.

FSM Civil Rule 5(a) requires that "every pleading, every paper relating to discovery, every written motion, notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties." FSM Civil Rule 5(b) states, in relevant part:

[S]ervice upon the attorney or trial counselor or upon a party shall be made by delivering

a copy to that person or by mailing it to that person's last known address or, if no address is known, by leaving it with the clerk of court. *Delivery of a copy within this rule means: handing it to the attorney, to the trial counsel or to the party; or leaving it at the person's office with the clerk or other person in charge thereof; or, if there is no one in charge, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.*

FSM Civ. R. 5(b) (emphasis added). FSM Civil Rule 5(d) further states that "[a]ll papers after the complaint required to be served upon a party shall be filed with the court, in duplicate, either before service or within a reasonable time thereafter and shall be accompanied by certificate of service of copies upon all other parties."

In this matter, the Answer and motion were both signed by defendants' attorney and contained a certificate of service, signed by the same attorney, stating as follows:

CERTIFICATE OF SERVICE

The undersigned certify that on 28 March 2016, I served a true and correct copy of the above Answer and Affirmative Defense on the following office:

Derrick Helgenberger
Acting Pro Se
Kolonia, Pohnpei FSM 96941

/s/
Marstella E. Jack

Plaintiff argues that the certificate of service failed to indicate the precise manner in which service was effected and that such omission is grounds for this court to invalidate the service of the Answer. The court acknowledges that this is poor practice, particularly in light of plaintiff Helgenberger's *pro se* status. Additionally, the court's calculation of the timeliness of responsive filings will often depend upon the manner of service.

However, plaintiff has made it clear that he was, in fact, served. The question then becomes whether the Answer, although filed with the court with a certificate of service purporting to show service on plaintiff, should be disregarded because of the inadequacy of the language in the certificate of service to show the exact manner in which service was accomplished.

The Court concludes that it should not. "The principal importance of the certificate of service is to provide the Court with clear proof that service has been accomplished." Ives v. Guilford Mills, Inc., 3 F. Supp. 2d 191, 195 (N.D.N.Y. 1998). The court takes note that the FSM Rules of Civil Procedure are silent as to what the certificate of service must state in particular, only that one must be filed with the court at the time of filing the relevant paper. FSM Civ. R. 5(d). Furthermore, this court "must rely on a certificate of service attached to a filing and presume that it is correct [which] may be rebutted by admissible evidence." Fan Kay Man, 12 FSM Intrm. at 495.

Plaintiff states that "[t]here is nothing in Rule 5(a) that purports to authorize service via computer or in a manner done or as provided by defendants' counsel in the instant case." Pl.'s Obj. to Def.'s Mode of Service of Answer and Enlargement and for an Order to Strike at 2. Plaintiff is correct that the rules do not authorize electronic service via e-mail.

Notwithstanding, plaintiff did in fact receive notice of the Answer as evidenced by plaintiff's instant motion to strike and has therefore not been prejudiced by any purported inadequate service. Kosrae v. Langu, 16 FSM Intrm. 83, 87 (App. 2008) (holding that a lack of a certificate of service for a notice of appeal does not require dismissal where appellee would not be prejudiced by the lack of a certificate of service, although lack of actual service could). Because the plaintiff does not dispute that he actually received defendants' Answer, has acknowledged its existence by filing the instant motion, and, in fact, quotes directly from the Answer in the instant motion, actual service has not been contested. "Where actual service is not contested, there is little point to invalidating an Amended Complaint for lack of a certificate" Ives, 3 F. Supp. 2d at 195. The same reasoning should apply here where "[i]nvalidation would seem to serve no purpose except to fruitlessly extend the length of this litigation." *Id.* Accordingly, defendants' Answer should be considered, despite their failure to comply with service requirements. See Russell v. City of Milwaukee, 338 F.3d 662, 666 (7th Cir. 2003) (the absence of a proper certificate of service does not require the invalidation of the pleading where service is not contested or service is actually accomplished).

ACCORDINGLY, because plaintiff received timely notice of defendants' Answer, plaintiff's motion to strike for inadequate service is DENIED. However, counsel for defendant is INSTRUCTED to file more accurate and descriptive certificates of service in future filings with this court.

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CHUUK STATE SUPREME COURT APPELLATE DIVISION

MINORU KAMA,)	CIVIL APPEAL NO. 02-2012
)	
Appellant,)	
)	
vs.)	
)	
CHUUK STATE,)	
)	
Appellee.)	
_____)	

OPINION

Argued: April 30, 2014
Submitted: July 17, 2014
Decided: July 12, 2016

BEFORE:

Hon. Keske S. Marar, Associate Justice, Presiding
Hon. Derensio S. Konman, Temporary Justice*
Hon. Brian Dickson, Temporary Justice*

*Attorney at Law, Weno, Chuuk