FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK, Plaintiff, vs. BERYSIN SALOMON and NANCY SALOMON, Defendants.	CIVIL ACTION NO. 2014-021 Consolidated with Civil Action No. 2014-023
BERYSIN SALOMON and NANCY SALOMON, Plaintiffs, vs. ANNA MENDIOLA, in her capacity as President and Chief Executive Officer of FSM Development Bank; BRANDON TARA, in his capacity as Chief Financial Officer of the FSM Development Bank; JOHN SOHL, in his official capacity as Chairman of the FSM Development Bank Board of Directors; and FSM DEVELOPMENT BANK, Defendants.	

ORDER DENYING MOTIONS

Ready E. Johnny
Associate Justice

Decided: August 15, 2016

APPEARANCES:

For the Plaintiff and Defendants: (Bank, Mendiola, Tara, & Sohl)
Nora E. Sigrah, Esq.
P.O. Box M
Kolonia, Pohnpei FM 96941

For the Defendants and Plaintiffs: (Salomons)
Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

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HEADNOTES

Courts – Recusal – Procedure

A court must decide a disqualification motion and give its reasons for its decision before it can rule on any other matter. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 569 (Pon. 2016).

Courts – Recusal – Judicial Statements or Rulings

Under controlling FSM case law, the disqualifying factors must stem from an extrajudicial source. Unfavorable or adverse rulings in a case, are not an extrajudicial source and are not a ground to reasonably question the judge's impartiality in that case. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 569-70 (Pon. 2016).

Courts – Recusal – Judicial Statements or Rulings

When none of the rulings about which the movants complain were based on or were the result of any extrajudicial source, knowledge, or factor, they cannot be a ground for disqualification. Litigation (and thus impartial judging) by its very nature, invites judicial rulings unfavorable to one party, or another, or both since it is in the very nature of our system of justice that judges must rule in favor of one party and against another. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 570 (Pon. 2016).

Courts – Recusal – Judicial Statements or Rulings

A judge's unfavorable rulings are not grounds for disqualification even if those rulings are believed to be erroneous, since the appellate division may later correct a judge's erroneous ruling. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 570 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

While the court would expect that if the grounds for certification of an interlocutory appeal existed, an aggrieved litigant seeking appellate review would move fairly promptly for certification, no rule requires that or sets a time limit for a motion to certify. While prejudice to the non-movants does not, by itself, make the motion untimely, it will be a factor to consider when determining whether a certification would materially advance the litigation's ultimate termination, and thus whether an order should be certified under Rule 5(a). FSM Dev. Bank v. Salomon, 20 FSM R. 565, 570-71 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

If a trial court order is certified, there is then a jurisdictional time limit of ten days within which the party seeking appellate review must file an application with the appellate division requesting permission to appeal. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 570 n.1 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

In order to certify an interlocutory trial court order as one from which a litigant may apply for permission to appeal, the trial court must be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 571 (Pon. 2016).

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

The court's power to dismiss, under Rule 12(b)(6) some of a plaintiff's claims (or to grant partial summary judgment, under Rule 56(c), when a Rule 12(b)(6) motion is converted to a summary judgment motion because matters outside the pleadings were considered), because, even when viewing the plaintiff's factual allegations in the light most favorable to the plaintiff, the complaint's factual allegations fail to state a claim on which relief can be granted, is too well established to merit discussion. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 571 & n.2 (Pon. 2016).

Civil Procedure – Consolidation

When the court has consolidated actions involving a common question of law or fact, it may use its power to make such orders concerning proceedings therein to rearrange parties, and thus their claims, where the consolidated cases had different, and adverse, plaintiffs. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 571 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

Certification must be denied when an immediate appeal from the interlocutory order would retard, rather than materially advance, the litigation's ultimate determination. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 571 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

When an interlocutory order does not contain controlling questions of law over which substantial grounds for exist for a difference of opinion and when an immediate appeal would not materially advance the litigation's ultimate termination, a motion to certify the order for a possible interlocutory appeal must be denied. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 572 (Pon. 2016).

Appellate Review – Decisions Reviewable – Collateral Orders; Appellate Review – Decisions Reviewable – Interlocutory

If an interlocutory order were a collateral order, a trial court certification would not be needed in order to appeal it. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 572 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory; Civil Procedure – Parties – Substitution of

Whether FSM Development Bank officials can be considered public officers for the purpose of Rule 25(d)(1) is neither a controlling issue of law nor a matter of first impression. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 572 (Pon. 2016).

Civil Procedure – Parties – Official Capacity; Civil Procedure – Parties – Substitution of

Since Rule 25(d)(1) makes the substitution of public officers automatic, it does not require a motion and the grant of the motion for the substitution to take effect. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016).

Civil Procedure – Parties – Official Capacity; Civil Procedure – Parties – Substitution of

A major reason for automatic substitution of public officers in their official capacity or, alternatively, for the use of the officer's official title rather than the officer's name, is that the holders of public office change frequently, and the substitution of one public officer for another would, at best, be a time-consuming formality. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 n.3 (Pon. 2016).

Civil Procedure – Parties – Official Capacity

No person can be sued in their "former official capacity." FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016).

Evidence

Counsel's representation does not constitute competent evidence. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016).

Civil Procedure – Depositions

Only in the rarest of cases would a party not be subject to a deposition at another party's request. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016).

Civil Procedure – Depositions

Age or ill health are grounds to take a deposition. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016).

Civil Procedure – Depositions; Evidence – Witnesses

By trying to take a party's deposition, the parties can reach an informed opinion about that party's competence to testify. Whether she is physically or mentally incapable of testifying is a factual, not a legal, question which can be resolved by taking her deposition. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

An order will not be certified when, even if it involved a controlling question of law, there is no substantial ground for a difference of opinion and when an immediate appeal of the issue would only retard, not materially advance this litigation's ultimate termination. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 574 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

Factual disputes are not appropriate for Appellate Rule 5(a) certification. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 574 (Pon. 2016).

Civil Procedure – Discovery

The general rule is that if a party has the documents sought, it is always preferable that those documents be obtained from the party rather than burden a nonparty. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 574 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory; Civil Procedure – Discovery

Since an order denying or granting discovery ordinarily does not present a controlling question of law so as to allow immediate appeal, it is thus a nonappealable interlocutory order reviewable only upon final judgment or order. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 574 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory

If the supposed controlling issue involves facts over which there is a substantial ground for difference, then Appellate Rule 5(a) cannot be used. Rule 5(a) appeals can be maintained only when it is the controlling question of law that is in dispute, not when the dispute is over factual matters. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 575 (Pon. 2016).

Attorney's Fees – Court-Awarded; Civil Procedure – Sanctions

The FSM Development Bank may recover an attorney's fee award under Rule 37. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 575 (Pon. 2016).

Attorney's Fees – Court-Awarded; Civil Procedure – Sanctions; Judgments

If, and when, a party is awarded its expenses under Rule 37, and if that party is not paid those expenses reasonably promptly, that expense award will, at final judgment, be deducted from any money judgment awarded to the opposing party or added to any money judgment awarded to the party. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 575 (Pon. 2016).

Appellate Review – Decisions Reviewable – Interlocutory; Civil Procedure – Sanctions

The appropriate time to seek appellate review of a Rule 37 expense award would be after final judgment. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 575 (Pon. 2016).

Civil Procedure – Discovery; Civil Procedure – Sanctions

If a party fails to obey an order to provide or permit discovery, the court may make such orders about that failure as are just, including an order striking out pleadings or parts thereof. Thus, if a party continues to disobey the court's order to provide discovery (including an order to appear at a deposition), the court unquestionably has the authority to strike out the parts of her joint pleadings that pertain to her. Her co-party's pleadings would remain. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 575 (Pon. 2016).

Civil Procedure – Default and Default Judgments

The entry of a co-party's default is not likely to alter the outcome of the plaintiff's case against the co-parties because when a default is entered against a party whose liability would be joint and several with a co-party, the court will generally not enter a default judgment against that party until the case against the co-party has been resolved and then a default judgment (or dismissal) consistent with the judgment against (or dismissal for) the joint and several co-party can be entered simultaneously. FSM Dev. Bank v. Salomon, 20 FSM R. 565, 575-76 (Pon. 2016).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on Berysin Salomon's and Nancy Salomon's 1) Motion to Disqualify, with supporting Affidavit of Counsel, filed June 9, 2016; 2) Motion to Certify August 31, 2015 Order for Interlocutory Appeal, filed June 9, 2016; 3) Motion to Certify May 25, 2016 Order for Interlocutory Appeal; Motion to Stay Proceeding Pending Disposition of Motion and Interlocutory Appeal, filed June 9, 2016; 4) Motion for Protective Order, filed June 10, 2016; and on 5) the FSM Development Bank's Opposition to Salomons' Second Motion to Disqualify Associate Justice Ready Johnny, filed June 17, 2016; 6) Opposition to Certify August 31, 2015 Order, filed June 17, 2016; 7) Opposition to Motion to Certify May 25, 2016 Order; Opposition to Motion to Stay Proceedings, filed June 17, 2016; 8) Opposition to Salomons' Motion for Protective Order, filed June 17, 2016; and 9) the bank's Notice of Salomons' Non-Compliance; Request for Entry of Sanctions, filed July 5, 2016. The Salomons' motions are denied. The court's reasons follow.

I. MOTION TO DISQUALIFY

As the Salomons correctly note, the court must decide a disqualification motion and give its reasons for its decision before it can rule on any other matter. Ting Hong Oceanic Enterprises v. Trial Division, 7 FSM R. 642, 643 (App. 1996). The motion to disqualify is therefore considered first.

Berysin and Nancy Salomon ("the Salomons") move to disqualify me, the undersigned justice, from presiding on this case because, in their view, my impartiality might reasonably be questioned. They base this view, supported by their attorney's affidavit, on their characterization of various rulings I have made in this case. The Salomons assert that since those rulings were unfavorable to them and since, in their view, those rulings may portend future unfavorable rulings or a future unfavorable final disposition of the case, that I obviously must be biased against them and that I must therefore be disqualified.

Under 4 F.S.M.C. 124(1), an FSM Supreme court justice must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Under controlling FSM case law, the disqualifying factors must stem from an extrajudicial source. Halbert v. Manmaw, 20 FSM R. 245,

250 (App. 2015); Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 195 (App. 2013); Hartman v. Bank of Guam, 10 FSM R. 89, 96 (App. 2001); In re Main, 4 FSM R. 255, 260 (App. 1990). Unfavorable or adverse rulings in a case, are not an extrajudicial source and are not a ground to reasonably question the judge's impartiality in that case. Halbert, 20 FSM R. at 250; George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015); FSM v. Wainit, 13 FSM R. 293, 295 (Chk. 2005); FSM v. Wainit, 11 FSM R. 424, 431 (Chk. 2003); FSM v. Ting Hong Oceanic Enterprises, 7 FSM R. 644, 649 (Pon. 1996); FSM v. Skilling, 1 FSM R. 464, 473, 484 (Kos. 1984).

Since none of the rulings about which the Salomons complain were based on or were the result of any extrajudicial source, knowledge, or factor, they cannot be a ground for disqualification. Litigation (and thus impartial judging) by its very nature, invites judicial rulings adverse or unfavorable to one party, or another, or both. "[I]t is in the very nature of our system of justice that judges must rule in favor of one party and against another." FSM v. Halbert, 20 FSM R. 49, 52 (Pon. 2015). A judge's unfavorable rulings are thus not grounds for disqualification even if those rulings are believed to be erroneous, since the appellate division may later correct a judge's erroneous ruling.

Thus, the Salomons' second motion to disqualify me is hereby denied.

II. Motions to Certify

A. *August 31, 2015 Order*

The Salomons move the court to amend its August 31, 2015 Order Partially Dismissing Claims, Salomon v. Mendiola, 20 FSM R. 138 (Pon. 2015), to add language that would permit them to seek permission from the appellate division to hear an interlocutory appeal of that order. They acknowledge that they make this motion because the appellate division has dismissed, for lack of subject-matter jurisdiction, their first attempt to appeal the August 31, 2015 order. Salomon v. Mendiola, 20 FSM R. 357, 361 (App. 2016) (since appeal was not from a final order or judgment; no jurisdiction). Accordingly, they now ask the trial court to certify its August 31, 2015 order so that they may apply to the appellate division for permission to pursue an interlocutory appeal under FSM Appellate Rule 5(a).

1. *Timeliness*

The bank contends that this motion is untimely because it was made over nine months after the order was entered and two months after the dismissal of their first attempt to pursue an interlocutory appeal. The bank also asserts that a motion to certify a trial court order so that a party may seek permission for an interlocutory appeal, must be made promptly after entry of that order. The bank further contends that since the Salomons could have moved for certification back in September 2015, but choose not to, the bank is now prejudiced because it has proceeded with its discovery requests and pretrial motions and, at this late stage of pretrial proceedings, the remaining discovery, including the Salomons' depositions, should be concluded shortly.

While the court would expect that if the grounds for certification existed, an aggrieved litigant seeking appellate review would move fairly promptly for certification, no rule requires that or sets a time limit for a motion to certify.[1] The motion cannot be denied solely as untimely. Prejudice to the non-movants does not, by itself, make the motion untimely, although it will be a factor to consider when

[1] If a trial court order is certified, there is then a jurisdictional time limit of ten days within which the party seeking appellate review must file an application with the appellate division requesting permission to appeal. FSM App. R. 5(a); *cf. In re* Estate of Hartman, 7 FSM R. 409, 410 (Chk. 1996).

determining whether a certification would materially advance the litigation's ultimate termination, and thus whether an order should be certified under Rule 5(a).

2. *Whether the August 31, 2015 Order Can Be Certified*

In order to certify an interlocutory trial court order as one from which a litigant may apply for permission to appeal, the trial court must "be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." FSM App. R. 5(a).

The Salomons contend that the August 31, 2015 order involves controlling questions of law and that substantial grounds exist for difference of opinion. They assert that 1) whether the court could, under Rule 12(b)(6), dismiss four causes of action in their well-pleaded complaint and 2) whether the court can "convert" the remaining causes of action into affirmative defenses, are controlling issues of law about which there is a substantial ground for difference of opinion.

The court must reject these assertions. The court's power to dismiss, under Rule 12(b)(6),[2] some of a plaintiff's claims because, even when viewing the plaintiff's factual allegations in the light most favorable to the plaintiff, the complaint's factual allegations fail to state a claim on which relief can be granted, is too well established to merit discussion. No reasonable grounds for a difference of opinion can exist on this point. It is further undisputed that once a final judgment has been entered, an aggrieved litigant may, raise as an issue in any timely appeal, whether the partial Rule 12(b)(6) dismissal was proper.

The Salomons also contend that no rule or authority permits the court to "convert" their claims into affirmative defenses in this now consolidated case. First, the court must reject the Salomons' characterization of its order. Once some of the Salomons' claims were dismissed for the failure to state a claim, FSM Civ. R. 12(b)(6), the rest were deemed either counterclaims [compulsory under Rule 13(a)] or affirmative defenses, depending on the nature of the claim. Salomon v. Mendiola, 20 FSM R. 138, 142 (Pon. 2015).

The court's authority to manage its caseload for procedural efficiency is unquestioned. Under Civil Procedure Rule 42(a):

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

This power to "make such orders concerning proceedings therein" has been used, routinely and without controversy, to rearrange parties, and thus their claims, in consolidated cases when, as here, the consolidated cases had different, and adverse, plaintiffs. *See, e.g.*, Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 102, 107 (Pon. 2010), *aff'd*, 17 FSM R. 427, 431-32 (App. 2011).

Furthermore, certification must be denied when an immediate appeal from the order would retard, rather than materially advance, the litigation's ultimate determination. Lonno v. Trust Territory (II), 1

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[2] Or to grant partial summary judgment, under Rule 56(c), when a Rule 12(b)(6) motion is converted to a summary judgment motion because matters outside the pleadings were considered.

FSM R. 75, 78 (Kos. 1982). That is the case here. The delay caused by certifying the August 31, 2015 order to permit an application for an interlocutory appeal, would only retard, rather than materially advance, this litigation's ultimate termination.

Accordingly, since the August 31, 2015 order does not contain controlling questions of law over which substantial grounds for exist for a difference of opinion and since an immediate appeal would not materially advance the litigation's ultimate termination, this motion must be denied.

3. *Collateral Order Doctrine*

The Salomons also contend that, because, in their view, the August 31, 2015 order is a collateral order, its partial dismissal of their claims will not be reviewable on any appeal from a final judgment in this case and can only be reviewed if an immediate appeal is taken. The appellate division has already explicitly rejected the argument that the August 31, 2015 order is reviewable under the collateral order doctrine. Salomon v. Mendiola, 20 FSM R. 357, 361 (App. 2016) (the partial dismissal "would not preclude [the Salomons] from lodging an appeal once a final decision is entered"). The August 31, 2015 order is not a collateral order. If it were a collateral order, the Salomons would not need a trial court certification in order to appeal it.

B. *May 25, 2016 Order*

The Salomons also move the court to amend its May 25, 2016 Order Imposing Sanctions, Compelling Responses, and Substituting Party, FSM Dev. Bank v. Salomon, 20 FSM R. 431 (Pon. 2016), to add language that would permit them to apply to the appellate division for permission to pursue an interlocutory appeal of that order. The Salomons contend that the May 25, 2016 order involves controlling questions of law and that substantial grounds exist for difference of opinion. They assert that: 1) whether the bank's Chief Financial Officer qualifies for substitution as a public officer under FSM Civil Procedure Rule 25(d)(1); 2) whether a party's medication renders her incompetent to testify; 3) whether the bank's request for twelve years of financial records exceeds the scope of discovery; 4) whether the bank is entitled to expenses for its motion to compel; and 5) whether a default can be entered against only one of the Salomons when they filed their pleadings jointly, are all controlling questions of law about which substantial grounds exist for difference of opinion and that an immediate appeal of these questions would materially advance the litigation's ultimate termination. They also contend that these are matters of first impression in the FSM.

1. *Substitution of Tara for Lawrence*

The Salomons contend that the bank's chief financial officer does not qualify for substitution as a public officer under FSM Civil Procedure Rule 25(d)(1), and therefore the bank's motion to substitute its current chief financial officer for its former chief financial officer involved a controlling issue of law; the issue being whether bank officials can be considered public officers for the purpose of Rule 25(d)(1).

This is not a controlling issue of law, and it is also hardly a matter of first impression. Furthermore, the Salomons have not shown that the substitution of the bank's current chief financial officer for its former chief financial officer could possibly change the relief they might be able to obtain against the bank's chief financial officer in that officer's capacity as a bank official.

There is no substantial ground for a difference of opinion on whether Civil Procedure Rule 25(d)(1) would apply. The appellate division has held, on several occasions, that the FSM Development Bank is an instrumentality of the national government. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 514-

16 (App. 2016); FSM Dev. Bank v. Edmond, 19 FSM R. 425, 433 (App. 2014); Helgenberger v. FSM Dev. Bank, 18 FSM Intrm. 498, 500 (App. 2013). And since the rule makes the substitution of public officers automatic, it does not even require a motion and the grant of the motion for the substitution to take effect.[3] Lastly, since no person can be sued in their "former official capacity," Herman v. Bisalen, 16 FSM R. 293, 296 (Chk. 2009), Lawrence could not remain in this lawsuit as a party in her capacity as the bank's former chief financial officer.

2. *Nancy Salomon's Deposition*

The Salomons contend that Nancy Salomon has been so impaired by heavy medication and illness that she is not competent to testify and that therefore the court's order that the bank could take her deposition is a controlling question of law. They assert that this is evident because one of the usual preliminary questions in any depositions is whether the deponent is taking any medications that might impair the deponent's ability to respond truthfully and accurately during the deposition.

There is, however, no competent evidence before the court that Nancy Salomon is physically or mentally incapable of being deposed. There is only counsel's representation that she cannot be deposed because of her heavy medication and her illness. Counsel's representation does not constitute competent evidence. Actouka Executive Ins. Underwriters v. Simina, 15 FSM R. 642, 653 (Pon. 2008).

The Salomons mischaracterize the actual question of law here or they badly misunderstand the court's ruling. Nancy Salomon is a party. A party must expect to be deposed by another party at that other party's request. It is not a question of law about which there is any serious difference of opinion since the appellate division has definitively ruled that only in the rarest of cases would a party not be subject to a deposition at another party's request. FSM Dev. Bank v. Adams, 14 FSM R. 234, 254 (App. 2006). And the appellate division has also clearly stated that, instead of being a reason not to depose someone, age or ill health are a ground to take a deposition. *Id.*

Furthermore, the court's order requires the parties "to make such arrangements as may be needed to accommodate a deponent's medical condition." Salomon, 20 FSM R. at 438. That a usual preliminary question at a deposition is about the medications the deponent is taking and whether it might affect the deposition, is a further ground to compel the deposition. By trying to take her deposition, the parties can reach an informed opinion about Nancy Salomon's competence to testify. Whether Nancy Salomon is physically or mentally incapable of testifying is a factual, not a legal, question which can be resolved by taking her deposition.

Now, it may be that once the bank takes Nancy Salomon's deposition, it will agree that she is not mentally competent or physically able to testify. Or it may be that, even after the deposition is taken, the parties disagree about Nancy Salomon's competence or ability to testify. If that is so, and if the bank then seeks to use her deposition at trial in this matter, the court will hold a competency hearing before trial to determine whether Nancy Salomon was competent at the time her deposition was taken.

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[3] "When a public officer is a party to an action in an official capacity and during its pendency . . . ceases to hold office . . . the officer's successor is automatically substituted as a party." FSM Civ. R. 25(d)(1). A major reason for automatic substitution of public officers in their official capacity, *id.*, or, alternatively, for the use of the officer's official title rather than the officer's name, FSM Civ. R. 25(d)(2), is that the holders of public office change frequently, and the substitution of one public officer for another would, at best, be a time-consuming formality.

Thus, even if this were a controlling question of law, there is, in light of the appellate division's clear statements, no substantial ground for a difference of opinion. Lastly, all of the Salomons' arguments combined afford no basis whatsoever to justify Berysin Salomon's failure to appear for his own deposition. The court can only conclude that an immediate appeal of this issue would only retard, not materially advance this litigation's ultimate termination. Only compliance with the bank's deposition requests will materially advance this litigation's ultimate termination.

3. *Discovery of Twelve Years of Records*

The Salomons contend that a controlling question of law is involved because the bank's request for documents of their financial and income records, including patient names, for a period of twelve years exceeded the scope of discovery permitted by Civil Procedure Rule 26(b). They also contend that this is a controlling question of law because some of the documents fall under the doctor-patient privilege and because the bank could obtain the financial records sought (gross revenue tax returns, social security tax returns, and MiCare insurance payments) from those government agencies instead of from the Salomons. The Salomons further assert that Berysin Salomon responded fully to the discovery requests and was thus under no duty to supplement them.

This last assertion is a falsehood. The court found that Berysin Salomon failed to respond fully to the bank's interrogatories and therefore was under a duty to supplement them. Salomon, 20 FSM R. at 440-41, 443. The Salomons now dispute this factual finding, but factual disputes are not appropriate for Rule 5(a) certification. It is also clear that the Salomons want to reargue their response to the bank's motion to compel, which was granted only in part, since they do not address the court's actual May 25, 2016 order. They ignore what the court actually ordered and instead repeat their earlier arguments against the bank's motion, as if court adopted the bank's requests unmodified.

The court order specifically allowed the Salomons to redact any privileged patient information and specifically stated that patient names need not be provided. *Id.* at 442. Because of the extensive nature of the bank's request, the court order permitted the Salomons to, instead of providing the bank document copies, provide the bank with a compilation, abstract, or summary their extensive business records, *id.* at 441, or to produce those records for the bank's inspection, *id.* at 442. The Salomons ignore these aspects of the May 25, 2016 order. They also continue to maintain that they should not have to provide the discovery the discovery the bank has requested of them at all since, in their view, the bank should, or must, instead obtain the documents from FSM Custom and Tax, FSM Social Security Administration, and MiCare Health Insurance, none of whom are parties to this action, and that the bank not bother the Salomons for these requests. The general rule is that if a party has the documents sought, it is always preferable that those documents be obtained from the party rather than burden a nonparty. *Id.* at 441-42. The Salomons do not assert that they do not have the documents sought.

Thus, an immediate appeal of the court's order granting discovery would not materially advance this action's ultimate termination but would instead only delay the production of discovery and thus the case's ultimate termination. Furthermore, "an order denying or granting discovery ordinarily does not present a controlling question of law so as to allow immediate appeal and is thus a nonappealable interlocutory order which is reviewable only upon final judgment or order." Amayo v. MJ Co., 13 FSM R. 259, 263 (Pon. 2005). These issues are not a ground to certify the May 25, 2016 order for possible interlocutory appeal.

4. *Award of Motion Expenses*

The Salomons contend that the award of expenses, which they contend the bank did not incur,

because the bank successfully brought a motion to compel discovery "involves a controlling question of law and facts which there is substantial ground for difference of opinion and that an immediate appeal is necessary." Mot. to Certify May 25, 2016 Order for Interlocutory Appeal at 7. The Salomons also contend that what prevented the depositions was Nancy Salomon's health condition and medical treatment, including off-island treatment. The bank counters that four out of six times when depositions were scheduled but not taken, it was due to travel by the Salomons' attorney or other excuses and not Nancy Salomon's medical condition.

If the supposed controlling issue involves facts over which there is a substantial ground for difference, then Appellate Rule 5(a) cannot be used. Rule 5(a) appeals can be maintained only when it is the controlling question of law that is in dispute, not when the dispute is, as here, over factual matters, in this instance, whether the bank incurred any expenses and the reasons depositions could not be taken. Factual disputes are never appropriate for Rule 5(a) certification. The order certified must have a controlling question of law for the appellate court to decide.

It is also not a matter of first impression that the bank may recover an attorney's fee award under Rule 37 because that issue was squarely addressed in FSM Development Bank v. Kaminanga, 12 FSM R. 454, 455-56 (Chk. 2004). If, and when, the bank is awarded its expenses, and if the bank is not paid those expenses reasonably promptly, that expense award will, at final judgment, be deducted from any money judgment awarded to the Salomons or added to any money judgment awarded to the bank. Adams v. Island Homes Constr., Inc., 14 FSM R. 473, 475 (Pon. 2006) (once final judgment has been entered, any unpaid Rule 37 sanctions previously imposed should be considered costs); *see also* Berman v. Rosario, 15 FSM R. 429, 431 (Pon. 2007) (discovery sanction will be incorporated into the final judgment as a matter of course). Thus, the appropriate time to seek appellate review of a Rule 37 expense award would be after final judgment.

5. *Entry of a Default Against Only One Co-Party*

The Salomons contend that the May 25, 2016 order must involve a controlling question of law because Rule 12(f) motions to strike pleadings are viewed with disfavor and rarely granted and then only for such things as insufficient defenses, redundant, immaterial, impertinent, or scandalous matters, none of which apply here.

The Salomons misunderstand the nature both of the court's May 25, 2016 order and the motion it was deciding. The bank's motion, and the court's ruling, had absolutely nothing to do with Rule 12(f). The motion and order were based on Rule 37. Furthermore, the order did not, at that time, strike any pleadings. But it did provide that pleadings would be stricken if the Salomons again failed to obey a court order to provide or permit discovery.

This is a power the court clearly has. "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) An order striking out pleadings or parts thereof . . . ." FSM Civ. R. 37(b)(2). Thus, if Nancy Salomon continues to disobey the court's order to provide discovery (including the order to appear at a deposition), the court unquestionably has the authority to strike out the parts of the Salomons' pleadings that pertain to her. Those pleadings have not yet been stricken, although they will likely be if the Salomons do not comply with the court's May 25, 2016 order as extended herein.

Even then Berysin Salomon's pleadings would remain. The entry of Nancy Salomon's default is not likely to alter the outcome of the bank's case against the Salomons, and thus cannot be a controlling question of law. That is because when a default is entered against a party whose liability

would be joint and several with a co-party, the court will generally not enter a default judgment against that party until the case against the co-party has been resolved and then a default judgment (or dismissal) consistent with the judgment against (or dismissal for) the joint and several co-party can be entered simultaneously. Damarlane v. Damarlane, 19 FSM R. 97, 110 (App. 2013); People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM R. 412, 417 (Yap 2012).

6. *Future Proceedings*

Having failed to identify any controlling issues of law that could be the subject of an Appellate Rule 5(a) appeal, the Salomons cannot prevail on this motion. But because the Salomons may have believed that their June 9, 2016 motions had merit, the court will extend the deadline for the Salomons to have their depositions taken. The depositions of Berysin Salomon and Nancy Salomon shall be taken by September 23, 2016. Berysin Salomon shall, as previously directed in the May 25, 2016 order, also supplement his discovery responses by September 23, 2016.

III. Motion to Stay

The Salomons also move that further proceedings in the matter be stayed until their interlocutory appeals have been decided. Since the court, by this order, denies certification of the orders for potential interlocutory appeal(s), this motion is moot. It is therefore denied.

IV. Motion for Protective Order

The Salomons also move for a protective order so that they do not have to submit to the bank's discovery requests while their motions to certify the court's August 31, 2015 and May 25, 2016 orders for possible interlocutory appeals are pending. Since those motions are denied by this order, this motion is moot.

V. Conclusion

Accordingly, the Salomons' second motion to disqualify is denied, as are their motions to certify for possible appeal the court's August 31, 2015 and May 25, 2016 orders. These denials make the Salomons' motions for a stay and for a protective order moot. The deadline for the Salomons' depositions to be taken and for Berysin Salomon to supplement his discovery responses is extended to September 23, 2016.

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