

It is a long-standing principle that a state law vesting exclusive jurisdiction in a state court cannot divest the FSM Supreme Court of jurisdiction over a matter it would otherwise have jurisdiction, as mandated by the FSM Constitution. Gimnang v. Yap, 5 FSM R. 13, 23 (App. 1991). Since, as determined in previous court orders, see above at page 611, and as affirmed by the appellate division, Ehsa v. FSM Dev. Bank, 20 FSM R. 498 (App. 2016), the court otherwise has jurisdiction over this case, Pohnpei State Law No. 3L-99-95, § 11-26 (58 Pon. C. § 8-125) cannot divest the FSM Supreme Court of jurisdiction.

5. *Pohnpei Constitution Article 12, Section 5*

Ehsa also contends that Pohnpei Constitution Article 12, Section 5 bars the transfer of title because that section provides that "[n]o land shall be sold, except as authorized by statute."

As noted above, a statute, 6 F.S.M.C. 1410(2) provides for the sale of a judgment debtor's particular non-exempt assets with the net proceeds to be paid to the judgment creditor. Such an order may be made only after a hearing on a motion for an order in aid of judgment. 6 F.S.M.C. 1409. Such a hearing was held. Timakyo Ehsa appeared at that hearing and agreed to Parcel No. 055-D-14's sale. The court then issued an order in aid of judgment that contained an order of sale for that parcel.

None of Ehsa's grounds being meritorious, NOW THEREFORE IT IS HEREBY ORDERED that the plaintiff's Motion for an Order Transferring Title is granted. That order shall issue herewith.

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FSM SUPREME COURT TRIAL DIVISION

ROSA RODRIGUEZ JACOB,)	CIVIL ACTION NO. 2011-040
)	
Plaintiff,)	
)	
vs.)	
)	
NICKONTRO W. JOHNNY, in his capacity as)	
Associate Justice in the Pohnpei Supreme Court,)	
Pohnpei State Police Department Director LUCAS)	
CARLOS, in his official capacity, and Pohnpei)	
Supreme Court Chief Clerk LEON FELIX,)	
individually and in his official capacity,)	
)	
Defendants.)	
)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Aliksa B. Aliksa
Specially Assigned Justice

Decided: September 16, 2016

APPEARANCES:

For the Plaintiff: Salomon M. Saimon, Esq.
Directing Attorney
Micronesia Legal Services Corporation
P.O. Box 129
Kolonja, Pohnpei FM 96941

For the Defendant: Judah C. Johnny
(Carlos) Attorney General
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Kolonja, Pohnpei FM 96941

* * * *

HEADNOTES

Attorney and Client – Disqualification of Counsel

Under Model Rule of Professional Conduct 1.11, a lawyer must not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. Jacob v. Johnny, 20 FSM R. 612, 615 (Pon. 2016).

Attorney and Client – Disqualification of Counsel

To be disqualified, a former government lawyer's participation must have been personal and substantial. "Indirectly involved" is not equivalent to "participated personally and substantially." Jacob v. Johnny, 20 FSM R. 612, 615 (Pon. 2016).

Attorney and Client – Disqualification of Counsel

A former government lawyer may represent a private party when the appropriate government agency has consented during a hearing. Jacob v. Johnny, 20 FSM R. 612, 615 (Pon. 2016).

Civil Procedure – Summary Judgment – Grounds

A court, viewing the facts and inferences therefrom in the light most favorable to the nonmoving party, must grant summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue about any material fact and that the moving party is entitled to a judgment as a matter of law. Jacob v. Johnny, 20 FSM R. 612, 616-17 (Pon. 2016).

Torts – Immunity

"Facially valid" does not mean "lawful." An erroneous court order or a court order that is infirm or unlawful can be a facially valid order. Jacob v. Johnny, 20 FSM R. 612, 617 (Pon. 2016).

Civil Rights

Since the FSM civil rights statute was patterned after U.S. civil rights statutes, the FSM Supreme Court may consider U.S. jurisprudence under 42 U.S.C. § 1983 and § 1988 to help determine the intended meaning of 11 F.S.M.C. 701(3) and governmental liability thereunder. Jacob v. Johnny, 20 FSM R. 612, 617 n.3 (Pon. 2016).

Torts – Immunity

An official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit challenging conduct prescribed by that order. Because controversies sufficiently intense to erupt in litigation are not easily capped by judicial decree, the common law provided absolute immunity from subsequent damages liability for all persons – governmental or otherwise – who were integral parts of the judicial process. Jacob v. Johnny, 20 FSM R. 612, 617-18 (Pon. 2016).

Torts – Immunity

Absolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform without the need to secure permanent legal counsel. Non-judicial officers whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct since it would be unfair to spare the judges who give orders while punishing the officers who obey them. Jacob v. Johnny, 20 FSM R. 612, 618 (Pon. 2016).

Torts – Immunity

Tension between trial judges and those officials responsible for enforcing their orders would inevitably result were there not absolute immunity for both. If law enforcement officials assigned to carry out a judge's orders were not absolutely immune, they would then, for their own protection, need to scrutinize every court order and investigate its background before deciding whether to try to enforce it. The judicial system cannot function that way. Jacob v. Johnny, 20 FSM R. 612, 618 (Pon. 2016).

Torts – Immunity

Enforcement officials must not be required to act as pseudo-appellate courts scrutinizing judges' orders. The public interest demands strict adherence to judicial decrees, and absolute immunity will ensure the public's trust and confidence in courts' ability to completely, effectively and finally adjudicate the controversies before them. Jacob v. Johnny, 20 FSM R. 612, 618 (Pon. 2016).

Torts – Immunity

An official who is absolutely immune for a person's arrest and for her confinement to jail because those were acts prescribed by a judge's facially valid order, only has qualified immunity from civil liability arising from the conditions under which that person was held in jail. This is because absolute immunity extends only to acts prescribed by the judge's order, and the judge's order did not prescribe the person's treatment in jail. It only prescribed her arrest and confinement. Jacob v. Johnny, 20 FSM R. 612, 618 (Pon. 2016).

Civil Procedure – Summary Judgment – Procedure

To overcome a *prima facie* case of entitlement to summary judgment, the non-moving party cannot rely on mere allegations or denials in her pleading or unsubstantiated denials to carry her burden, but must present some competent evidence by affidavits or as otherwise provided in Rule 56, that would be admissible at trial set forth specific facts showing that there is a genuine issue of fact. If she does not so respond, summary judgment, if appropriate, will be entered against her. Jacob v. Johnny, 20 FSM R. 612, 618-19 (Pon. 2016).

* * * *

COURT'S OPINION

ALIKSA B. ALIKSA, Specially Assigned Justice:

On May 3, 2016, this came before the court for a status conference and to consider pending

matters. The first matter before the court was the Notice of Appearance; Motion to Permit Appearance as No Conflict of Interest, filed by Salomon Saimon of Micronesian Legal Services Corporation shortly before the May 3, 2016 hearing. Also pending was an unopposed Motion for Summary Judgment, or in the Alternative for Partial Summary Judgment, filed, with supporting affidavits and exhibits, by defendant Lucas Carlos on April 5, 2013.

I. PLAINTIFF'S PRELIMINARY MATTER

Saimon sought to appear as plaintiff Rosa Rodriguez Jacob's new counsel even though the Pohnpei Supreme Court appellate division had disqualified him from representing her in a related case because of his prior employment in the Pohnpei Attorney General's Office. The Pohnpei Supreme Court appellate division held that "[d]uring the original case, Mr. Saimon was employed as an Assistant Attorney General and was indirectly involved in the case against [Jacob]." Jacob v. Johnny, Order Disqualifying Attorney at 1, App. No. 11-11 (Sept. 16, 2011) (petition for writ of prohibition). Saimon avers that this is factually incorrect because he worked for the Pohnpei Attorney General's Office from 2004 to 2008, and had not been employed there for some time when, based on events that occurred in June, July, and August 2011, this case and the application for a writ of prohibition in the Pohnpei Supreme Court appellate division were both filed.

Under Model Rule of Professional Conduct 1.11, "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation." FSM MRPC R. 1.11(a). The Pohnpei appellate division concluded that, during some earlier case, Saimon was "indirectly involved." To be disqualified, a former government lawyer's participation must have been personal and substantial. "Indirectly involved" is not equivalent to "participated personally and substantially." *Cf. Park-N-Shop, Ltd. v. City of Highwood*, 864 F. Supp. 82, 83 (N.D. Ill. 1994) (attorney's participation that was, "at best, tangential," is not personal and substantial); Security Gen. Life Ins. Co. v. Superior Court, 718 P.2d 985, 987 (Ariz. 1986) (Rule 1.11 requires disqualification only when former official was personally involved in the same matter or litigation to a material degree in the investigative or deliberative process).

During the May 3, 2016 hearing, the Pohnpei Attorney General's Office indicated that it did not object to Saimon representing Jacob. The appropriate government agency, the Pohnpei Attorney General's Office, having consented, the court accordingly, by written order, permitted Micronesian Legal Services Corporation to represent Jacob and Saimon to appear for her.

II. SUMMARY JUDGMENT MOTION

In that same order, the court also gave Jacob's new counsel (Saimon) until May 12, 2016, to file a written opposition to the motion because it seemed unlikely that Jacob's prior counsel had ever received Carlos's summary judgment motion. Jacob filed her opposition on May 12, 2016. Carlos, or rather his successor as Pohnpei Director of Public Safety,¹ did not file a reply. The matter was then considered submitted to the court for its decision.

¹ Carlos is no longer the Director of Public Safety, which means that his successor in that office has automatically been substituted for him. FSM Civ. R. 25(d)(1). Jacob sued Carlos in both his official and individual capacities, but the claims against Carlos in his individual capacity were earlier dismissed, leaving only the claims against him in his official capacity. Jacob v. Johnny, 18 FSM R. 226, 232 (Pon. 2012).

A. Background

As the court earlier stated,

Jacob alleges that her uncle, Patricio Rodriguez, transferred to her a Kolonia Town residential leasehold, Lot No. 017-A-47, on which she made improvements; that she recorded the transfer; and that after her uncle's death the Board of Trustees, without notice or hearing, changed the lease to another person. She then filed suit, docketed as PCA No. 215-2005, in Pohnpei Supreme Court, naming that other person and the Board of Trustees as defendants. That suit was eventually assigned to Justice Mayceleen JD Anson who, on January 5, 2011, dismissed it without prejudice.

Jacob v. Johnny, 18 FSM R. 226, 229 (Pon. 2012). On June 16, 2011, Pohnpei Supreme Court Associate Justice Nickontro W. Johnny issued an order in Pohnpei Civil Action No. 215-2005, evicting Jacob from parcel No. 017-A-47 and giving her 30 days to remove herself and her property from that land. Jacob alleges that this eviction order was never served on her.

On July 28, 2011, Justice Johnny issued a further order that convicted Jacob of contempt, sentenced her to 60 days in jail, suspended that sentence if she voluntarily removed herself from the land, and authorized the Pohnpei State Police to arrest her and confine her if she did not comply with the June 16, 2011 eviction order. Jacob alleges that this order and contempt conviction was issued without notice or hearing.

Director Carlos received that order, reviewed it, and passed it on to the Pohnpei Chief of Police to take action. Carlos, with twenty years in law enforcement, did not notice anything irregular or questionable about the order.² Based on that order, Jacob was arrested at the Pohnpei police station on the afternoon of August 1, 2011, and confined in the Pohnpei state jail, arriving there about 4:36 pm. She was not given supper there because, according to the Pohnpei jail confinement report, Jacob arrived after supper had been served. Jacob was allowed to call her lawyer, was given multiple bathroom breaks due to her diarrhea, and was given drinking water. Jacob declined breakfast when it was offered the next morning. She was then taken to court and released at 11:00 am, on August 2, 2011.

Jacob then filed a second Pohnpei Supreme Court suit, docketed as PCA No. 174-11, seeking to re-establish her rights to the Lot No. 017-A-47 leasehold. Justice Johnny sua sponte and without hearing, notice, or a pleading or a motion being filed by the defendant, dismissed this suit nine days after it was filed. Eight days later, Jacob moved to set aside that dismissal. Her motion was, without hearing, notice, or an opposition being filed by the defendant, denied four days later. . . .

Jacob, 18 FSM R. at 229. Jacob then filed this lawsuit was on December 19, 2011.

B. The Motion

Carlos moves for summary judgment on the claims against him. A court, viewing the facts and

² The only thing obviously out of place in the order is that the order states that Jacob failed to "comply with the order issued July 16, 2011" and later concludes that "[t]he Police should further execute the eviction order dated June 16, 2011 accordingly." The date discrepancy (June/July), if noticed, would likely have been presumed by Carlos (as it is by the court) to be a typographical error.

inferences therefrom in the light most favorable to the nonmoving party, must grant summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue about any material fact and that the moving party is entitled to a judgment as a matter of law. George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014).

Carlos contends that he should be immune from civil liability because he was enforcing a facially valid Pohnpei Supreme Court order. His summary judgment motion is supported by his affidavit, the arresting officer's affidavit, the affidavits of various jail personnel, authenticated copies of Pohnpei jail confinement records, and certified copies of Justice Johnny's June 16, 2011 and July 28, 2011 court orders.

Jacob, in opposition, asserts that Carlos's motion shows that there are triable issues of fact present. She argues that his filings show that Pohnpei Assistant Attorney General Ira Shifflet was present throughout the proceedings that ended with the July 28, 2011 jailing order and that that same branch of the Pohnpei state government was aware that PCA No. 215-2005 had been assigned to a judge other than Justice Johnny and had already been dismissed by that judge before Justice Johnny started issuing (what Jacob calls) invalid or unlawful orders in it. Jacob contends that therefore "Pohnpei Government enforced a commitment order that its lawyers knew was invalid." Opp'n to Summ. J. at 3. She concludes that, as all the defendants in their official capacities are state actors, their actions must constitute a violation of 11 F.S.M.C. 701(3).

C. Analysis

Jacob's claims against Carlos are limited to her arrest and her confinement in Pohnpei jail, both of which Jacob contends were unlawful. She sets forth her claims against Carlos in her third cause of action, a claim for deprivation of her civil rights and right to due process.

The court, having reviewed the July 28, 2011 order, concludes that Public Safety Director Carlos was presented with a facially valid court order, which commanded Jacob's arrest if she did not vacate Lot No. 017-A-047. Jacob does not contend that the July 28, 2011 order was not facially valid. She asserts that it was an unlawful order and that the Pohnpei Attorney General's Office knew it was an unlawful or invalid order based on an unlawful June 16, 2011 order.

"'Facially valid' does not mean 'lawful.'" Turney v. O'Toole, 898 F.2d 1470, 1473 (10th Cir. 1990).³ An erroneous court order or a court order that is infirm or unlawful can be facially valid. *Id.*

"[A]n official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit challenging conduct prescribed by that order." Valdez v. City & County of Denver, 878 F.2d 1285, 1286 (10th Cir. 1989). Because "'controversies sufficiently intense to erupt in litigation are not easily capped by judicial decree' . . . the common law provided absolute immunity from subsequent damages liability for all persons-governmental or otherwise-who

³ Since the FSM civil rights statute was patterned after U.S. civil rights statutes, the FSM Supreme Court may consider U.S. jurisprudence under 42 U.S.C. § 1983 and § 1988 to help determine the intended meaning of 11 F.S.M.C. 701(3) and governmental liability thereunder. Poll v. Victor, 18 FSM R. 402, 404 (Pon. 2012); Kaminanga v. Chuuk, 18 FSM R. 216, 219 n.1 (Chk. 2012); Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 148, 150 n.2 (Pon. 2010); Sandy v. Mori, 17 FSM R. 92, 96 n.3 (Chk. 2010); Robert v. Simina, 14 FSM R. 438, 443 n.1 (Chk. 2006); Annes v. Primo, 14 FSM R. 196, 206 n.6 (Pon. 2006); Estate of Mori v. Chuuk, 10 FSM R. 123, 124 (Chk. 2001); Estate of Mori v. Chuuk, 10 FSM R. 6, 13 (Chk. 2001); Plais v. Panuelo, 5 FSM R. 179, 204 (Pon. 1991).

were integral parts of the judicial process." Briscoe v. LaHue, 460 U.S. 325, 335, 103 S. Ct. 1108, 1115, 75 L. Ed. 2d 96, 108 (1978) (quoting Butz v. Economou, 438 U.S. 478, 512, 98 S. Ct. 2894, 2913, 57 L. Ed. 2d 895, 919 (1978)). "Absolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform without the need to secure permanent legal counsel." Valdez, 878 F.2d at 1288. "Non-judicial officers whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct." Henry v. Farmer City State Bank, 808 F. 2d 1228, 1238 (7th Cir. 1986).

Otherwise, it would "simply [be] unfair to spare the judges who give orders while punishing the officers who obey them." Valdez, 878 F.2d at 1289.⁴ The court has already recognized that Justice Johnny, the judge who issued the facially valid but allegedly unlawful order, is immune from civil liability for that order. Jacob, 18 FSM R. at 232-33. "Tension between trial judges and those officials responsible for enforcing their orders inevitably would result were there not absolute immunity for both." Valdez, 878 F.2d at 1289 (citing T & W Inv. Co. v. Kurtz, 588 F.2d 801, 802 (10th Cir. 1978)). If law enforcement officials assigned to carry out a judge's orders were not absolutely immune, they would then, for their own protection, need to scrutinize every court order and investigate its background before deciding whether to try to enforce it. The judicial system cannot function that way. Such enforcement officials "must not be required to act as pseudo-appellate courts" scrutinizing judges' orders. Valdez, 878 F.2d at 1289 (citing Henry, 808 F. 2d at 1239). "The public interest demands strict adherence to judicial decrees. . . . Absolute immunity will ensure the public's trust and confidence in courts' ability to completely, effectively and finally adjudicate the controversies before them." Valdez, 878 F.2d at 1289. Absolute immunity is therefore required.

Carlos is therefore absolutely immune for Jacob's arrest and for her confinement to Pohnpei jail, since those were acts prescribed by Justice Johnny's facially valid order. He is thus entitled, as a matter of law, to summary judgment that he is immune from liability for Jacob's arrest and confinement.

Carlos, however, only has qualified immunity from civil liability arising from the conditions under which Jacob was held in jail. Turney, 898 F.2d at 1472. This is because absolute immunity extends only to acts prescribed by the judge's order, and the judge's order did not prescribe Jacob's treatment in jail. *Id.* at 1474 (citing Morrison v. Jones, 607 F.2d 1269, 1274 (9th Cir. 1979)). It only prescribed her arrest and confinement.

Carlos contends that Jacob's due process and civil rights were not violated at anytime during her confinement since she was given access to her attorney, to a restroom, and to water and food, although she declined the food offered. This contention is supported by affidavits from various jail personnel. Carlos has made out a *prima facie* case that he is entitled to summary judgment. Jacob, in her opposition, does not contest the motion's supporting affidavits or Carlos's contentions about her treatment while confined.

To overcome a *prima facie* case of entitlement to summary judgment, the non-moving party cannot rely on unsubstantiated denials to carry her burden, but must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact. *See, e.g.*, Chuuk v. Secretary of Finance, 8 FSM R. 353, 362 (Pon. 1998). In responding to a summary judgment

⁴ The court also notes that under this doctrine, court clerks are entitled to absolute immunity from actions for damages arising from acts that they were specifically required to do under court order or at a judge's direction. Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. Unit A June 1981). However, no motions have been filed on court clerk Leon Felix's behalf.

motion, an adverse party may not rest upon the mere allegations or denials in her pleading, but her response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM R. 574, 579 (Pon. 2002); Bank of the FSM v. Hebel, 10 FSM R. 279, 282 (Pon. 2001). If she does not so respond, summary judgment, if appropriate, will be entered against her. Suldan, 10 FSM R. at 579 (Pon. 2002); Hebel, 10 FSM R. at 282.

Jacob did not so respond. There is thus no genuine issue of material fact about Jacob's treatment in jail. Carlos is therefore entitled, as a matter of law, to summary judgment on Jacob's claims against him for not only her arrest and her confinement in Pohnpei jail but also for the conditions of her confinement there.

III. CONCLUSION

Accordingly, Lucas Carlos's summary judgment motion is granted. This summary judgment is partial in that it applies to only one defendant - Lucas Carlos.

There being no just cause for delay, the clerk is directed to enter judgment in his favor. FSM Civ. R. 54(b). Costs to be borne by the parties.

Since Jacob was without counsel until recently, the court hereby sets the following schedule: 1) all discovery requests shall be made by November 15, 2016; 2) discovery must be completed by December 15, 2016; and 3) all pretrial motions must be filed by January 13, 2017.

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FSM SUPREME COURT TRIAL DIVISION

FRITZ EDWARD HARTMANN,)	CIVIL ACTION NO. 2016-1001
)	
Petitioner,)	
)	
vs.)	
)	
DEPARTMENT OF JUSTICE, FEDERATED)	
STATES OF MICRONESIA,)	
)	
Respondent.)	
_____)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Dennis K. Yamase
Chief Justice

Hearing: July 5, 2016
Decided: September 19, 2016