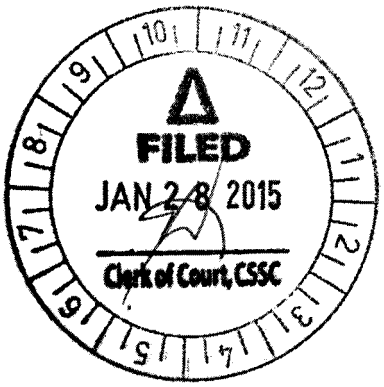
CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk



FINEUO SAITO,	)	**CSSC CV Case No. 035-2011**
	)	
Plaintiff,	)	
	)	**ORDER GRANTING**
v.	)	**DEFENDANTS' MOTION TO**
	)	**DISMISS**
MASASINGE SIRO, et. al.,	)	
	)	
Defendants.	)	

INTRODUCTION

A hearing was held August 6, 2014, on the motion to dismiss based on the doctrine of res judicata ("Motion") filed by the Defendants Masasinge Siro et. al. ("Defendants"). Plaintiff Fineuo Saito ("Plaintiff") filed a response to the Motion on September 13, 2013.

At the hearing, Johnny Meippen, Esq. appeared on behalf of the Plaintiff. Jack Fritz, Esq. appeared on behalf of the Defendants.

The Court, upon review of the pleadings, arguments of counsel, the applicable authorities, and for the reasons set forth on the record and below, finds as follows.

BACKGROUND

This case involves ownership rights over the Islands of Fenepi, Fononuk, and Fanuenipwin, and certain lands known as Teuesin (located on Fanaan Island) and Neminiu (located on Uman Island) (collectively referred to as the "Properties").

On August 26, 1964, the Trust Territory High Court in the case styled *Doris Moses v. Siro and Dolly Albert*, Civil Action No. 222, entered a Judgment, which states in part that, "the lands Unlufonu, Neongi and Epinimon on Fenepi Island and the islands of Fononuk and Fanunenipuin, the land Teuesin on Fannan Island and the land Neminiui on Uman Island are owned by the defendant Siro and the group for whom he acts – his brother Fineo, his sister Fuko and the children of all three of them . . ." (Plaintiff's Compl., ¶ 8, Ex. A; Defs. Mot. To Dismiss, Ex. A).

On or about July 18, 1983, in the case styled *Mariano Moses v. Siro K. Fiuko N.*, Civil Action 95-77, the Trust Territory High Court issued an Opinion declaring that the plaintiff, Mariano Moses "shall control one-half of the tideland in the atoll Royalist, specifically, that portion adjacent to his dry land property Fanaik and Ipis, and that the defendants herein shall control one-half of the tidelands in the atoll Royalist that is adjacent to their dry land property Fononuk and Fenepi." (Plaintiff's Compl., ¶ 8, Ex. A).

On May 1, 2000, in the case styled *Fuko S. Narruhn v. Fineo Saito and Masasinge Kallen, on Behalf of the Children of Siro*, CSSC CA No. 144-99, this Court entered an Order of Dismissal with Prejudice as the claim over the parcels of land at issue had already been litigated and determined by the Trust Territory High Court. (Plaintiff's Compl., ¶ 8, Ex. A; Defs. Mot. to Dismiss, Ex. B).

On May 9, 2011, the Plaintiff filed a "Complaint for Quiet Title" ("Complaint") against the Defendants, requesting that the Plaintiff be declared the sole owner of the Properties as he is the "only surviving member from the first line of land owners." (Compl., ¶ 8). The Plaintiff maintains that the Defendants are the heirs of Plaintiff's deceased brother, Siro Kallen, and sister, Fuko Narruhn. (Compl. ¶ 9).

In response to the Complaint, the Defendants filed a Motion to Dismiss on August 26, 2013. In their Motion, the Defendants argue that this case should be dismissed based on the doctrine of res judicata. Specifically, the Defendants maintain that the dispute regarding the ownership and title over the Properties has already been litigated, and that the court has determined that the Defendants, the Plaintiff and his children, as well as the children of Fuko are the legal owners of the Properties. (Defs.' Motion, pg. 3).

On September 13, 2013, the Plaintiff filed a response to the Defendants' Motion to Dismiss. The Plaintiff's main contention in opposition to the Motion is that res judicata is an affirmative defense that cannot be raised by way of a Rule 12(b)(6) motion, without first filing an answer and raising res judicata as an affirmative defense.

On September 16, 2013, the Defendants filed an Answer, wherein they raised res judicata as an affirmative defense.

On July 2, 2014, the Defendants filed a "Motion for Leave to Amend Motion to Dismiss and Amended Motion to Dismiss based on Rule 12(b)(6) and the Memorandum Filed Supporting Said Motion." In their motion, the Defendants state that they are moving for dismissal under 12(b)(6) based on res judicata grounds.

ISSUES

1. Whether the Defendants may move for dismissal under Rule 12(b)(6) based on an affirmative defense (res judicata).
2. If the Defendants' may move dismissal based on the doctrine of res judicata, whether the motion to dismiss should be granted.

ANALYSIS

Res judicata is listed as an affirmative defense under Rule 8(c). As such, the doctrine of res judicata must be pleaded as an affirmative defense in an answer. However, res judicata, like the statute of limitations, is an affirmative defense that may be presented in a motion to dismiss. *See e.g., Skilling v. Kosrae State Land Comm'n*, 13 FSM Intrm. 16, 19 (Kos. S. Ct. Tr. 2004) ("The 'statute of limitations' is an affirmative defense which must be raised in either the answer or in a motion to dismiss."); *Kinere v. Kosrae Land Comm'n*, 13 FSM Intrm. 78, 80 (Kos. S. Ct. Tr. 2004). Furthermore, res judicata can be raised in the context of a Rule 12(b)(6) motion when the preclusive effect of the prior action can be determined from the face of the complaint. *Steinberg v. Alpha Fifth Group*, 2008 U.S. Dist. LEXIS 25527 (S.D. Fla. 2008). Based on the foregoing, the Court finds that the Defendants may move for dismissal based on the doctrine of res judicata.

Next, the Court must determine whether the motion to dismiss should be granted based on the doctrine of res judicata.

The doctrine of res judicata was explained by the Court in *Ungeni v. Fredrick*, 6 FSM Intrm. 529, 531 (Chk. S.Ct. App. 1994) as follows:

> The term res judicata literally means "a matter adjudged" or "settled by judgment." 46 Am. Jr. 2. Judgments § 394, at 558-59 (1969). For a matter to be considered adjudged so that the doctrine of res judicata is applicable, there must be an existing, final judgment that has been decided on the merits without fraud or collusion by a court or tribunal of competent jurisdiction. Id. If these requirements are met, the doctrine applies. The doctrine bars any litigation of the same issues between the same parties or anyone claiming under those parties. Id.

Thus, in determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

In this case, the Court finds that the doctrine of res judicata applies. First, this suit involves ownership rights over the Islands of Fenepi, Fononuk, and Fanuenipwin, and certain lands known as Teuesin (located on Fanaan Island) and Neminiu (located on Uman Island) – the same issue adjudicated in the following three cases: *Doris Moses v. Siro and Dolly Albert*, Civil Action No. 222; *Mariano Moses v. Siro K. Fiuko N.*, Civil Action 95-77; and *Fuko S. Narruhn v. Fineo Saito and Masasinge Kallen, on Behalf of the Children of Siron*, CSSC CA No. 144-99.

Second, in the most recent case, CSSC CA No. 144-99, the Court entered an Order of Dismissal with prejudice, which provides that the claims over the Properties had been already litigated in a prior case before the Trust Territory High Court (Civil Action No. 222). "A dismissal with prejudice constitutes a judgment on the merits." *Kitti Mun. Gov't v. Pohnpei*, 11 FSM Intrm. 622, 628 (App. 2003). Because the dismissal was with prejudice, there was a judgment on the merits.

Third, the prior action involved the same parties or their privies. In fact, the Plaintiff was specifically named as a defendant in the prior action.

Last, the Court believes that preclusive effect of the prior action can be determined from the fact of the complaint.

CONCLUSION

Based on the foregoing, the Court finds that the doctrine of res judicata applies because all the requirements have been satisfied. Accordingly, the Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED on this 8th day of August, 2014.

Keske Marar
Associate Justice

Entered this 20th day of January, 2014.

Clerk of Court, CSSC

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division-Weno, Chuuk

CSSC CIVIL CASE NO. 178-2014

GARDENIA AISEK MACAYAON,

Plaintiff,

vs.

CHUUK STATE BOARD OF EDUCATION, JOHANNES BERDON, individually and in his official capacity as the Chairman of the Board of Education, ANTASIO BISEK, individually and in his official capacity as a member of the Board of Education, SAM BISALEN, individually and in his official capacity as member of the Board of Education, ABRAHAM RAYPHAND, individually and in his official capacity as a member of the Board of Education, KIND KANTO, individually and in his official capacity as a member of the Board of Education, and IROMY BRUTON, individually and in her Official capacity as a member of the Board of Education,

Defendants.

FILED
JAN 26 2015
Clerk of Court, CSSC

ORDER GRANTING PRELIMINARY INJUNCTION

On January 16, 2015, this came before the court to hear the plaintiff's motion for a preliminary injunction. Johannes Berdon, Iromy Bruton, Cinty Siren Mori, and Gardenia Aisek Macayon testified. The motion is granted for the reasons that follow.

I. BACKGROUND

Based on their testimony and the parties' filings, the court makes the following findings of facts.[1] The plaintiff, Gardenia Aisek Macayon, was the duly appointed head of the Department of Education. As such, she was the Executive Director of the Chuuk State Board of

[1] A trial court judge is required by Rule 52(a) to make findings of fact and conclusions of law when granting or refusing a preliminary injunction. Mathias v. Engichy, 15 FSM R. 90, 95 n.4 (Chk. S. Ct. App. 2007).

Education, Chk. Const, art. X, § 4; Chk. S.L. No. 191-15, § 8(1), and was required to attend all Board meetings but did not have the power to vote, Chk. S.L. No. 191-15, § 8(2).

At the Board's July 21, 2014 meeting, someone introduced a resolution to terminate Director Macayon. Macayon was present then and aware of the resolution. The resolution averred in general terms that she had altered the Department's budget; that there had been a number of complaints about "violation of Equal Treatment, violation of court decision, and violation of Personnel Regulations"; that on sensitive information there had been "no transparency of information between the Director and the Board"; that in many of her decisions she did not cooperate or collaborate with the Board; that her decisions caused the teachers and their families to be unable "to have the necessities in life and faced an inability to pay their bills"; and that the Board had "further evidence" that the Director was "incompetent and very inconsistent." No action was taken on the resolution.

Over the next few months, there were a couple of "closed–door" Board meetings at which the Director was not present and at which she would not have been allowed to be present, but at which, the rest of the Board did discuss the Director's removal. The Board met again on December 8, 2014. Director Macayon was present. The resolution was listed on the meeting's agenda. The Director asked to be excused when that agenda item came up. At no time, either in July or December, was the Director invited to discuss the allegations against her or asked to explain or justify her alleged misdeeds or to rebut the allegations' accuracy.

Six of the eight Board members then voted, by secret ballot, to remove Macayan. She was notified by letter the next day that she had been terminated, that she should "refrain from signing any document or taking any action on behalf of the Chuuk Department of Education

from this date forward," and that she should vacate the Director's office, take her personal belongings, and surrender all government property. She did so.

On December 17, 2014, Macayon filed this lawsuit, alleging that she was unlawfully terminated. She seeks, as is usual in unlawful termination cases, to be reinstated in her former position. On December 22, 2014, Macayon filed a motion seeking injunctive relief until the court can rule on her declaratory relief claim that she was unlawfully terminated. She asks that a preliminary injunction be issued barring the hiring of a replacement Executive Director while this action is pending. She asks that the court order that the status quo — the Department is currently being headed by an Acting Director — be maintained until a final judgment in this case.

II. *PRELIMINARY JURISDICTIONAL QUESTION*

As a preliminary matter, the defendants contend that this court does not have jurisdiction over this lawsuit. They assert that the unlawful or wrongful termination of a public employee without due process is a civil rights claim under FSM national law and that therefore the national court, not the state court, should hear this claim.

The court must reject this argument. The FSM Supreme Court has acknowledged the "[t]he Chuuk state Supreme Court is perfectly competent to adjudicate a civil rights claim against the state made under 11 F.S.M.C 701(3) (violation of national constitutional rights) and also claims made under Chuuk's own constitutional provision barring deprivation of property." Narruhn v. Chuuk, 16 FSM R. 558, 564 (Chk. 2009), aff'd, 17 FSM R. 289 (App. 2010). Although she does not cite any particular constitution or specific statute, Macayon does generally assert that when she was terminated her due process rights were violated. Accordingly, the court

may hear, consider, and rule on Macayon's claim that her termination was unlawful since she was not afforded due process.

III. *PRELIMINARY INJUNCTION ALALYSIS*

The court now turns to whether Macayon should be granted a preliminary injunction. Injunctive relief is an equitable remedy for which a court must use a balance-of-hardship test with a flexible interplay among four factors – the likelihood of irreparable harm to the plaintiff without an injunction; likelihood of harm to the defendant with an injunction; plaintiff's likelihood of success on the merits; and the public interest. Onopwi v. Aizawa, 6 FSM R. 537, 539 (Chk. S. Ct. App. 1994). Striking a fair balance between the two more important factors, the likelihood of harm to the competing sides, and thus the issuance of injunctive relief is largely a matter of the facts of each situation and is thus a matter peculiarly for the trail judge's discretion. *Id.* The object of seeking injunctive relief is to preserve the status quo pending the litigation on the merits. Chuuk Public Utilities Corp. v. Billimon, 15 FSM R. 290, 292 (Chk. S. Ct. Tr. 2007).

A. Irreparable Harm

A court may not grant a plaintiff's request for injunctive or other equitable relief when there has been not showing of irreparable harm or that there is no adequate remedy at law. Hartman v. Chuuk 8 FSM R. 580, 581 (Chk. S. Ct. Tr. 1998). The defendants contend that Macayon has an adequate remedy at law because, in their view, she has not exhausted her administrative remedies under the Administrative Procedures Act.

When there is a conflict between a statute of general application to numerous agencies or situations, such as an Administrative Procedure Act, and a statute specifically aimed at a particular agency or procedure the more particularized provision will prevail. Olter v. National Election Comm'r, 3 FSM R. 123, 129 (App. 1987). "This rule is based upon recognition that

the legislative body, in enacting the law of specific application, is better focused and speaks more directly to the affected agency and procedure." *Id.*

Since the Executive Director of the Department of Education is an office uniquely created by the Chuuk Constitution, Chk. Const. art. X, § 4, and since both the Chuuk Constitution and the applicable statute provide the sole means by which an Executive Director may be removed, the court must conclude that the general statutory provisions of the Administrative Procedures Act do not apply to the removal of the head of the Education Department. When it comes to the executive Director's removal, there is no higher administrative agency than the Board. Thus, the only place the removal of the Executive Director of the Education Department can be reviewed is in court. "The trial division of the State Supreme Court has jurisdiction to review the actions of any state administrative agency, board, or commission, as may be provided by law." Chk. Const. art. VII, § 3 (c). The Chuuk State Judiciary Act provides that the court has "the authority to review all actions of an agency of the Government of this State in accordance with this Act and the provisions of the Chuuk State Constitution." Chk. S.L. No. 190-08, § 17(1).

The court further finds that irreparable harm could occur if the preliminary injunction is not granted. Since the plaintiff's remedy, if successful in this suit, is her reinstatement as Director, if another person is nominated and confirmed as the Director in the meantime, the Department and the State would be in the untenable position of having two Executive Directors simultaneously.

B. *Likelihood of Success on the Merits*

The Director does not serve at the Board's, or the Governor's, pleasure. The Governor cannot remove the Director from office. Only the Board, by majority vote, can remove the Director, and then only for one or more of four reasons: "misconduct, incompetency, neglect of duty, or other good cause." Chk. S.L No. 191-15, § 8 (6). Several of these reasons were cited in the Board's

resolution removing Macayon. However, no specifics were mentioned or provided. This presents two difficulties.

First, Macayon was not given the opportunity to respond to the allegations because she was not given notice of which of her actions or omissions were the grounds for the Board concluding that she had committed some misconduct, or that she was incompetent, or that constituted good cause for her termination. At a minimum, Macayon should have been given notice of the allegations and evidence on which the Board based its resolution, and she should have been given an opportunity to respond or to explain her actions or omissions and to rebut any false allegations. This is the essence of due process – notice and an opportunity to be heard. Phillip v. Moses, 18 FSM R. 247, 250 (Chk. S. Ct. App. 2012). Thus, Macayon's likelihood of success on her due process claim seems almost certain.

The second difficulty presented by the conclusory statements in the Board's resolution terminating Macayon, is that it gives the court no record to review. The court can only guess at what formed the basis for the Board's conclusions. The court generally will not conduct a trial de novo to review an agency action. *See* Nakamura v. Moen Municipality, 7 FSM R. 375, 377-78 (Chk. S. Ct. Tr. 1996). And it has no desire to in this case. The better course in most instances, and the most likely course of action in this case, is that the matter would be remanded to the administrative agency – in this case, the Board of Education – for it to give Macayon notice of which of her actions and omissions it considers might be grounds for her removal and to give her an opportunity to respond to those grounds and explain or justify or rebut the allegations against her before it votes on whether to remove her.

C. *Balance of hardship (harm to the Defendants)*

The harm of a preliminary injunction to the defendants appears to be slight. The Department of Education will continue to function under an acting director until this litigation is decided on the merits. The defendants have not shown that they, or the public, will be harmed by this.

D. *Public Interest*

The public interest favors compliance with the law that an Executive Director can only be removed for certain specified and limited number of reasons. The public should be able to be satisfied that those grounds exist before any removal is effected.

E. *Issuance of Preliminary Injunction*

Weighing all four factors, the court concludes that a preliminary injunction should issue as requested. Furthermore, no bond will be required because of the lack of monetary harm to the defendants if the preliminary injunction should not have been granted.

IV. *CONCLUSION*

Accordingly, a preliminary injunction will issue with this order, enjoining the nomination, hiring, or appointment of the head or the Executive Director of the Chuuk Department of Education until further court order.

SO ORDERED, this 26th day of January, 2015.

Camillo Noket
Chief Justice

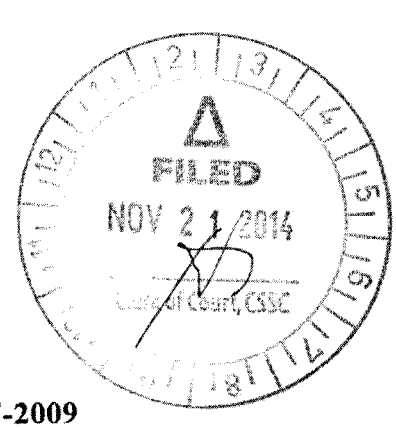
ENTERED this 26th day of January, 2015.

Kency K. Conrad
Chief Clerk of Court

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk



CHUUK STATE, Plaintiff, vs. GIBSON THOMAS, et. al., Defendants.	)	**CSSC CR. NO. 77-2009** **ORDER REGARDING DEFENDANT'S MOTION FOR WORK RELEASE**

On June 3, 2014, Defendant Gibson Thomas was sentenced to imprisonment for five (5) years on the charge of aggravated assault, count I; five (5) years on the charge of liability for crimes of another for aggravated assault, count V; three (3) years on the charge of liability for crimes of another for assault with dangerous weapon, count VI; and six (6) years for the charge of liability for crimes of another for manslaughter, count VII. However, as set forth in the Conviction and Sentencing Order entered on June 3, 2014, the Defendant would serve six (6) years imprisonment, except for the last three (3) years of his sentence, which would be suspended subject to the conditions of probation as set forth therein.

On June 13, 2014, Defendant filed a "Motion to Modify Sentencing Order to Allow Work Release" ("Motion"). Thereafter, per order entered on July 25, 2014, the Court requested that the Defendant submit additional evidence in support of his Motion. On August 5, 2014, Defendant filed a document entitled "Supplement to Modify Sentence" and attached a copy of an employment agreement executed on March 1, 2014.

A continued hearing on the Defendant's Motion was held on November 13, 2014. At the hearing, Defendant appeared with his counsel, BJ Joseph from the FSM Public Defender's Office. Ms. Nemwarichen Salle appeared on behalf of the Government.

At the hearing, Mr. Touhang Kim, the local worker's manager for the Korea South Pacific Ocean Research Center located in Sapuk village, Weno Island, Chuuk State testified in support of the Defendant's Motion. Mr. Kim testified, among other things that: (1) Defendant is a good employee; (2) Defendant will work from Monday through Friday from 8:00 a.m. to 4:00 p.m.; (3) he accepts full responsibility regarding Defendant's work attendance and will report to the probation officer every month regarding the Defendant's work attendance; (4) he will sign a surety bond, if requested; and (5) Defendant's wife, Louisa Thomas has a valid license and may use his vehicle to transport the Defendant to and from the jail to work.

Defendant's wife, Louisa Thomas also testified in support of the Defendant's Motion. Mrs. Thomas testified, among other things that she has no objection to the police escort being present while transporting her husband to and from jail, and will sign a surety bond, if requested.

In response to the Motion, the Government requested that Defendant be under police custody who shall accompany Defendant at all times during his absence from the Chuuk State Jail.

Based on the Motion, the supplemental documentation submitted, the testimonies presented at the hearing, and no opposition from the Government, the Defendant's Motion is GRANTED and the sentence of the Defendant is hereby modified and subject to the following conditions:

(1) Mr. Touhang Kim must sign a surety in the amount of two thousand dollars ($2,000 USD);

(2) Mrs. Louisa Thomas must sign a surety in the amount of two thousand dollars ($2,000 USD);

(3) Once the conditions set forth in paragraphs (1) and (2) have been met, Defendant shall be permitted to work at the Korea South Pacific Ocean Research Center located in Sapuk village, Monday through Friday from 8:00 a.m. to 4:00 p.m., and shall be under the direct supervision of Mr. Touhang Kim;

(4) Mr. Kim shall file a report to the probation officer as directed while Defendant is under his supervision;

(5) From Monday through Friday, Defendant will be permitted to leave the Chuuk State Jail at 7:00 a.m. for Sapuk where his job is located by the most direct route and shall return to the Chuuk State Jail by the most direct route no later than 5:00 p.m. Mrs. Louisa Thomas shall transport (using Mr. Kim's vehicle) the Defendant to and from jail;

(6) Defendant shall obey all laws and ordinances, State, municipal, and national;

(7) Defendant shall not leave Chuuk State without the Court's permission;

(8) Defendant shall not posses, consume or otherwise acquire any forbidden drugs, including alcoholic beverages; and

(9) In the event the Defendant's employment is terminated for whatever reason or he resigns, he must return to the custody of the Director of Public Safety until he completes his term in jail.

IT IS SO ORDERED on this 21st day of November, 2014.

Camillo Noket
Chief Justice, CSSC

Entered this 21st day of November, 2014.

Clerk of Court, CSSC

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division-Weno, Chuuk

KUTTU MUNICIPALITY and TONOAS MUNICIPALITY,	CSSC CA. No. 012-2014
Plaintiffs,	
v.	**ORDER DENYING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT WITH LEAVE TO RENEW**
CHUUK STATE GOVERNMENT,	
Defendant.	

This matter is before the Court on the plaintiffs' Motion for Default Judgment pursuant to Chuuk Rule of Civil Procedure 55.

I. Procedural Background

This proceeding was initiated on January 28, 2014, by a complaint filed by the plaintiffs Kuttu Municipality and Tonoas Municipality[1] ("Plaintiffs") against defendant Chuuk State Government ("State"). The Complaint alleges a breach of contract claim based on certain monies loaned by the Plaintiffs to the State. In support of their allegations, the Plaintiffs submitted a document entitled "Chuuk State Government CIP Fund Balance 2001-2005."

Subsequently, the Plaintiffs' filed a Motion for Default Judgment pursuant to Rule 55 of the Rules of Civil Procedure. To date, no response has been filed by the State.[2]

[1] Initially, Weno Municipality was also named as a Plaintiff in this matter. However, a notice of withdrawal was filed on February 13, 2014.

[2] Clerk's entry of default was entered on July 25, 2014.

II. Issue

The question before this Court is whether the Plaintiffs are entitled to default judgment.

III. Analysis

In order to obtain a judgment by default, a party must follow the two-step process described in the Chuuk Rule of Civil Procedure 55. First, it must seek an entry of default from the Clerk of the Court under Rule 55(a). Second, after default has been entered by the Clerk, the party must seek default judgment according to the strictures of Rule 55(b).

Here, the Plaintiffs filed a motion requesting for entry of default and default judgment. As explained above, however, a party must follow the two-step process described in Chuuk Rule of Civil Procedure 55 in order to obtain a judgment by default. As such, the Plaintiffs' motion should have been rejected for noncompliance with the rules. Notwithstanding the foregoing, the Court will consider the Plaintiffs' request.

After careful review of the Plaintiffs' complaint and exhibit, and applicable law and rules, the Court elects to exercise its power under Rule 55(b)(2) to "conduct hearings" to "determine the amount of damages" and "establish the truth of any averment by evidence." Accordingly, the Court directs the Plaintiffs to brief and provide evidence supporting the amount of damages as set forth in their Complaint (e.g., loan documents). *See also* Rule 55(e). Upon a showing substantiating Plaintiffs' damages against the Defendant, the Court will reconsider the Plaintiff's motion for default judgment.

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk

CHUUK STATE, Plaintiff, v. RESIS MAZAWA, PAUL SOWAS and NIROY ORLANDO, Defendants.	)	**CSSC CR. NO. 69-2014** **ORDER GRANTING MOTION TO REDACT FILED BY DEFENDANT NIROY ORLANDO**

On August 12, 2014, Defendant Niroy Orlando ("Defendant") filed a motion entitled "Motion to Redact Defendant Orlando's Name in Co-Defendants' Statements" ("Motion to Redact"). To date, no opposition has been filed by the Plaintiff Chuuk State.

For the reasons that follow, the Motion to Redact is GRANTED.

I. BACKGROUND

On July 9, 2014, the Defendant and the other individuals named-above as defendants were arrested. On that same date, co-defendants Resis Mazawa and Paul Sowas allegedly admitted to the commission of the crime and implicated the Defendant in their statements. On July 10, 2014, the Defendant was released after the initial appearance. Thereafter, on July 18, 2014, the Defendant and his co-defendants pleaded not guilty to all the charges.

II. ANALYSIS

"When codefendants are tried together, one defendant's admissible out-of-court statement out to be redacted to eliminate references to the codefendant." *FSM v. Sorim*, 17

FSM Intrm. 515, 524 (Chk. 2011) (citing *Hartman v. FSM*, 6 FSM Intrm. 293, 301-02 (App. 1993) (once redacted, no prejudice will occur if the statement then gives no reference to codefendant; failure to redact may result in reversal)). This is because the use of a defendant's statement as evidence against a codefendant would violate the codefendant's "right . . . to be confronted with the witnesses against him," FSM Const. Art. IV, § 6, if the declarant is not a witness at the trial subject to cross-examination. *Id.* (citing Hartman v. FSM, 5 FSM Intrm. 224, 229 (App. 1991)).

In this case, it is unclear whether codefendants Resis Mazawa and Paul Sowas will testify at trial. However, out of an abundance of caution, the Court will require that the prosecution prepare a redacted version of the codefendants statements in the event the codefendants do not testify at trial.

III. CONCLUSION

Based on the foregoing, the Defendant's Motion to Redact is GRANTED. Any defendant statement that the prosecution may wish to introduce at trial shall be designated as such at least five days before trial along with the proposed redactions. The parties shall then consult so as to produce before trial an agreed redacted copy which shall be the version that the prosecution may try to introduce at trial.

IT IS SO ORDERED on this 23rd day of October, 2014.

Repeat R. Samuel
Associate Justice, CSSC

Entered this 23rd day of October, 2014

Clerk of Court, CSSC

IV. Conclusion

Based on the foregoing, the Plaintiffs' Motion for Default Judgment is DENIED with leave to renew. Plaintiff is directed to submit a memorandum and evidence in support of their claim against the Defendant and in support of its request for damages on or before **December 2, 2014.**

IT IS SO ORDERED.

This 12 th day of November, 2014.

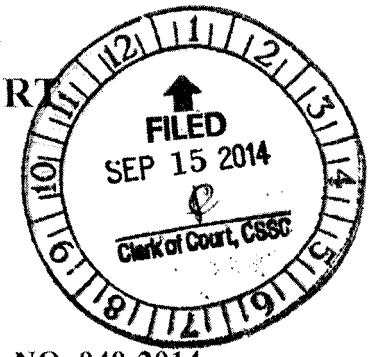
Repeat R. Samuel
Associate Justice, CSSC

Entered this 12th th day of November, 2014.

Clerk of Court, CSSC

CHUUK STATE SUPREME COURT

Federated States of Micronesia
Trial Division – Weno, Chuuk



CHUUK STATE	)	**CSSC CR. NO. 040-2014**
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**
	)	
SANSER KAPWICH,	)	
	)	
Defendant.	)	
	)	

On August 12, 2014, Defendant Sanser Kapwich ("Defendant") filed a motion to dismiss pursuant to Rules 12(b) and 48 (b) of the Chuuk State Supreme Court Rules of Criminal Procedure ("Motion"). In his Motion, Defendant appears to be arguing that the Defendant's right to a speedy trial was violated due to the "delay in filing of the criminal information," citing *Kosrae v. Langu,* 15 FSM Intrm. 601, 603 (Kos. S. Ct. Tr. 2008). (Mot. p. 1). In response, the Plaintiff Chuuk State ("State") filed an opposition to the Motion on August 22, 2014.

For the reasons set forth herein, the Defendant's Motion is DENIED.

I. BACKGROUND

On May 22, 2014, the State re-filed a criminal information against the Defendant, charging him with sexual assault, sexual abuse, false imprisonment, assault, and threat in connection with an incident that allegedly occurred on November 11, 2013.

In response to the State's request for an arrest warrant, the Court issued a warrant for the Defendant on May 27, 2014.

The Defendant was arrested on July 14, 2014. Seven days later, on July 21, 2014, Defendant appeared for arraignment with his counsel, Bethwell O'Sonis from the FSM Public Defender's Office and pleaded not guilty to all charges. At the arraignment hearing, the Court issued a scheduling order and set a trial date for September 2, 2014.

II. ANALYSIS

The Motion asks the Court to dismiss the criminal information on the basis that there was a delay in filing the criminal information. Specifically, the Defendant points to the fact that the incident giving rise to the charges against the Defendant occurred on November 11, 2013; but the criminal information was filed on May 22, 2014, more than six months after the alleged crime.[1]

The four-factor balancing test applicable for cases implicating a defendant's right to a speedy trial or a Chuuk Criminal Rule 48 (b) dismissal for unnecessary delay in prosecution include: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Chuuk v. William,* 15 FSM Intrm. 381, 386 (Chk. S. Ct. Tr. 2007). The first factor, whether there has been a lengthy delay, is a triggering mechanism for further analysis to determine if a defendant's right to a speedy trial has been violated. *Id.*

In this case, the criminal information was re-filed against the Defendant a little over six months after the alleged incident. The Court does not take the position that a "little over 6 months" can viewed as a lengthy delay, to trigger further analysis and consideration of the remaining three factors. *Chuuk v. William,* 15 FSM Intrm. 381, 386 (Chk. S. Ct. Tr. 2007) ("A delay of one year is presumptively prejudicial and triggers application of the three remaining factors.").

[1] The Motion fails to mention that the first criminal information was filed on April 24, 2014, in CSSC Crim. Case No. 037-2014. However, that case was dismissed pursuant to Rule 48 (b) without prejudice for the reasons set forth in the order entered on May 14, 2014.

The authority cited by the Defendant does not change this result. The *Kosrae v. Langu* case is not binding on this Court. Moreover, the Defendant in this case has been charged with felonious crimes, not misdemeanors like the defendant in *Kosrae v. Langu.* Accordingly, it is inapplicable.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion is hereby DENIED.

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IT IS SO ORDERED on this 15th day of September, 2014.

Jayson Robert
Associate Justice, CSSC

ENTERED this 15th day of September, 2014.

Clerk of Courts, CSSC

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk

FILED
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Clerk of Court, CSSC

IN THE MATTER OF THE ESTATE, OF RAYMOND SETIK,	)	**CSSC PROBATE NOS.: 48-97; 50-97 and 4-98 (Consolidated)**
Deceased,	)	
MARIANNE SETIK,	)	**ORDER**
Petitioner.	)	

On July 24, 2014, Petitioner Marianne Setik ("Petitioner") filed a "Motion for Temporary Restraining Order, and a Preliminary and Permanent Injunction" ("TRO Motion") against "Kasio Mida Jr., Cherisse Mida, and Vicky Setik Irons, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from taking any further entry upon the land identified as Parcel No. 007-A-12, Nepon #2, Iras Village" pending a determination of the probate matter. On August 13, 2014, the Petitioner filed a "Motion for an Emergency Hearing" ("Emergency Motion") in connection with the TRO Motion.

For the reasons that follow, the Petitioner's TRO Motion and Emergency Motion are DENIED.

I. Background

On February 14, 2014, the FSM Court entered an order in aid of judgment in Civil Case No. 2007-1008, *FSM Development Bank v. Christopher Corporation, Patricia (Peggy) Setik, Marianne B. Setik, the Estate of Manny Setik, Antansio Setik, Vicky Setik Irons, Irene Setik Walter, Marleeen Setik, Junior Setik, Eleanor Setik Sos, Joanita Setik Pangelinan, Meriam Setik Sigrah, Christopher James Setik, George Setik, individually, and d.b.a. Christopher Store*, Civil ("Civil Action"), which approved the sale of certain real property known as Parcel No. 007-A-12, Nepon #2, Iras Village, Weno Municipality, to Kasio Mida Jr. and Cherisse Mida for the sum of $52,250.00, following a 30-day grace period during which time the defendants in the Civil Action were given an opportunity to satisfy the judgment. (TRO Mot., Ex. C).

On March 19, 2014, counsel for FSM Development Bank ("FSMDB") filed "Plaintiff's Notice of Completion of Sale of Parcel No. 007-A-12, Nepo #2, Iras; Notice to Chuuk State Land Commission" ("Notice"). (TRO Mot., Ex. C). The Notice provides in relevant part as follows:

> FSMDB reports that no payments were made by Defendants during the grace period, that the judgment was not satisfied, and that as of March 17, 2014, the amount of $1,613,576.49 remains outstanding, including principal and accrued post-judgment interest. Accordingly, on March 17, 2014, FSMDB accepted payment of $52,250 from the Midas for the purchase of parcel no. 007-A-12 in accordance with the February 14, 2014 order in aid of judgment.
>
> ***
>
> FSMDB now provides notice to the Court of the receipt of $52,250.00 from Kasio Kembo Mida Jr. and Cherisse Mida as payment in full for purchase of parcel no. 007-A-12, and that the full amount of $52,250.00 has been applied to the outstanding judgment herein.

> Also pursuant to the February 14, 2014 order in aid of judgment, this Notice of Completion of Sale serves as notice to the Chuuk State Land Commission that a new certificate of title for parcel no. 007-A-12, Nepon #2, situated in Iras Village, Weno Municipality, with 2,090 square meters, as shown on cadastral plat no. 012-A-00, be issued to Kasio Kembo Mida Jr. and Cherisse Irons Mida. FSMDB now requests that the Chuuk State Land Commission issue the new Certificate of Title for parcel no. 007-A-12 to Kasio Kembo Mida Jr. and Cherisse Irons Mida in accordance with the order in aid of judgment.

The Petitioner states that the defendants in the Civil Action have appealed the order authorizing the sale of Parcel No. 007-A-12, Nepo #2, and filed the appropriate motions to stay that order. (TRO Mot., p. 4, lines 9-10). However, the FSM Court has yet to rule on the pending motions and appeal. (TRO Mot., p. 4, line 11).

II. Discussion

A. Applicable Law

To obtain a temporary restraining order or preliminary injunction, the Petitioner must show: (1) the possibility of irreparable injury; (2) the balance of possible injuries between the parties; (3) the Petitioner's likelihood of success on the merits; and (4) any impact on the public interest. *Ponape Transfer & Storage v. Pohnpei State Public Lands Auth.*, 2 FSM Intrm. 272, 276-77 (Pon. 1986).

Chuuk State Rule of Civil Procedure 65 addresses procedural issues with respect to temporary restraining orders and preliminary injunctions. While a temporary restraining order may issue without notice and expires within 14 days unless extended by the court for good cause or by consent of the restrained party, a preliminary injunction cannot issue without notice and usually remains in effect until a final determination on

the merits. *See* Rule Civ. P. 65(b)(2), (a)(1). Furthermore, Rule 65(b) provides in relevant part that:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should be required.

B. Application of Law to Facts

1. Irreparable Injury

In this case, the Petitioner has failed to demonstrate the possibility of irreparable injury. Petitioner argues that the "loss of title to land is not compensable by money damages based on the cultural value Micronesians attach to their land. Therefore, the taking of real estate property known as Nepon #2 and further developing that property without due process constitutes irreparable harm." (TRO Mot., pg. 7, lines 10-14) Petitioner in support of this proposition cites *Yang v. Western Sales Trading Co.*, 11 FSM Intrm. 607, 616 (Pon. 2003), where the court held that the loss of good will, loss of customers and potential customers, lost sales, and similar harms are not readily compensable by money damages. There are at least two problems with the Petitioner's argument.

First, as set forth in Exhibit C of Petitioner's TRO Motion, a judgment in the sum of $1,613,576.49 was issued against the defendants (including Petitioner) in connection with the Civil Action. Said judgment was not satisfied. "Accordingly, on March 17, 2014, FSMDB accepted payment of $52,250 from the Midas for the purchase of parcel

no. 007-A-12 in accordance with the February 14, 2014 order in aid of judgment." The Petitioner states that the defendants in the Civil Action have appealed the order authorizing the sale of Parcel No. 007-A-12, Nepo #2, and filed the appropriate motions to stay that order. The Court does not believe that the possibility that the FSM court issues an order denying the stay motions and/or affirming the decision on appeal constitutes the possibility of irreparable injury required for the issuance of a temporary restraining order. *See e.g., Ambros & Co. v. Board of Trustees*, 12 FSM Intrm. 124, 127 (Pon. 2003) (The possibility that the agency might issue an adverse decision does not constitute the immediate and irreparable injury to the applicant required for the issuance of a restraining order). An unwelcome outcome is among the everyday risks of litigation; it does not constitute irreparable injury for purposes of a temporary restraining order.

Second, while the Court acknowledges that Micronesians place value to real property, the sale of the property at issue does not create irreparable harm because it can be fully remedied with money damages, if the defendants (including the Petitioner) are ultimately able to reverse the sale order entered in the Civil Action, and prevail on appeal.

Based on the above, the Court cannot find that the injuries alleged by the Petitioner will give rise to the level of irreparable injury.

2. Likelihood of Success on the Merits

In her TRO Motion, the Petitioner (also a defendant in the Civil Action) suggests that the Court should find in her favor even if the Petitioner is "not more likely to prevail" because "sufficient case law has proven that injunction should still issue so long as the movant's position raised serious, non friviolous issues," citing a string of cases

such as *Ponape Enterprises Co. v. Bergen*, 6 FSM Intrm. 286, 289 (Pon. 1993); *Palik v. Henry*, 9 FSM Intrm. 309, 312 (Kos. S. Ct. Tr. 2000); *Seventh Kosrae State Legislature v. Sigrah*, 11 FSM Intrm. 110, 113 (Kos. S. Ct. Tr. 2002); *Sigrah v. Kosrae*, 12 FSM Intrm. 513, 518 (Kos. S. Ct. Tr. 2004); *Benjamin v. Youngstrom*, 13 FSM Intrm. 72, 75 (Kos. S. Ct. Tr. 2004). Indeed, it appears that the Petitioner has acknowledged she may not prevail on appeal. Moreover, the Petitioner has failed to identify a single error of the FSM Court in entering the sale order. Given these circumstances, the Court finds that the Petitioner has failed to show that she has likelihood of success of the merits.

3. Balance of Possible Injuries Between the Parties

With respect to the balance of possible injuries requirement, the Court finds that the Midas would bear the risk. Any potential harm suffered by the Petitioner is minimal considering that the Petitioner cannot establish a likelihood of success on the merits.

4. Public Interest

The next factor asks for a determination of where the public interest lies. Based on the arguments advanced by the Petitioner in her TRO Motion, it is unclear how the public interest will be served by entering a temporary restraining order. Thus, the Court cannot find based on the Petitioner's unsupported allegations (which are not evidence) that a temporary restraining order is warranted in this case.

III. Conclusion

Because each of the four factors considered by the Court favors denying the motion for a temporary restraining order,

IT IS HEREBY ORDERED that the Petitioner's TRO Motion is DENIED.

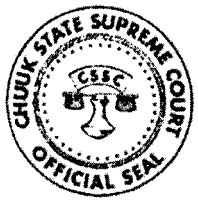
IT IS FURTHER ORDERED that the Petitioner's Emergency Motion is DENIED.

IT IS SO ORDERED on this 2nd day of September, 2014.

Repeat R. Samuel
Associate Justice, CSSC

Entered this 3rd day of September, 2014.

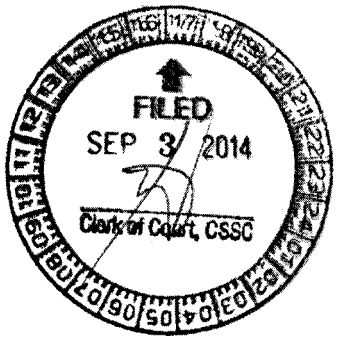
Clerk of Court, CSSC



CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk



SHIGETO CORPORATION, Plaintiff, v. LAND COMMISSION STATE OF CHUUK, Defendant.	)	**CSSC CV Case No. 076-2010** **ORDER DENYING PLAINTIFF'S MOTION FOR COSTS**

I. INTRODUCTION

A "Motion for Costs" ("Motion") was filed by the Plaintiff, Shigeto Corporation on August 14, 2013 pursuant to Rule 54(d) of the Chuuk State Rules of Civil Procedure. No opposition was filed by the Defendant, Land Commission State of Chuuk.

II. ISSUE

The question before the Court is whether the Plaintiff is entitled to costs pursuant to Rule 54(d).

III. APPLICABLE LAW

The general rule is that the prevailing party is entitled to costs per Rule 54(d). However, Rule 54(d) also provides that "costs against the State of Chuuk, its officers, and agencies shall be imposed only to the extent permitted by law." Thus, under Rule 54(d), costs cannot be awarded against the State of Chuuk, except when authorized by statute. *See e.g.*, *Udot Municipality v. FSM*, 10 FSM Intrm. 498, 501, 502 (Chk. 2002) ("While

costs are allowed as of course to a prevailing party, costs against the FSM, its officers, and agencies are imposed only when authorized by statute.").

IV. FACTS

On July 16, 2010, the Plaintiff filed a complaint for breach of contract against the Defendant, Land Commission State of Chuuk.

The breach of contract claim involves a Toyota Hi-Lux 4x2 Pick Up ("Vehicle"). (Compl. ¶ 4). As set forth in the complaint, the Plaintiff states that it delivered the Vehicle to the Defendant; however, to date, the Defendant has failed to pay the Plaintiff the purchase price of $15,744.75, plus sales tax of $787.24, for a total of $16,531.99 ("Unpaid Balance"). An invoice dated September 7, 2001 was attached as Exhibit A to the Complaint. In addition, a demand letter dated July 28, 2005, regarding the Unpaid Balance was attached as Exhibit B to the Complaint. No other written documentation was submitted.

At a hearing held on July 14, 2014, trial counselor, Daieko Robert was instructed to submit a proposed payment schedule re the Unpaid Balance by September 15, 2014.

V. APPLICATION OF FACTS AND LAW

This case involves a breach of contract claim against the Defendant for failure to pay the Unpaid Balance in connection with the purchase and delivery of the Vehicle. Per a review of the case file, no written documentation was submitted to show that the Plaintiff would be entitled to recover costs in the event that Plaintiff prevailed against the Defendant in a civil suit. Additionally, there is no statute authorizing the Plaintiff to recover costs against the State of Chuuk based on a breach of contract claim. *See Udot Municipality v. FSM*, 10 FSM Intrm. 498, 501, 502 (Chk. 2002) ("While costs are

allowed as of course to a prevailing party, costs against the FSM, its officers, and agencies are imposed only when authorized by statute."). Accordingly, the Plaintiff is not entitled to any costs pursuant to Rule 54(d).

VI. CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Plaintiff's Motion for Costs is DENIED.

IT IS SO ORDERED on this 3rd day of September, 2014.

Repeat R. Samuel
Associate Justice

Entered this 3rd day of September, 2014.

Clerk of Court, CSSC

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk

IN THE MATTER OF TITLE TO TWO PARCELS OF REAL PROPERTY DESIGNATED NO. 012-A-21 AND 012-A-28 AS PLAT NO. 012-1-00	)	**CSSC Civil Action No.: 12-93**
YUSER JESSE, THE ESTATE OF KUNI, DIVISION OF LAND MANAGEMENT,	)	**ORDER DENYING CHUUK STATE LAND MANAGEMENT'S MOTION TO DISQUALIFY TRIAL JUDGE**
Claimants.	)	

On June 11, 2014, Chuuk State Land Management ("Movant") filed a "Motion to Void Judgment and to Disqualify the Trial Judge that Issued the Judgment" ("Motion"). In response to the Motion, Yuser Jesse filed an opposition on June 19, 2014 ("Opposition").

A hearing on the Movant's Motion was set and held on July 14, 2014, at 10:00 a.m. before the Honorable Keske Marar. Sabino S. Asor, Esq. appeared on behalf of the Movant. Jack Fritz, Esq. appeared on behalf Yuser Jesse.

A continued hearing was held on August 11, 2014, and the Court took the matter under advisement.

The Court, having considered the pleadings filed, applicable authorities, and the entire record finds as follows:

I. BACKGROUND

On or about January 26, 1993, over twenty-one years ago, this matter, CSSC Civil Action No.: 12-93 ("Civil Action") was referred and transferred from the Land Commission to this trial court to determine the ownership of Parcels Nos. 012-A-21 and 012-A-28. The Civil Action was re-assigned to Associate Justice Repeat Samuel on December 16, 2010, almost four years ago.

A Judgment was entered in favor of Yuser Jesse on November 6, 2013 ("Judgment") in the Civil Action. No appeal of the Judgment was taken.

Movant filed its first Motion to Set Aside the Judgment on January 29, 2014, which was later denied by order dated February 21, 2014. Movant then filed its second Motion to Set Aside the Judgment on May 30, 2014, which was denied by order dated June 16, 2014.

Now, the Movant moves to disqualify Judge Samuel for two main reasons as fully set forth in its Motion. First, Movant contends the trial judge should have recused himself from the Civil Action because he had personal knowledge of evidentiary facts concerning the proceeding. Second, Movant contends that the trial judge served as a trial counselor/family lawyer to the Mersai family, and was "working on their complaint to intervene" in the instant action. (Mot., page 4). In support, Movant submitted the affidavit of Ms. Elizabeth Mersai Aten.

In response to the Motion, Jesse raised the following arguments, among others:

First, he argues that the Movant failed to comply with Chuuk State Supreme Court Rule 6(d), which states in pertinent part that "all motions shall contain certification by the

movant that a reasonable effort has been made to obtain the agreement or acquiescence of the opposing party and that no such agreement has been forthcoming."

Second, Jesse argues that the Movant has failed to establish "good cause" for the late filing of the Motion. He points to the fact that the Movant did not provide any legal authority in support of its Motion, and/or any affidavit showing due diligence on its part or some excusable reason on why it took over seven months after the Judgment was entered to file the Motion, especially given that the Movant has been paying the Mersai family compensation for the alleged lands at issue since 2006. (Opp'n, pages 6, 18-19).

Third, Jesse argues that Ms. Aten's affidavit is inadmissible hearsay. Further, Jesse points to the fact that Ms. Aten is not party to the instant matter.

Fourth, Jesse argues that Ms. Aten's description of the alleged land purchase involves several lots that are not the subject of this case. (Opp'n, page 9).

II. ISSUE

The only question before this Court is whether the trial judge should be disqualified from presiding over this matter.

III. APPLICABLE LAW

A. Chuuk State Judiciary Act of 1990

The Chuuk State Judiciary Act, CSL 190-08, Section 22 provides in pertinent part as follows:

> (1) A justice or a municipal judge may not hear any proceeding in which his impartiality might reasonably be questioned.
>
> (2) A justice or municipal judge may not hear any proceeding in any of the following circumstances:
>
> a. Where he has personal bias or prejudice concerning a party or his counsel, or

personal knowledge of disputed evidentiary facts concerning the proceeding;

b. Where in private practice he served as lawyer or a trial assistant in the matter in controversy, . . . The term private practice shall include practice with legal services or public defender organization;

(5) A party may move to disqualify a Justice or a municipal judge for one of the reasons stated in subsection (1) or (2) of this Section. The motion shall be accompanied by an affidavit stating the reasons for the belief that grounds for disqualification exist, and shall be filed before the trial or hearing unless good cause is shown for filing it at a later time. Upon receipt of such motion, the Justice shall refer the motion to another Justice, to hear the motion and rule upon it.

B. A Motion for Disqualification Must be Supported by an Admissible Affidavit Establishing a Factual Basis for the Motion

A motion for disqualification of a Chuuk State Supreme Court justice must be supported by affidavit(s) establishing a factual basis for the motion. *Nakamura v. Sharivy*, 15 FSM Intrm. 410, 412 (Chk. S. Ct. Tr. 2007) (citing *Kupenes v. Ungeni*, 12 FSM Intrm. 252, 259 (Chk. S. Ct. Tr. 2003). Mere argument by counsel, be it oral or set forth in a brief, is not the basis on which motions to disqualify are determined. *Id.* It is the movant's burden to go beyond wide-ranging speculation or conclusions and show a factual basis for recusal by admissible, competent evidence. *Jano v. King*, 5 FSM Intrm. 266, 268 (Pon. 1992).

A trial judge is, therefore, justified in denying a motion for recusal on the basis of failure of the moving party to file an affidavit explaining the factual basis for the motion. *Skilling v. FSM*, 2 FSM Intrm. 209, 216-17 (App. 1986); *see also Allen v. Kosrae*, 13 FSM

Intrm. 55, 59 (Kos. S. Ct. Tr. 2004) (A motion to disqualify a judge that is not supported by an affidavit which explains the factual basis for the motion is insufficient and will be denied.).

C. A Showing of Good Cause Must be Established When a Motion to Disqualify is Filed After Trial has Commenced

An application for a trial judge's disqualification must be filed at the earliest opportunity. *Tolenoa v. Kosrae*, 11 FSM Intrm. 179, 184 (Kos. S. Ct. Tr. 2002). This rule will be strictly applied against a party who, having knowledge of the facts constituting a disqualification, does not seek to disqualify the judge until an unfavorable ruling has been made. *Id.* A motion to recuse may be considered untimely when it is brought many weeks after the deadline for pretrial motions and where the movant has known for months which justice would be presiding over the trial. *Shrew v. Kosrae*, 10 FSM Intrm. 533, 535 (Kos. S. Ct. Tr. 2002).

By statute, a disqualification motion filed after trial has begun must be denied unless there is a good cause for filing it at a later time. Chk. S.L. No. 190-08, § 22(5); *Hartman v. Bank of Guam*, 10 FSM Intrm. 89, 95-96 (App. 2001).

IV. APPLICATION OF LAW TO FACTS

The Movant's disqualification motion is deficient and untimely. First, there appears to be several issues with the affidavit submitted in support of the Movant's disqualification motion. Specifically, it is unclear what involvement, if any, the trial judge had in the instant matter.

Moreover, even if the Court were inclined to find that the trial judge should have recused himself, the Movant has failed to establish "good cause" for filing the disqualification almost seven months after the Judgment was rendered. In support of its disqualification

motion, the Movant merely states that "the state did not have knowledge of the facts constituting a disqualification until about seven months, or this month, June 2014." (Mot., pg. 3). This statement, without anything further, is insufficient to meet the good cause standard. It was only after a Judgment was rendered in favor of Jesse, and after the denial of two motions to set-aside the Judgment, that the Movant moved to disqualify the trial judge. Given these reasons, the Movant's disqualification motion is untimely.

V. CONCLUSION

Based on the foregoing, the Movant's motion to disqualify Associate Justice Repeat Samuel is DENIED.

IT IS SO ORDERED on this 12 day of August, 2014.

Keske Marar
Associate Justice

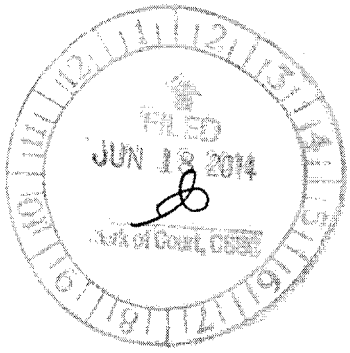
Entered this 12 day of August, 2014.

Clerk of Court, CSSC

CHUUK STATE SUPREME COURT

Federated States of Micronesia

Trial Division – Weno, Chuuk



CHUUK STATE, *Plaintiff* v. KANIF KOKY; NIU ESENSON KOKY; AKSON AKE and ROTTO AKE, *Defendants.*	)	**CSSC CR NO. 010-2014** **ORDER RE THE APPLICATION OF THE MERGER DOCTRINE**

At the arraignment hearing held on January 23, 2014, the parties were requested to submit briefs on the application of the merger doctrine to the instant case.[1] On June 2, 2014, briefs were submitted by the Office of the FSM Public Defender on behalf of the defendants, Esenson Koly, Akson Ake, and Rotto Ake ("Defendants"), and the Office of the Attorney General on behalf of the plaintiff, Chuuk State.

After carefully reviewing the parties' briefs and applicable authorities, the Court finds as follows:

Article 3, Section 5 of the Chuuk State Constitution provides that "[n]o person may be compelled to give evidence that may be used against such person in a criminal case, or be twice put in jeopardy for the same offense." Article 4, Section 7 of the FSM

[1] Defendant Esenson Koky was charged with assault with dangerous weapon (Count 15) and unlawful use of slingshot (Count 24). Defendant Akson Ake was charged with assault with dangerous weapon (Count 16) and unlawful use of slingshot (Count 25). Defendant Rotto Ake was charged assault with dangerous weapon (Count 17) and unlawful use of slingshot (Count 25).

Constitution provides that "[a] person may not be compelled to give evidence that may be used against him in a criminal case, or be twice put in jeopardy for the same offense." The principal purpose of the protection against double jeopardy established by the FSM Constitution is to prevent the government from making repeated attempts to convict an individual for the same alleged act. *FSM v. Zhang Xiaohui,* 14 FSM Intrm. 602 (Pon. 2007) (citing *Laoin v. FSM*, 1 FSM Intrm. 503, 521 (App. 1984)).

In *FSM v. Zhang Xiaohui*, the court explained that:

> . . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. If the test is met a dual conviction will not violate the constitutional protection against double jeopardy . . . Similarly, where a trial court orders concurrent sentences of two convictions of different offenses flowing from a single wrongful act, there is no cumulative or multiple punishments that might violate the double jeopardy clause. *Id.* at 524; *FSM v. Ting Hong Oceanic Enterprises*, 8 FSM Intrm. 166, 179 (Pon. 1997) (no violation of double jeopardy if each offense charged requires proof of a fact which the other does not).

14 FSM Intrm. at 612. The court went on to explain that if both a lesser included and greater offense are proven with respect to the same act, the court should then enter a conviction on only the greater offense. *Id.* A defendant cannot be sentenced on both a higher and lesser included offense arising out of the same criminal transaction. *Id.* (citing *Palik v. Kosrae*, 8 FSM Intrm. 509, 516 (App. 1998)).

In this case, the parties do not dispute that the use of a slingshot[2] is a lesser included offense of assault with a dangerous weapon.[3] (Plaintiff Br., p. 2, Def. Br., p.8).

[2] A defendant is found guilty of the "use of a slingshot" if he uses a slingshot. *See* CSL 10-09-04, section 4.

In fact, the parties agree that if the Defendants are convicted of assault with a dangerous weapon (slingshot), they cannot be convicted of use of a slingshot, a lesser included offense. This Court agrees.

Accordingly, if the use of a slingshot offense and assault with a dangerous weapon offense are proven with respect to the same act, the Court will enter a conviction on only the greater offense.

IT IS SO ORDERED on this 18th day of June, 2014.

Keske Marar
Associate Justice

Entered this 18th day of June, 2014.

Clerk of Court, CSSC

[3] A defendant will be found guilty of "assault with dangerous weapon" if he (1) attempts to cause or purposely causes; (2) bodily injury to another person; and (3) with a dangerous weapon. CSL 6-66 § 407.