

FSM SUPREME COURT TRIAL DIVISION

ALFREDSON LADORE, YOLANDA PABLO, and JAY'S TAXI SERVICE	)	CIVIL ACTION NO. 2009-055
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
HENTRICK PANUEL, in his official and personal capacities as Driver for the Department of Education, POHNPEI DEPARTMENT OF EDUCATION, and STATE OF POHNPEI,	)	
	)	
Defendants.	)	
	)	

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MEMORANDUM AND ORDER ON PENDING MOTIONS

Martin G. Yinug  
Acting Chief Justice

Decided: October 14, 2010

APPEARANCES:

For the Plaintiffs: Salomon M. Saimon, Esq.  
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For the Defendants: Monaliza Abello-Pangelinan, Esq.  
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HEADNOTES

Civil Procedure – Summary Judgment – Grounds

Summary judgment must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. A court considering a summary judgment motion must view facts and inferences drawn from those facts in the light most favorable to the party opposing the motion. Ladore v. Panuel, 17 FSM Intrm. 271, 273 (Pon. 2010).

Civil Procedure – Summary Judgment – Grounds

The existence of a genuine issue as to material facts means that the court need not reach the

question of whether or not the plaintiff is entitled to judgment as a matter of law. Ladore v. Panuel, 17 FSM Intrm. 271, 274 (Pon. 2010).

#### Civil Procedure – Pleadings – Amendment

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served and the defendants' motion to dismiss is not a responsive pleading. Ladore v. Panuel, 17 FSM Intrm. 271, 274 (Pon. 2010).

#### Civil Procedure – Pleadings – Amendment

Even if the defendants had filed an answer and raised their Rule 12(b) defenses in the answer, the court may still grant leave for the plaintiffs to amend their complaint, and Rule 15(c) instructs the court clearly that leave shall be freely given when justice so requires. It does not serve justice by denying a complaint where there may be a source of jurisdiction, and the amendment of a single letter in the complaint may be the difference between dismissal and a foot in the door of justice – the plaintiffs should not be punished for their counsel's inexplicable clerical error. Ladore v. Panuel, 17 FSM Intrm. 271, 274 (Pon. 2010).

#### Civil Procedure – Dismissal – Before Responsive Pleading

A court may grant a Rule 12(b) motion to dismiss for failure to state a claim upon which relief may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proved in support of the claim. Ladore v. Panuel, 17 FSM Intrm. 271, 275 (Pon. 2010).

#### Torts

Torts are primarily areas of state law, and should the FSM Supreme Court take up tort issues, it would apply state law. Ladore v. Panuel, 17 FSM Intrm. 271, 275 (Pon. 2010).

#### Civil Rights

Chapter 7 of Title 11 of the FSM Code creates a statutory cause of action for individuals whose constitutional rights have been violated. It was enacted to safeguard the rights guaranteed to all FSM citizens under Article IV of the FSM Constitution. Ladore v. Panuel, 17 FSM Intrm. 271, 275 (Pon. 2010).

#### Constitutional Law – Due Process; Constitutional Law – Taking of Property

The fundamental concept of procedural due process is that the government may not deprive citizens of life, liberty or property in an unfair, arbitrary manner. A taking occurs whenever a public entity substantially deprives a private party of the beneficial use of his property for a public purpose. Ladore v. Panuel, 17 FSM Intrm. 271, 275 (Pon. 2010).

#### Constitutional Law – Taking of Property

The requirement of a public purpose for a taking means that the deprivation must have as its cause some sort of public purpose. Even if the court were to interpret "public purpose" liberally to include any government policy, no interpretation of the facts could make out a government policy or public purpose which caused the deprivation when the cause was a quotidian traffic accident which raises a question of tort, not due process. Ladore v. Panuel, 17 FSM Intrm. 271, 275-76 (Pon. 2010).

#### Civil Procedure – Dismissal – Before Responsive Pleading; Jurisdiction – Pendent

When the court dismisses causes of action for the failure to state claims on which the FSM Supreme Court can grant relief and the remaining causes of action are all based in tort, which are properly the domain of state law, the court will grant the motion to dismiss with regard to the rest of the complaint because without at least one viable national law cause of action from which to hang, there is no pendent jurisdiction for the state law issues. Ladore v. Panuel, 17 FSM Intrm. 271, 276

(Pon. 2010).

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## COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

This matter comes before the court on a number of different motions, which this order will address. This case has a somewhat unusual history. The plaintiffs filed their complaint on December 2, 2009. The defendants did not file an answer, but filed a motion to dismiss on two Rule 12(b) grounds: lack of jurisdiction under Rule 12(b)(1), citing to the plaintiffs' identification of FSM Const. art. XI § 6(a) instead of § 6(b) as the source of jurisdiction; and failure to state a claim upon which relief may be granted under Rule 12(b)(6).

The plaintiffs filed an opposition to the motion on January 14, 2010, along with a motion to amend the complaint, and an amended complaint. The amended complaint is identical to the original complaint, except that under the statement of jurisdiction, FSM Const. art. XI § 6(a) has been changed to § 6(b). The defendants did not file a response to the motion to amend.

The plaintiffs then filed a motion for summary judgment on June 21, 2010, to which the defendants responded on July 9, 2010. The defendants have not to date filed an answer to either the original or amended complaint.

The court will restate the facts as alleged in the complaint, and address the motions in reverse chronological order.

### I. FACTUAL BACKGROUND

On October 31, 2008, defendant Panuel was operating a vehicle owned by the Pohnpei State Department of Education at "an unlawful speed and time" and collided with a vehicle owned by plaintiff Jay's Taxi. The impact caused heavy damage to the vehicle, such that it was inoperable "as a taxi or any other capacity beneficial to the plaintiffs." Efforts to mitigate damages to the vehicle "have been futile," and the vehicle's inoperability has limited the ability of Jay's Taxi to operate as a business, and thereby earn revenue with which to repay its outstanding business loan debt.

### II. LEGAL ANALYSIS

#### A. *Plaintiffs' Motion for Summary Judgment*

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FSM Civ. R. 56(c). A court considering a motion for summary judgment must view facts and inferences drawn from those facts in the light most favorable to the party opposing the motion. *See, e.g., Zion v. Nakayama*, 13 FSM Intrm. 310, 312 (Chk. 2005); *Etscheit v. Adams*, 6 FSM Intrm. 365, 373 (Pon. 1994); *Bank of Guam v. Island Hardware, Inc.*, 2 FSM Intrm. 281, 284 (Pon. 1986); *FSM v. Ponape Builders Constr. Inc.*, 2 FSM Intrm. 48, 52 (Pon. 1985).

Here, there is a genuine issue as to at least one material fact, namely, the damages that resulted from the incident. Plaintiffs assert that defendants have not paid, and cite an affidavit from plaintiff

Ladore, stating: "As of now, the government has not paid a dime to me or to shops t [*sic*] repair the damaged vehicle." In the opposition to the motion for summary judgment, defendants assert that "efforts were in fact made to assist Plaintiffs to restore the damaged vehicle" and that "Defendants did pay for the repair services done to the vehicle," although acknowledging that there were additional repairs required later.

The existence of a genuine issue as to material facts means that the court need not reach the question of whether or not the plaintiff is entitled to judgment as a matter of law. The court denies the motion for summary judgment.

#### B. *Plaintiffs' Motion to Amend Complaint*

As part of its response to the defendants' motion to dismiss, the plaintiffs moved in the alternative to file an amended complaint to address the question of jurisdiction. The attached amended complaint was identical to the original complaint except for identifying FSM Const. art. XI § 6(b) as the source of jurisdiction.

The FSM Rules of Civil Procedure address amendment of pleadings:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

FSM Civ. R. 15(a).

The first question, then, is whether or not the defendants' motion to dismiss is a responsive pleading. The FSM Rules of Civil Procedure indicate it is not:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . .

FSM Civ. R. 12(b). The rule makes a distinction between a responsive pleading and a motion, including specifically Rule 12(b) motions, such as the defendants' motion to dismiss in this case. Thus, the motion is not a responsive pleading.

Since the motion to dismiss under Rule 12(b) is not a responsive pleading, under Rule 15(c), plaintiffs have the right as a matter of course to file an amended complaint.

Even if the defendants had filed an answer and raised their Rule 12(b) defenses in the answer, the court may still grant leave for the plaintiffs to amend their complaint, and Rule 15(c) instructs the court clearly that leave shall be freely given when justice so requires. The court does not serve justice when it denies a complaint where there may be a source of jurisdiction, and the amendment of a single letter in the complaint may be the difference between dismissal and a foot in the door of justice – the plaintiffs should not be punished for an inexplicable clerical error on the part of their counsel.

The court grants the motion to amend complaint, and deems the amended complaint filed as of

the date of the original complaint.

*C. Defendants' Motion to Dismiss*

A court may grant a Rule 12(b) motion to dismiss for failure to state a claim upon which relief may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proved in support of the claim. *See, e.g., Sipos v. Crabtree*, 13 FSM Intrm. 355, 362 (Pon. 2005); *Faw v. FSM*, 6 FSM Intrm. 33, 37 (Yap 1993); *Mailo v. Twum-Barimah*, 2 FSM Intrm. 265, 267 (Pon. 1986). In making this determination, the court must view facts and inferences drawn from those facts in the light most favorable to the plaintiff. *See, e.g., Annes v. Primo*, 14 FSM Intrm. 196, 201 (Pon. 2006); *Sipos*, 13 FSM Intrm. at 362; *Jano v. King*, 5 FSM Intrm. 388, 390 (Pon. 1992).

The complaint, both original and as amended, allege the following eight causes of action: (1) negligence per se; (2) trespass to chattels; (3) negligence; (4) destruction of creditworthiness; (5) infliction of emotional distress; (6) *respondeat superior* (as against the Pohnpei State Department of Education and the Government of Pohnpei by imputing defendant Panuel's actions to them); (7) due process violations under FSM Const. art. IV, § 3 and Pohnpei Const. art. 4, § 4; and (8) civil rights violations under 11 F.S.M.C. 701(3). The first six causes of action are based in torts, which are primarily areas of state law. *See Phoenix of Micronesia, Inc. v. Mauricio*, 9 FSM Intrm. 155, 158 (App. 1999). Should the FSM Supreme Court take up these issues, it would apply state law. *See, e.g., Amayo v. MJ Co.*, 10 FSM Intrm. 244, 253-54 (Pon. 2001); *Nethon v. Mobil Oil Micronesia, Inc.*, 6 FSM Intrm. 451, 455 (Chk. 1994); *Edwards v. Pohnpei*, 3 FSM Intrm. 350, 360 n.22 (Pon. 1989).

The remaining two causes of action, for violations of due process and civil rights, raise questions of national law by virtue of invoking, respectively, FSM Const. art. IV, § 3<sup>1</sup> and 11 F.S.M.C. 701(3).<sup>2</sup> "Chapter 7 of Title 11 of the FSM Code creates a statutory cause of action for individuals whose constitutional rights have been violated." *Isaac v. Weilbacher*, 8 FSM Intrm. 326, 335 (Pon. 1998). Further, Chapter 7 of Title 11 of the FSM Code was enacted to safeguard the rights guaranteed to all FSM citizens under Article IV of the FSM Constitution. *Davis v. Kutta*, 9 FSM Intrm. 565, 568 (Chk. 2000). Thus, it is an error to assert due process violations as a separate cause of action; rather, the plaintiffs' eighth cause of action is the cause of action for the alleged due process violations. The eighth cause of action also does not allege any facts or assert any theories of law that make out a civil rights violation other than the due process violations. That is, the only question of national law brought in the complaint is that of due process violations.

The fundamental concept of procedural due process is that the government may not deprive citizens of life, liberty or property in an unfair, arbitrary manner. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 354-55 (Pon. 1983). The plaintiffs do not allege that there has been a deprivation of life or liberty; thus this case may present a question of takings. A taking occurs whenever a public entity substantially deprives a private party of the beneficial use of his property for a public purpose. *Damarlane v. United States*, 7 FSM Intrm. 167, 170 (Pon. 1995). The requirement of a public purpose means that the deprivation must have as its cause some sort of public purpose. Even if the court were to interpret

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<sup>1</sup> "A person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws."

<sup>2</sup> "Civil liability. A person who deprives another of any right or privilege protected under this Section shall be civilly liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, without regard to whether a criminal case has been brought or conviction obtained."

"public purpose" liberally to include any government policy, no interpretation of the facts makes out a government policy or public purpose which caused the deprivation. Nor have the plaintiffs put forth any theory that there is some government policy to hire drivers to collide with the vehicles of private citizens. In short, even the most liberal interpretation of the facts indicates that what happened on October 31, 2008, was a quotidian accident which raises a question of tort, not due process. The theory that this was a due process violation is further attenuated by the facts that the government had been in communication with the plaintiffs, and that the plaintiffs have access to courts to resolve the matter.

The court grants the motion to dismiss with regard to the seventh and eighth causes of action, for failure to state claims for which this court can provide relief.

The remaining causes of action are all based in tort, and such causes of action are properly the domain of state law. See Phoenix of Micronesia, Inc., 9 FSM Intrm. at 158. Further, without at least one viable national law cause of action from which to hang, there is no pendent jurisdiction for the state law issues. Therefore, the court grants the motion to dismiss with regard to the remainder of the complaint.

### III. CONCLUSION

For the reasons above, the court disposes of the pending motions as follows:

1. The plaintiffs' motion for summary judgment is DENIED.
2. The plaintiffs' motion to amend the complaint is GRANTED.
3. The amended complaint is deemed filed on the date of the original complaint.
4. The defendants' motion to dismiss is GRANTED.

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