FSM SUPREME COURT APPELLATE DIVISION

SNYDER H. SIMON, Appellant, vs. HEIRS OF EDMOND TULENKUN, Appellees.	APPEAL CASE NO. K6-2009 (Small Claim No. 52-09)

OPINION

Argued: July 28, 2011
Submitted: August 10, 2011
Decided: September 5, 2011

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCE:

For the Appellant: Snyder H. Simon, Esq.
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HEADNOTES

Appellate Review – Decisions Reviewable

The FSM Supreme Court appellate division is obligated to examine the basis of its jurisdiction, *sua sponte*, if necessary. Simon v. Heirs of Tulenkun, 17 FSM Intrm. 646, 648 (App. 2011).

Appellate Review – Decisions Reviewable

The Kosrae state constitution permits the FSM Supreme Court appellate division to review cases on appeal from the highest Kosrae state court in which a decision may be had, which, since no Kosrae State Court appellate division has yet been prescribed by law, is the Kosrae State Court trial division. Simon v. Heirs of Tulenkun, 17 FSM Intrm. 646, 648 (App. 2011).

Civil Procedure – New Trial

Small claims cases are heard in the Kosrae State Court trial division under a simplified small claims procedure since a separate division or department was not created within the State Court for small claims. A small claims judgment is not the final action that can be taken in the State Court trial division since either party to a small claim judgment may have a new trial in the same court according to the usual trial procedure for large claims by filing a request for new trial within 30 days after the

small claims judgment. Simon v. Heirs of Tulenkun, 17 FSM Intrm. 646, 648-49 (App. 2011).

Civil Procedure – New Trial

The word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, but the context in which the word appears must be the controlling factor and in Kosrae Civil Procedure Rule 87(i), the discretion is exercised by a small claims judgment-party. The judgment-party decides whether there will be a new trial. If the party asks within 30 days, then there must or shall be a new trial following the usual procedures for civil cases. The procedure is, if a party in a small claims action is dissatisfied by the judgment, the party can get, by asking within 30 days, a new trial that follows the regular civil action procedure. Simon v. Heirs of Tulenkun, 17 FSM Intrm. 646, 649 (App. 2011).

Appellate Review – Decisions Reviewable

A Kosrae small claims judgment does not qualify as a decision of "the highest state court in which a decision may be had" since there are further State Court proceedings available in which a decision may be had. A decision after a trial de novo on the State Court's regular civil docket, instead of on its small claims docket, would be a judgment from the "highest" state court in which a decision could be had. Simon v. Heirs of Tulenkun, 17 FSM Intrm. 646, 649 (App. 2011).

Appellate Review – Decisions Reviewable

When a party's sole recourse from a Kosrae small claims judgment is to file for a trial de novo in the Kosrae State Court, the party cannot appeal directly to the FSM Supreme Court. The FSM Supreme Court's only authority over a direct appeal from a Kosrae small claims judgment is to enter an order dismissing the appeal since the court lacks jurisdiction over it because it is not an appeal from the highest state court in which a decision may be had. Simon v. Heirs of Tulenkun, 17 FSM Intrm. 646, 649-50 (App. 2011).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This appeal is from a Kosrae State Court small claims judgment, Heirs of Tulenkun v. Simon, 16 FSM Intrm. 636 (Kos. S. Ct. Tr. 2009), awarding the Heirs of Edmund Tulenkun, a refund from attorney Snyder H. Simon of a $500 retainer fee plus reimbursement of their $10 filing fee. We dismiss the appeal for lack of jurisdiction. Our reasons follow.

I. BACKGROUND

On October 4, 2007, the Kosrae State Court affirmed the Kosrae Land Court's dismissal of the claims of the Heirs of Edmond Tulenkun to Parcels No. 018-U-01 and 018-U-02. Heirs of Tulenkun v. Heirs of Seymour, 15 FSM Intrm. 342, 347 (Kos. S. Ct. Tr. 2007). They filed a further appeal to the FSM Supreme Court (docketed as App. No. K10-2007) and sought an attorney to assist them there.

On June 30, 2008, attorney Simon filed a notice of appearance in K10-2007 and filed the Tulenkun heirs' third motion for an enlargement of time to file an opening brief. On July 3, 2008, Joab A. Edmond, acting for the Tulenkun heirs, and Simon entered into a written contract for legal services that called for a $5,000 retainer fee to be charged at the rate of $100 an hour. Edmond paid Simon $500 that day. No later payments were made.

The enlargement was granted, and August 30, 2008, was set as the new deadline. On September 16, 2008, Simon filed the Tulenkun heirs' fourth enlargement motion. It was granted and the filing deadline for the opening brief was set for November 17, 2008. No brief was filed. On November 24, 2008, the appellees moved to dismiss the K10-2007 appeal for failure to file an opening brief. On December 2, 2008, the motion was granted and the appeal was dismissed. (Simon's opposition was not filed until December 11, 2008.) No further action was taken in K10-2007.

On October 5, 2009, the Tulenkun heirs filed a small claims action in the Kosrae State Court seeking the return of the $500 and the reimbursement of the $10 small claims filing fee. After hearing, the trial court issued a written opinion granting the Tulenkun heirs judgment for $510. Heirs of Tulenkun v. Simon, 16 FSM Intrm. 636, 647 (Kos. S. Ct. Tr. 2009). The State Court concluded that since the Tulenkun heirs were not seeking to recover the value of the land that was at issue in the appeal, their claim was one for breach of contract and not for legal malpractice, *id.* at 644, and it concluded that since the Tulenkun heirs had proven that Simon had breached the contract by failing to file a brief and since Simon had failed to prove that the Tulenkun heirs had breached the contract, the Tulenkun heirs were entitled to the $510 sought. *Id.* at 646-47.

II. Appellate Issues

Simon then appealed to the FSM Supreme Court. He contends that the small claims court erred: 1) by finding that Simon breached the contract when it should have found that Edmond breached the contract; 2) by not basing its decision on substantial evidence; 3) by misapplying the facts to the application of law; 4) by violating Simon's due process rights; 5) by abusing its discretion; and 6) because its decision was clearly erroneous.

Whether we have jurisdiction to hear this appeal is a matter of first impression since this is the first appeal from a Kosrae State Court small claims judgment. Since we are obligated to examine the basis of our jurisdiction, *sua sponte*, if necessary, Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010); Kosrae v. Benjamin, 17 FSM Intrm. 1, 3 (App. 2010); Alanso v. Pridgen, 15 FSM Intrm. 597, 598 n.1 (App. 2008), we raised the point at oral argument and asked Simon if he would like to file a brief or memorandum on whether, in light of Kosrae Civil Procedure Rule 87(i) and Article XI, section 7 of the FSM Constitution, we have jurisdiction to hear an appeal from a Kosrae small claims judgment. He indicated that he would. He was given until August 10, 2011 to file his brief on jurisdiction. When no brief was filed by then, we considered the matter submitted to us for our decision.

III. Our Appellate Jurisdiction

Under the FSM Constitution, "[i]f a state constitution permits, the appellate division of the Supreme Court may review other cases on appeal from the highest state court in which a decision may be had." FSM Const. art. XI, § 7. The Kosrae Constitution so permits. It provides that:

> Decisions of the Trial Division of the State Court may be appealed to the appellate division of the State Court, as shall be prescribed by law. Decisions of the highest division of the State Court may be appealed to the appellate division of the Supreme Court of the Federated States of Micronesia.

Kos. Const. art. VI, § 6. There currently is no State Court appellate division since one has not yet been prescribed by law.

Small claims cases are heard in the Kosrae State Court trial division under a simplified small claims procedure. Kos. Civ. R. 87. It does not appear that a separate division or department was

created within the State Court for small claims. Nevertheless, a small claims judgment is not the final action that can be taken in the State Court trial division. "Either party to a small claim judgment may have a new trial in the same court according to the usual trial procedure for large claims by filing a request for new trial within thirty (30) days after the small claims judgment." Kos. Civ. R. 87(i). Thus the question is whether an appeal of a small claims judgment directly to the FSM Supreme Court appellate division is an "appeal from the highest state court in which a decision may be had" since a party to a small claims judgment can obtain a new trial (a trial de novo) in the State Court after which a new, superseding judgment would be entered.

Kosrae Civil Procedure Rule 87(i) provides that a "party to a small claim judgment may have a new trial" by filing a request within 30 days. The word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, but the context in which the word appears must be the controlling factor. Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 20-21 (App. 2006); Kama v. Chuuk, 10 FSM Intrm. 593, 599 (Chk. S. Ct. App. 2002). In Rule 87(i), the discretion is exercised by a judgment-party. The judgment-party decides whether there will be a new trial. If the party asks within 30 days, then there must or shall be a new trial following the usual procedures for civil cases. *Cf.* AHPW, Inc. v. Pohnpei, 14 FSM Intrm. 188, 191 (Pon. 2006) ("[i]n a proper case the word 'may' will be construed as 'must' or 'shall.'"). Thus, the procedure is, if a party in a small claims action is dissatisfied by the judgment, the party can get, by asking within 30 days, a new trial following the regular civil action procedure.

Even if the Rule 87 small claims procedure is technically conducted in the same division (the trial division) of the Kosrae State Court as would a trial de novo, it seems that it functions as a separate, small claims division or department. Whether small claims are heard in a different division, a different department, or just entered on a separate docket is, we think, not relevant. By creating a separate small claims docket and a separate, simplified small claims procedure, the State Court has, in effect, created within the State Court an inferior court of limited jurisdiction from which an appeal can be made by asserting a right to a trial de novo using the usual civil procedure for large claims. That being so, a small claims judgment does not qualify as a decision of "the highest state court in which a decision may be had." There are further State Court proceedings available in which a decision may be had. A decision after a trial de novo on the State Court's regular civil docket, instead of on its small claims docket, would be a judgment from the "highest" state court in which a decision could be had.

In this case, Simon did not invoke his right to a trial de novo after the small claims judgment was entered against him. He chose instead to appeal directly to the FSM Supreme Court. The situation in Prosser v. Derickson, 1 S.W.3d 608 (Mo. Ct. App. 1999) was similar except that the court there relied on state statutes for the right to appeal instead of on a constitution. In Prosser, a plaintiff filed a suit in a circuit court seeking the return of property valued at $1,172, and when that court dismissed his suit he appealed to the Missouri Court of Appeals. That court ruled that, since the state statute gave any litigant aggrieved by an associate circuit judge's decision the right to a trial de novo in all cases where the damage claims did not exceed $5,000, the plaintiff could not appeal directly to the appellate court. *Id.* at 609. It held that the plaintiff's "sole recourse was to file for a trial de novo in the circuit court, he cannot appeal to [the Court of Appeals] directly." *Id.* It noted that "[a]n appeal without statutory sanction confers no authority upon an appellate court except to enter an order dismissing the appeal." *Id.*

The only differences between Prosser and Simon's appeal are that a civil procedure rule instead of a statute confers the right to a trial de novo and a constitution (actually two constitutions, FSM and Kosrae) instead of a statute confers the right to appeal. Those differences do not alter the result. If anything, the FSM constitutional dimension makes the result more likely. We therefore hold that Simon's sole recourse from the small claims judgment was to file for a trial de novo in the Kosrae State

Court. He cannot appeal to us directly. Our only authority is to enter an order dismissing this direct appeal from the Kosrae small claims judgment.

III. Conclusion

Accordingly, this appeal is dismissed because we lack jurisdiction over it since it is not an appeal from the highest state court in which a decision may be had.

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FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF ISAIAH BENJAMIN, Appellants, vs. HEIRS OF CLINTON BENJAMIN, Appellees.	)	APPEAL CASE NO. K3-2010

OPINION

Argued: July 28, 2011
Decided: September 6, 2011

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

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HEADNOTES

Appellate Review – Standard of Review – Civil Cases; Property – Land Court

By statute, the standard under which the Kosrae State Court must review Land Court decisions is by applying the "substantial evidence rule." And, if the State Court finds the Land Court decision was not based upon substantial evidence or that the Land Court decision was contrary to law, it must remand the case to the Land Court with instructions and guidance for re-hearing the matter in its entirety or such portions of the case as may be appropriate. Heirs of Benjamin v. Heirs of Benjamin,