FSM SUPREME COURT TRIAL DIVISION

ARTSON S. TALLEY, Plaintiff, vs. ANNA MENDIOLA, individually and in her official capacity as President and Chief Executive Officer of FSM Development Bank; JOHN SOHL, in his official capacity as Chairman of the FSM Development Bank Board of Directors; NORA SIGRAH, in her personal capacity; and FSM DEVELOPMENT BANK, Defendants.	)	CIVIL ACTION NO. 2020-2002

ORDER GRANTING SUMMARY JUDGMENT, DISMISSING CASE, & IMPOSING RULE 11 SANCTIONS

Larry Wentworth
Associate Justice

Decided: June 7, 2021

APPEARANCES:

For the Plaintiff: Yoslyn G. Sigrah, Esq.
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For the Defendants: Nora E. Sigrah, Esq.
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HEADNOTES

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

When a party, either in support or in opposition to a Rule 12(b)(6) motion to dismiss for the failure to state a claim, submits matters to the court outside of the pleadings, the court has two options – it may either accept those outside matters and treat the motion as one for summary judgment under Rule 56 or it may exclude those matters and continue to treat the motion as one for dismissal for failure to state a claim upon which relief can be granted. Talley v. Mendiola, 23 FSM R. 317, 322 (Kos. 2021).

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

When there is no reason to exclude the outside matters that are presented with a Rule 12(b)(6) motion, the court must treat the motion as one for summary judgment once all parties have had a reasonable opportunity to present all material made pertinent to such a motion under Rule 56. Talley v. Mendiola, 23

FSM R. 317, 322-23 (Kos. 2021).

Civil Procedure – Motions – Unopposed; Civil Procedure – Summary Judgment

The failure to oppose a summary judgment motion is generally deemed a consent to the motion, but even when there is no opposition, the court still needs good grounds before it can grant the motion. Talley v. Mendiola, 23 FSM R. 317, 323 (Kos. 2021).

Judgments – Relief from Judgment; Judgments – Relief from Judgment – Independent Actions

Relief from a judgment may be sought either by a Rule 60(b) motion or by an independent action – through filing a separate case. It cannot be sought by both. That is because Rule 60(b) motions for relief from judgment and independent actions for relief from judgment are alternative, not cumulative methods of relief. But an independent action to set aside a judgment made after a Rule 60(b) motion is denied, is permissible only if it is made on a ground different from the ground in the denied Rule 60(b) motion. Talley v. Mendiola, 23 FSM R. 317, 325 (Kos. 2021).

Civil Procedure – Res Judicata; Judgments – Relief from Judgment – Independent Actions; Judgments – Relief from Judgment – Time Limits

If a Rule 60(b) motion for relief from judgment is denied solely as untimely, that denial does not act as res judicata precluding an independent action since the denial was not on the merits. A Rule 60(b)(1) motion's denial solely on the ground that the absolute time limit of one year precluded consideration of the merits of the grounds presented does not preclude a prompt independent action for relief in the same court. Talley v. Mendiola, 23 FSM R. 317, 325 (Kos. 2021).

Jurisdiction – Personal

For a trial court to acquire personal jurisdiction over a defendant, the defendant has to be properly served with the complaint and summons. Talley v. Mendiola, 23 FSM R. 317, 325 (Kos. 2021).

Civil Procedure – Service of Process; Jurisdiction – Personal

Regardless of where a defendant might have been living at the time, when a defendant is served the complaint and summons in person on Kosrae, that is enough to give the court personal jurisdiction over him. Talley v. Mendiola, 23 FSM R. 317, 325 (Kos. 2021).

Civil Procedure – Default and Default Judgments; Civil Procedure – Notice; Civil Procedure – Service of Process

The service of the complaint and summons on a defendant gives the defendant notice that the plaintiff has filed suit against the defendant and notice of the plaintiff's claims against the defendant. The service of the complaint and summons on a defendant also gives the defendant the opportunity to be heard on the plaintiff's claims against the defendant and the summons gives the defendant notice that, if the defendant fails to file an answer or other responsive pleading, a default judgment will be rendered against the defendant for the relief demanded in the complaint. Talley v. Mendiola, 23 FSM R. 317, 325 (Kos. 2021).

Civil Procedure – Default and Default Judgments – Entry of Default

When a defendant, who has been properly served, has not appeared and answered or otherwise defended within the allotted time, and the plaintiff has made that fact to appear to the court clerk, the clerk must, on request, enter the defendant's default. Talley v. Mendiola, 23 FSM R. 317, 326 (Kos. 2021).

Civil Procedure – Default and Default Judgments; Civil Procedure – Default and Default Judgments – Entry of Default

The plaintiff does not have to serve on the defendant a copy of the requests for an entry of default and for a default judgment when the defendant has failed to appear and answer or otherwise defend. In such situations, the defendant has no grounds on which to oppose the plaintiff's request. Talley v. Mendiola, 23

FSM R. 317, 326 (Kos. 2021).

Civil Procedure – Default and Default Judgments; Constitutional Law – Due Process – Procedural

When the summons served with the complaint warns the defendant that, if he or she does not appear or defend within twenty days of the complaint's service, a default judgment could be taken against him or her, that summons (and complaint) constitute the notice to the defendant and the opportunity to be heard that is required by due process of law. The defendant is not entitled to a second notice and warning that the plaintiff is now going to obtain an entry of default and a default judgment. That notice has already been given and the opportunity to be heard has been afforded and has passed. Talley v. Mendiola, 23 FSM R. 317, 326 (Kos. 2021).

Civil Procedure – Default and Default Judgments; Constitutional Law – Due Process – Procedural

When a defendant was personally served with the complaint and summons, the defendant was given notice and had the opportunity to be heard by answering the complaint or otherwise defending, and if the defendant does not take advantage of that opportunity, he or she is not entitled to a second notice and a second opportunity to be heard before a default judgment is entered because the defendant has waived that right by failing to appear. The defendant has received the procedure and process to which he or she was due. Talley v. Mendiola, 23 FSM R. 317, 326 (Kos. 2021).

Civil Procedure – Stare Decisis

In order to be "controlling law," the precedent must be binding. A binding precedent is a precedent that a court must follow – an applicable holding of a higher court in the same jurisdiction; in other words, an appellate decision. Talley v. Mendiola, 23 FSM R. 317, 326 n.1 (Kos. 2021).

Banking; Torts

Title 30 provisions do not create any private causes of action or defenses. Talley v. Mendiola, 23 FSM R. 317, 326 (Kos. 2021).

Attorney Discipline; Civil Procedure – Sanctions – Rule 11

An attorney may argue for a change or modification of the existing controlling law in order to preserve that issue for appeal, but, when making such an argument, the attorney is ethically required to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel, and then make a non-frivolous argument why the controlling law should be altered, modified, or reversed. Failure to do so may not only put the attorney in Rule 11 jeopardy, but may also leave the client in the difficult position of not having the benefit of reasoned advocacy that might improve the client's position. Talley v. Mendiola, 23 FSM R. 317, 326-27 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

A legal contention is not warranted by existing law if it is based on legal theories that are plainly foreclosed by well-established legal principles and authoritative precedent, unless the advocate plainly states that he or she is arguing for a reversal or change of law and presents a non-frivolous argument in support of that position. Talley v. Mendiola, 23 FSM R. 317, 327 n.2 (Kos. 2021).

Torts – Fraud

The elements of fraud or intentional misrepresentation are: 1) a knowing or deliberate misrepresentation by the defendant, 2) made to induce action by the plaintiff, 3) with justifiable reliance by the plaintiff upon the misrepresentations, 4) to the plaintiff's detriment. Talley v. Mendiola, 23 FSM R. 317, 327 (Kos. 2021).

Civil Procedure – Pleadings – With Particularity; Judgments – Relief from Judgment – Independent Actions

Rule 9(b) requires that in allegations of fraud, the circumstances constituting the fraud must be pled

with particularity. When fraud is alleged, particularity is a pleading requirement that applies with equal force to independent actions brought under Rule 60(b). Talley v. Mendiola, 23 FSM R. 317, 327 (Kos. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Pleadings – With Particularity; Torts – Fraud

When alleging fraud, a plaintiff must state with particularity the circumstances constituting fraud and must identify particular statements and actions and specify why they are fraudulent. Conclusory allegations do not satisfy the requirements of Rule 9(b) and subject the pleader to dismissal. Talley v. Mendiola, 23 FSM R. 317, 327 (Kos. 2021).

Evidence – Burden of Proof; Torts – Fraud

A preponderance of the evidence is not sufficient proof for a fraud and misrepresentation allegation. To establish fraud, a proponent must prove the fraud by clear and convincing evidence, which is the highest burden of proof in civil cases; a mere preponderance of the evidence is not enough. Talley v. Mendiola, 23 FSM R. 317, 327 (Kos. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Pleadings

Since a party generally cannot assert the rights of another (a third party) as the party's own, to the extent that an allegation seeks to adjudicate the rights of borrowers other than the plaintiff, it fails to state a claim for which the court could grant relief. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Civil Procedure – Default and Default Judgments

If a defendant, who has been properly served a summons and complaint, fails to answer or otherwise defend, the plaintiff is expected to seek a default judgment because the default judgment remedy is available when the adversary process has halted because of an essentially unresponsive party, such as a defendant who does not answer or otherwise defend. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Civil Procedure – Default and Default Judgments

The default judgment remedy protects the diligent plaintiff so that the plaintiff is not faced with interminable delay and continued uncertainty, and a default is a deterrent to those parties who choose delay as part of their litigation strategy. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Attorney and Client; Civil Procedure – Default and Default Judgments; Civil Procedure – Dismissal – Lack of Prosecution

A bank's in-house counsel cannot be faulted for promptly seeking a default judgment against a non-answering defendant because a lawyer must act with reasonable diligence and promptness in representing a client, and if a plaintiff's lawyer takes no action after a properly served defendant has not answered or otherwise defended, the plaintiff's case is then subject to possible dismissal under Rule 41(b) for want of prosecution. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Civil Procedure – Default and Default Judgments

There are times when a defendant might logically prefer that the plaintiff obtain a prompt default judgment. For instance, when the debt's interest rate of 15% drops to the 9% judgment rate, or when the default judgment keeps any liability for the plaintiff's collection costs, including reasonable attorney's fees, low. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Interest and Usury

A 15% interest rate on a consumer loan is not excessive interest – that is, it is not usury. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Civil Procedure – Dismissal; Civil Procedure – Parties

When all actions, or inactions, complained of, were taken by persons in their capacities as bank officers, dismissal of them in their individual capacities is proper. Talley v. Mendiola, 23 FSM R. 317, 328 (Kos. 2021).

Judgments – Relief from Judgment – Independent Actions

An independent action in equity to set aside a judgment must satisfy five essential elements: 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law, and if any one of these elements is missing the court cannot take equitable jurisdiction of the case. Talley v. Mendiola, 23 FSM R. 317, 329 (Kos. 2021).

Judgments – Relief from Judgment – Independent Actions

A person cannot show the absence of fault or negligence on his part when the only reason given for his failure to timely plead his defenses in the case, whose judgment he seeks relief from, was an unexplained breakdown in communication between him and his attorney. Talley v. Mendiola, 23 FSM R. 317, 329 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

Rule 11 provides that an attorney's signature on any filing constitutes a the signer's certificate that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. One purpose of Rule 11 is to deter baseless filings. Talley v. Mendiola, 23 FSM R. 317, 329-30 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

Rule 11 sanctions can be imposed for either of two grounds – the filing was 1) not warranted by law or 2) filed for an improper purpose. Talley v. Mendiola, 23 FSM R. 317, 330 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

Rule 11 sanctions can be granted for violating any one of Rule 11's three elements – is the document 1) signed, or 2) is to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it well grounded in fact and warranted by law, or 3) is it interposed for any improper purpose such as delay or harassment. A meritless filing can be sanctioned even if it was made in good faith and not for an improper purpose, and, a meritorious filing can be sanctioned if it was made for an improper purpose. Talley v. Mendiola, 23 FSM R. 317, 330 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

The fact that a complaint, allegation, or motion is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a Rule 11 sanction is appropriate. Talley v. Mendiola, 23 FSM R. 317, 331 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

When it is clear that the complaint was not supported by law and was filed for the purpose of delay or harassment, the court will grant the opposing party's motion for sanctions in the form of costs including reasonable attorney's fees. These sanctions will be imposed against the plaintiffs' counsel of record. Talley v. Mendiola, 23 FSM R. 317, 331 (Kos. 2021).

Civil Procedure – Sanctions – Rules 11

Particularly telling that an independent action was filed for an improper purpose is the plaintiff's abandonment of the case once the defendants had expended time, effort, and resources responding to the "independent action" with their motions to dismiss and because it is obvious that the plaintiff has no interest in pursuing this independent action, the court can only conclude that it was only brought for the improper purposes of delay and harassment, and possibly also to increase the defendant's litigation expenses. Talley v. Mendiola, 23 FSM R. 317, 331-32 (Kos. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on 1) Defendant Nora Sigrah's Motion to Dismiss the Complaint, with supporting exhibits, filed August 4, 2020; 2) Defendants Anna Mendiola, John Sohl and FSM Development Bank's Motion to Dismiss the Complaint, filed September 18, 2020; 3) Suggestion of Death on the Record of Defendant John Sohl, filed December 20, 2020; and 4) Defendants' Motion for Order Imposing Rule 11 Sanctions, with supporting exhibit, filed January 26, 2021. As explained below, summary judgment is granted on the defendants' motions to dismiss and the Rule 11 motion is granted.

I. Nature and Posture of This Case

On July 15, 2020, Artson S. Talley filed a complaint against the FSM Development Bank, its president, the chairman of its board, and its in-house attorney. In this independent action, Talley seeks relief from the default judgment that the bank obtained against him in Civil Action No. 2018-2003. He asserts that the Civil Action No. 2018-2003 judgment was obtained in violation of his constitutional right to procedural due process; that it violated Title 30 of the FSM Code; that his unpaid loan was the result of the defendants' fraud and misrepresentation and their gross negligence.

On August 4, 2020, defendant Nora Sigrah, the bank's in-house attorney, filed a Rule 12(b)(6) motion to dismiss the complaint because it does not state a claim for which relief could be granted. She asserts that the complaint fails to meet all the requirements for an independent action for relief from judgment; that all causes of action or defenses that Talley pleads were available to Talley when he made his Rule 60(b) motion for relief from judgment in Civil Action No. 2018-2003, and thus are now barred; that Title 30 does not create any private causes of action; that the fraud and misrepresentation claim was inadequately pled; that the gross negligence allegations either fail to state a claim for relief or raise claims that belong to third parties and not to Talley; and that all the allegations against her are for her actions or inactions as a bank employee and she was only sued in her personal capacity. On September 18, 2020, all the other defendants joined Nora Sigrah in moving to dismiss the complaint. They assert the same grounds for dismissal as Nora Sigrah does and further assert that the complaint fails to state a claim against Anna Mendiola in her personal capacity.

To support their motions to dismiss, the defendants include matter (exhibits) outside the pleadings. When a party, either in support or in opposition to a Rule 12(b)(6) motion to dismiss for the failure to state a claim, submits matters to the court outside of the pleadings, the court has two options – it may either accept those outside matters and treat the motion as one for summary judgment under Rule 56 or it may exclude those matters and continue to treat the motion as one for dismissal for failure to state a claim upon which relief can be granted. Fuji Enterprises v. Jacob, 21 FSM R. 355, 363 (App. 2017).

No reason to exclude this outside matter is apparent. When there is no reason to exclude the outside

matters that are presented with a Rule 12(b)(6) motion, the court must treat the motion as one for summary judgment once all parties have had a reasonable opportunity to present all material made pertinent to such a motion under Rule 56. Estate of Gallen v. Governor, 21 FSM R. 477, 486 n.9 (Pon. 2018); Palasko v. Pohnpei, 20 FSM R. 90, 93 (Pon. 2015).

Talley has had more than ample time to respond to the motions to dismiss and to present any and all material that may be pertinent to counter the matter outside the pleadings. But Talley has not used this time to respond. He did not file anything. The failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d); Joe v. Kosrae, 13 FSM R. 45, 47 (Kos. 2004), but even when there is no opposition, the court still needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 442 (App. 1994). As explained below, good grounds exist. The motions to dismiss are therefore granted as a summary judgment denying Talley relief from the Civil Action No. 2018-2003 judgment.

II. CIVIL ACTION NO. 2018-2003 PROCEDURAL HISTORY

A. *Events Before the Civil Action No. 2018-2003 Suit*

On March 18, 2016, Talley borrowed $25,718.17 at 15% per annum, from the bank's Kosrae office, to be paid back over the next five years by $611.83 monthly payments from Talley's U.S. military retirement benefits. To secure this consumer loan, Talley executed a promissory note to that effect and also executed an assignment of salary agreement. Under the assignment agreement, Talley agreed that, if his loan repayments became delinquent by more than 30 days, the bank could declare a default and then it could take the $611.83 monthly payment directly from Talley's "salary" – Talley's U.S. military retirement benefits – or from his salary from any later employer. Talley apparently left Kosrae for Guam in June 2016, and sometime thereafter stopped making payments. Notices of delinquency were transmitted to him on May 4, 2017, and later dates.

B. *Civil Action No. 2018-2003 Events*

1. *The Bank's Complaint and Service of Process*

On October 25, 2018, the bank filed suit against Talley. The bank pled two causes of action – breach of contract and enforcement of the assignment of salary agreement. It alleged that as of September 28, 2018, Talley owed $26,420.92 in principal, accrued interest, and penalties. The complaint and summons were served on Talley in person on October 25, 2018, on Kosrae. He did not file an answer or otherwise defend. Talley's default was entered on November 19, 2018.

2. *Default Judgment*

On November 19, 2018, the bank moved for the entry of a default judgment against Talley for the outstanding loan principal of $21,054.74; accrued interest of $5,781.51 (as of November 15, 2018), which would continue to accrue until the entry of judgment; and $25 in costs for service of process. The court entered a default judgment against Talley on December 17, 2018. At the bank's request, writs of execution to enforce the judgment were issued on January 9, 2019, but were returned unsatisfied.

On April 30, 2019 (five days after the bank had noticed Talley's deposition), attorney Yoslyn G. Sigrah filed her notice of appearance on Talley's behalf. That deposition may not have occurred. On May 14, 2019, and again on March 12, 2020, the bank moved for an order in aid of judgment. No opposition was filed, and amid the covid-19 travel restrictions, the court did not set a hearing date.

3. *Rule 60(b) Motion for Relief from Judgment*

On April 14, 2020, a year after counsel had entered an appearance on his behalf and sixteen months after the default judgment had been entered, Talley moved, under Rule 60(b), to set aside the default judgment, and asked that he be allowed to file an answer and assert affirmative defenses. Talley's proposed answer, with affirmative defenses, accompanied his motion.

Talley contended that he was entitled to relief from the default judgment and should be allowed to file an answer in which he would contest the promissory note's legality and the bank's legal ability to issue such a loan; and that the assignment of his U.S. military retirement benefits was illegal because they are exempt and nonassignable under United States law, 38 U.S.C. § 5301.

Talley's proposed affirmative defenses were that the bank was not authorized by statute to make loans at 15%; that the loan was usurious and unconscionable; that the bank misrepresented or failed to disclose the loan terms; that estoppel barred the bank's actions; and that, under 30 F.S.M.C. 128, the bank existed, and must operate, solely for the public's benefit. Talley also asserted that a default judgment was improper because the amount sought was not a sum certain and no evidentiary hearing had been held. Talley asserted that these affirmative defenses entitled him to an invalidation of the loan documents and an award of punitive damages, attorney's fees, and costs.

Talley asserted as good cause to set aside the default judgment that he had always intended to file an answer but a breakdown in attorney-client communication had prevented his answer from being filed in time.

4. *Denial of Relief from Judgment*

On June 17, 2020, the court denied Talley's Rule 60(b) motion for relief from judgment. The court ruled that Talley's failure to timely file an answer or to file a Rule 60(b) motion earlier due to a purported breakdown in attorney-client communication was not excusable neglect under Rule 60(b)(1). FSM Dev. Bank v. Talley, 22 FSM R. 587, 592-93 (Kos. 2020). It held that Talley could not obtain any relief under Civil Procedure Rules 60(b)(1), (2), or (3) because the Rule 60(b) motion was filed well over a year after the entry of judgment and any motions for relief from judgment under Rules 60(b)(1), (2), and (3) must be filed within a reasonable time, not to exceed one year from the judgment date. Talley, 22 FSM R. at 592 (citing Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 508 (App. 2016)).

Rules 60(b)(4) and (5) did not apply and relief was not possible under Rule 60(b)(6) because Rule 60(b)(6) could only be used when the basis for relief involves extraordinary circumstances and is different from the grounds available under Rules 60(b)(1)-(5), and none were present. Talley, 22 FSM R. at 592. In dicta, the court further considered that, even if Talley had timely filed his motion, Talley still had not shown any meritorious defense that would have entitled him to relief from a default judgment. *Id.* at 593-95.

III. Defendants' Motions to Dismiss

Talley filed this case, Civil Action No. 2020-2002, on July 15, 2020. It is independent action in which Talley seeks relief from the Civil Action No. 2018-003 judgment. The defendants move to dismiss this independent action.

A. *Effect of Earlier Rule 60(b) Motion for Relief from Judgment Denial*

The defendants contend that this independent action for relief from the Civil Action No. 2018-2003 judgment is barred because Talley has already moved for and been denied relief from that judgment in that

case. The defendants assert that, under Rule 60(b), Talley cannot seek relief in an independent action on the grounds he had asserted in his Civil Action No. 2018-2003 Rule 60(b) motion and was denied or on grounds that were known and available to Talley at that time and that he could have asserted then.

In general, the defendants' statement of the law is correct. "Relief from a judgment may be sought either by a Rule 60(b) motion or by an independent action – through filing a separate case. It cannot be sought by both." Setik v. Mendiola, 21 FSM R. 537, 552 (App. 2018). That is because Rule 60(b) motions for relief from judgment and independent actions for relief from judgment are alternative, not cumulative methods of relief. *Id.* at 553. However, "an independent action to set aside a judgment made after a Rule 60(b) motion is denied," is permissible "only if it is made on a ground different from the ground in the denied Rule 60(b) motion." Setik, 21 FSM R. at 553.

Most of the grounds that Talley raises in this independent action are the same as those raised in his Rule 60(b) motion for relief from judgment in civil Action No. 2018-2003. However, Talley's Rule 60(b) motion was, as noted above in part II.B.4, denied as untimely.

> But, if a Rule 60(b) motion for relief from judgment is denied solely as untimely, that denial does not act as res judicata precluding an independent action since the denial was not on the merits. A Rule 60(b)(1) motion's denial solely on the ground that the absolute time limit of one year precluded consideration of the merits of the grounds presented does not preclude a prompt independent action for relief in the same court.

Setik, 21 FSM R. at 553 (internal quotations and citation omitted). Talley filed this independent action on July 15, 2020, which was promptly after the June 17, 2020 denial of relief in Civil Action No. 2018-2003. Res judicata does not bar the court from considering the merits of those claims that were precluded consideration in Civil Action No. 2018-2003 because the one-year absolute time limit barred them.

B. *Talley's Claims or Defenses Raised Herein*

1. *Procedural Due Process*

Talley alleges that the Civil Action No. 2018-2003 default judgment violated his rights to due process because it was issued without him receiving adequate notice and an opportunity to be heard and therefore the judgment is void because, in his view, the court never had personal jurisdiction over him since he was living on Guam then.

The court must reject this assertion. The court, in Civil Action No. 2018-2003, acquired personal jurisdiction over Talley when he was personally served with the Civil Action No. 2018-2003 complaint and summons. For a trial court to acquire personal jurisdiction over a defendant, the defendant has to be properly served with the complaint and summons. Setik v. FSM Dev. Bank, 21 FSM R. 505, 516 (App. 2018). And Talley was. Regardless of where Talley might have been living at the time, Talley was served the complaint and summons in person on Kosrae, and that is enough to give the court personal jurisdiction over him.

The service of the complaint and summons on Talley gave Talley notice that the bank had filed suit against him and of the claims it had against him. The service of the complaint and summons on Talley also gave Talley the opportunity to be heard on the bank's claims against him. Further, the summons that was served on Talley gave him notice that, if he failed "to file an answer or other responsive pleading, judgment by default will be rendered against you for the relief demanded in the Complaint." Civil Action No. 2018-2003 Summons. Talley did not take advantage of this opportunity to be heard by answering the bank's complaint or otherwise defending. Consequently, a default and a default judgment were later entered against

him.

Talley also alleges that his constitutional due process rights were violated because he was not again given notice and an opportunity to be heard when the bank sought entry of his default and the default judgment. When a defendant, who has been properly served, has not appeared and answered or otherwise defended within the allotted time, and the plaintiff has made that fact to appear to the court clerk, the clerk must, on request, enter the defendant's default. Lee v. FSM, 18 FSM R. 631, 633 (Pon. 2013). The plaintiff does not have to serve on the defendant a copy of the requests for an entry of default and for a default judgment when the defendant has failed to appear and answer or otherwise defend. FSM Civ. R. 5(a); Neth v. Peterson, 20 FSM R. 601, 603 n.1 (Pon. 2016); Western Sales Trading Co. v. Billy, 13 FSM R. 273, 279 (Chk. 2005); FSM Social Sec. Admin. v. David, 11 FSM R. 262j, 262L (Pon. 2002); Bank of the FSM v. Bergen, 7 FSM R. 595, 596 (Pon. 1996). In such situations, the defendant has no grounds on which to oppose the plaintiff's request. Lee, 18 FSM R. at 633.

When, as here, the summons served with the complaint warns the defendant that, if he or she does not appear or defend within twenty days of the complaint's service, a default judgment could be taken against him or her, that summons (and complaint) constitute the notice to the defendant and the opportunity to be heard that is required by due process of law. *Id.* Because the defendant had the chance to appear and be heard, but did not appear, the defendant is not entitled to a second notice and warning that, since he or she has not answered or otherwise defended, the plaintiff is now going to obtain an entry of default and a default judgment. *Id.* That notice has already been given and the opportunity to be heard has been afforded and has passed. *Id.*

Thus, when Talley was personally served with the complaint and summons, he was given notice and had the opportunity to be heard by answering the complaint or otherwise defending, but he did not take advantage of that opportunity. He was not entitled to a second notice and a second opportunity to be heard before a default judgment was entered because he had waived that right by failing to appear. Talley thus received the procedure and process to which he was due. Talley's due process claim therefore does not present a meritorious defense to the Civil Action No. 2018-2003 judgment, and thus not a claim for which he could be granted relief.

2. *Title 30 Violations*

Talley alleges that he is entitled to relief because Title 30 of the FSM Code, which is the statute that creates and governs the FSM Development Bank, requires the bank to operate for the public's benefit, 30 F.S.M.C. 128, and therefore the bank, in his view, is not authorized to charge a 15% interest rate or to provide credit life insurance to borrowers.

As a matter of controlling law[1] in the FSM, the provisions of Title 30 do not create any private causes of action or defenses. Setik v. Mendiola, 21 FSM R. 537, 556 (App. 2018). Thus, Talley's allegations concerning Title 30 do not provide Talley with a viable defense or state a claim for which relief could be granted.

Talley may, of course, argue as a defense for a change or modification of the existing controlling law in order to preserve that issue for appeal. However, an attorney, when making such an argument, is ethically required "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be

[1] In order to be "controlling law," the precedent must be binding. Setik v. Mendiola, 21 FSM R. 537, 560 (App. 2018). A binding precedent is a precedent that a court must follow – an applicable holding of a higher court in the same jurisdiction; in other words, an appellate decision. *Id.* at 561.

directly adverse to the position of the client and not disclosed by opposing counsel," FSM MRPC R. 3.3(a)(3), and then make a non-frivolous argument why the controlling law should be altered, modified, or reversed.[2] The complaint did not do so.[3] Talley's counsel is warned that such ethical lapses may not only put her in Rule 11 jeopardy, but may also leave the client in the difficult position of not having the benefit of reasoned advocacy that might improve the client's position.

3. *Fraud and Misrepresentation*

Talley also alleges that he is entitled to relief from the Civil Action No. 2018-2003 judgment because, in some unstated manner, the bank, and its employees engaged in fraud in both its execution of the loan agreement and in its lawyer's repayment collection efforts. Talley further states that, at trial, he will "submit proofs by preponderance of the evidence of the fraud and misrepresentation." Compl. para. 31 (July 15, 2020).

"The elements of fraud or intentional misrepresentation are: 1) a knowing or deliberate misrepresentation by the defendant, 2) made to induce action by the plaintiff, 3) with justifiable reliance by the plaintiff upon the misrepresentations, 4) to the plaintiff's detriment." Setik, 21 FSM R. at 556 (citing Arthur v. Pohnpei, 16 FSM R. 581, 597 (Pon. 2009)). "Rule 9(b) requires that in allegations of fraud, the circumstances constituting the fraud must be pled with particularity. When fraud is alleged, particularity is a pleading requirement that applies with equal force to independent actions brought under Rule 60(b)." Setik, 21 FSM R. at 556 (citation and internal quotation omitted). Talley's complaint does not plead the fraud and misrepresentation allegation with any particularity, let alone with the particularity required by Civil Procedure Rule 9(b).

Talley does not identify any particular statement as a misrepresentation or plead what that statement was and why that statement is a misrepresentation, and how he relied on that misrepresentation to his detriment. His allegations thus do not satisfy Rule 9(b)'s pleading requirements. "'When alleging fraud, a plaintiff must state with particularity the circumstances constituting fraud and must identify particular statements and actions and specify why they are fraudulent. Conclusory allegations do not satisfy the requirements of Rule 9(b) and subject the pleader to dismissal.'" Panuelo v. Sigrah, 22 FSM R. 341, 361 (Pon. 2019) (quoting Arthur v. Pohnpei, 16 FSM R. 581, 597 (Pon. 2009)). Therefore, Talley's fraud and misrepresentation allegation, which is merely a conclusory allegation, does not plead a claim for which relief could be granted. It does not plead a claim at all.

Furthermore, the court notes that a preponderance of the evidence is not sufficient proof for a fraud and misrepresentation allegation. To establish fraud, a proponent must prove the fraud by clear and convincing evidence, which is the highest burden of proof in civil cases; a mere preponderance of the evidence is not enough. Heirs of Henry v. Heirs of Akinaga, 21 FSM R. 310, 315 (App. 2017).

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[2] A legal contention is not warranted by existing law if it is based on legal theories that are plainly foreclosed by well-established legal principles and authoritative precedent, unless the advocate plainly states that he or she is arguing for a reversal or change of law and presents a non-frivolous argument in support of that position. Ehsa v. FSM Dev. Bank, 19 FSM R. 367, 371 (Pon. 2014).

[3] Talley's counsel should not have needed to do much research on this point of controlling law since she was counsel of record in the appeal case that established as controlling law that Title 30 did not create private causes of action.

4. *Defendants' Alleged Gross Negligence*

Talley alleges that the bank and its board chairman were grossly negligent in hiring, training, and supervising its officers, and in the issuance and collection of bank loans and thus the bank fell below the standard of care required of lending institutions. Talley alleges that the bank thereby breached its fiduciary duty to the public and to its customers. Talley further alleges that the bank and its officers were structuring loans to charge excessive interest and pursuing default judgments in order to deprive borrowers of their rights to trial on the merits and that the bank's failure to prevent this constituted gross negligence.

Almost all of this allegation appears to be directed against the bank's loans and loan collection efforts regarding other borrowers, and Talley is thus asserting the rights of other borrowers. A party generally cannot assert the rights of another (a third party) as the party's own. Robert v. Chuuk Public Utility Corp., 22 FSM R. 150, 154 (Chk. 2019); FSM v. Kana Maru No. 1, 14 FSM R. 368, 373 (Chk. 2006); Sipos v. Crabtree, 13 FSM R. 355, 363 (Pon. 2005); Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM R. 111, 115 (Chk. 1997). Thus, to the extent that this allegation seeks to adjudicate the rights of borrowers other than Talley, it fails to state a claim for which the court could grant Talley relief.

To the extent that Talley alleges that permitting the bank's in-house attorney to pursue a default judgment against him is gross negligence, that allegation also fails to state a claim for which the court could grant relief. If a defendant, who has been properly served a summons and complaint, fails to answer or otherwise defend, the plaintiff is expected to seek a default judgment. A default judgment is available "when the adversary process has been halted because of an essentially unresponsive party," such as when a defendant does not answer or otherwise defend. Narruhn v. Chuuk, 17 FSM R. 289, 299 n.3 (App. 2010). In that instance, the default judgment remedy protects the diligent plaintiff so that the plaintiff is not faced with interminable delay and continued uncertainty, and a default "is a deterrent to those parties who choose delay as part of their litigati[on] strategy." *Id.*

The bank's in-house counsel cannot be faulted for promptly seeking a default judgment against Talley because a lawyer must "act with reasonable diligence and promptness in representing a client." FSM MRPC R. 1.3. If a plaintiff's lawyer takes no action after a properly served defendant has not answered or otherwise defended, the plaintiff's case is then subject to possible dismissal under Rule 41(b) for want of prosecution. This gross negligence allegation is thus frivolous and fails to state a claim for which Talley could be granted relief.

The court also notes that there are times when a defendant might logically prefer that the plaintiff obtain a prompt default judgment. For instance, in Talley's case, once the bank obtained a default judgment against him, the interest rate dropped from 15% to the 9% judgment rate, thus benefitting Talley immediately. And since the most loan documents make a non-paying borrower responsible for collection costs, including the lender's reasonable attorney's fees, a default judgment keeps any such liability low.

Nor, as a matter of law, is the 15% rate on Talley's consumer loan "excessive interest" – that is, it is not usury. 34 F.S.M.C. 203(3) (loans that exceed 24% interest are usurious and prohibited). Accordingly, Talley's gross negligence allegations fails to state a claim.

5. *Individual Capacities*

Talley sued Nora Sigrah in her individual capacity and Anna Mendiola in both her individual and official capacities. All of their acts or omissions that Talley complains of were taken in the bank's interest and in their capacities as bank officers. When all actions, or inactions, complained of, were taken by persons in their capacities as bank officers, dismissal of them in their individual capacities is proper. Setik, 21 FSM R. at 556. Thus, the dismissal of Nora Sigrah and of Anna Mendiola in her personal capacity is proper on

this ground alone.

6. *Requirements for an Independent Action for Relief from Judgment*

An independent action in equity to set aside a judgment must satisfy five essential elements: 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law, and if any one of these elements is missing the court cannot take equitable jurisdiction of the case. Arthur v. FSM Dev. Bank, 16 FSM R. 653, 659 (App. 2009); *see also* Setik, 21 FSM R. at 552; Heirs of Henry v. Heirs of Akinaga, 21 FSM R. 310, 312-13 (App. 2017); Andrew v. Heirs of Seymour, 19 FSM R. 331, 341 (App. 2014).

Talley has obviously failed to satisfy several of these elements. As discussed above in parts III.B.1 through III.B.4, Talley has not asserted any good defense to the alleged cause of action on which the Civil Action No. 2018-2003 judgment is founded. Nor has he shown that any fraud, accident, or mistake prevented him from obtaining the benefit of the defenses he now asserts – that is, prevented him from timely raising his defenses in Civil Action No. 2018-2003. And Talley cannot show the absence of fault or negligence on his part when the only reason given in either this case or Civil Action No. 2018-2003 for Talley's failure to timely plead his defenses in Civil Action No. 2018-2003 was an unexplained breakdown in communication between him and his attorney.

7. *Summary Judgment Granted*

Accordingly, good grounds exist to grant the defendants' motions to dismiss this independent action for relief. Since matter outside the pleadings was not excluded, the defendants are hereby granted summary judgment.

IV. Suggestion of Death on the Record

John Sohl's death was suggested on the record on December 20, 2020.

Because all defendants are granted summary judgment on all the claims in Talley's complaint, the court does not need to consider whether Sohl should, under Rule 25(a)(1), be dismissed as a party since no motion to substitute someone for him was filed within the required 90 days, or whether whoever now holds the position of chairman of the bank's board of directors should, under Rule 25(d)(1), be considered automatically substituted for Sohl. Since, as explained above in part III, all defendants are granted summary judgment against Talley, neither approach would change the result.

V. Rule 11 Motion

A. *Rule 11 and its Effect*

Rule 11 provides that an attorney's signature on any filing constitutes a the signer's certificate that

> to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

One purpose of Rule 11 is to deter baseless filings. Berman v. Kolonia Town, 6 FSM R. 433, 436 (App. 1994).

The defendants move for Rule 11 sanctions against Talley, or his attorney, or both because Talley's complaint was not warranted by existing law or by a good faith argument for the extension or modification of existing law and because the complaint was filed for the improper purposes of harassing the bank's employees, of causing unnecessary delay in Civil Action No. 2018-2003, and of needlessly increasing litigation costs. The defendants contend that the motion can be granted on either one of these two grounds – 1) not warranted by law or 2) filed for an improper purpose. They ask that Talley, his attorney, or both be ordered to pay the defendants' reasonable attorney's fees.

Talley did not respond to this motion either, and is therefore deemed to have consented to it. *See supra* part I, last para.

Furthermore, the movants are correct that Rule 11 sanctions can be imposed for either of these two grounds. Damarlane v. Pohnpei Transp. Auth., 18 FSM R. 366, 372 (App. 2012). Rule 11 sanctions can be granted for violating any one of Rule 11's three elements – is the document 1) signed, or 2) is to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it well grounded in fact and warranted by law, or 3) is it interposed for any improper purpose such as delay or harassment. *Id.* A meritless filing can be sanctioned even if it was made in good faith and not for an improper purpose. In re Sanction of Berman, 7 FSM R. 654, 657 (App. 1996) (a purely frivolous, though good faith, argument is sanctionable); Amayo v. MJ Co., 14 FSM R. 355, 363 (Pon. 2006) (counsel cannot avoid the sting of Rule 11 sanctions under the guise of a pure heart and empty head). And, a meritorious filing can be sanctioned if it was made for an improper purpose. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1335, at 600 (3d ed. 2004) ("a violation of the improper purpose prong is sanctionable even if the pleading is not frivolous").

B. *Whether Not Warranted by Law*

1. *Denial of Previous Rule 60(b) Motion*

The defendants contend that since Talley had already moved for relief from the Civil Action No. 2018-2003 judgment and was denied, Talley must be sanctioned for seeking the same relief through this independent action for relief from that judgment because such relief is barred by controlling law. However, since, as explained above in part III.A, Talley's Rule 60(b) motion was denied as untimely and thus not on the merits (although, in an abundance of caution, the merits were discussed and rejected in dicta), the filing of this independent action for relief based on the denied untimely grounds is not expressly barred by the controlling law that bars subsequent independent actions for relief.

The court would grant this motion on this ground if Talley's Rule 60(b) motion in Civil Action No. 2018-2003 had been timely filed and denied on the merits. But it was not. Talley is fortunate in that regard.

2. *Other Reasons Not Warranted by Law*

The claims Talley actually alleged may themselves be prohibited by controlling law unless there was a good faith argument for the extension or modification of that existing controlling law. For instance, the allegation that Title 30 provided Talley with a ground for relief certainly was frivolous and no good-faith argument for the extension or modification of that existing controlling law was made. However, the bank does not seek Rule 11 sanctions on the ground that Talley's complaint was frivolous on the merits regardless of whether he had earlier filed a Rule 60(b) motion that was denied, although it might have. *See* In re Sanction of Berman, 7 FSM R. at 657 (litigant pleading non-frivolous along with frivolous claims cannot

expect to avoid all sanctions under Rule 11 merely because the pleading or motion under scrutiny was not entirely frivolous). The court will not pursue this line of inquiry further, especially since "the fact that a complaint, allegation, or motion is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a [Rule 11] sanction is appropriate." 5A WRIGHT & MILLER, *supra*, § 1335, at 603.

C. *Improper Purpose*

The defendants also contend that Talley brought this independent action for the improper purposes of harassing the bank's employees, of causing unnecessary delay in Civil Action No. 2018-2003, and of needlessly increasing litigation costs.

1. *Delay and Increasing Litigation Costs*

To support their contention that this action was brought for the improper purpose of delay and for the improper purpose of increasing the bank's litigation costs, the movants attached a copy of Talley's November 12, 2020 motion to stay all enforcement of the Civil Action No. 2018-2003 judgment, in which Talley sought a stay on only two grounds – that he had appealed the court's denial of his Rule 60(b) motion for relief and because he had filed this independent action for relief from the Civil Action No. 2018-2003 judgment. The bank also points to the relief sought in this independent action – that the court, in this case, enjoin the court in Civil Action No. 2018-2003 from enforcing that judgment, even though it is well settled that no trial court judge can enjoin the trial court judge in a different trial court case. The defendants further argue that Talley's failure to oppose their motion to dismiss this action is proof that he never intended to prosecute this action, that he accepted that his claims had no merit, and that he thus had brought this action for the improper purpose of delaying the bank's efforts to collect its judgment in Civil Action No. 2018-2003 and causing it unnecessary expense.

2. *Harassment*

The movants also contend that this action was brought for the improper purpose of harassing the Anna Mendiola and Nora Sigrah by suing them in their personal capacities, although Talley did not allege that they took any actions other than as bank employees, and then seeking to impose punitive damages on them. The movants point out that Anna Mendiola's and Nora Sigrah's actions that Talley alleges were actionable were actions that Talley alleged that they took in the scope of their employment as bank officers and that further the bank's interests, and therefore Talley had no factual basis to name them as defendants in their personal capacities. Thus, they contend that naming them in their personal capacities and threatening them with punitive damages was solely for the purpose of harassment.

3. *Sanctions Imposed*

When it is clear that the complaint was not supported by law and was filed for the purpose of delay or harassment, the court will grant the opposing party's motion for sanctions in the form of costs including reasonable attorney's fees. Ehsa v. FSM Dev. Bank, 19 FSM R. 367, 373 (Pon. 2014). These sanctions shall be imposed against the plaintiffs' counsel of record. *Id.*

In this case, the complaint was, as seen above in part III, without merit and not supported by law, but Rule 11 sanctions are not granted on that ground. Rule 11 sanctions are imposed because this action was further filed for the improper purposes of delay and harassment. Particularly telling is Talley's abandonment of this case once the defendants had expended time, effort, and resources responding to Talley's "independent action" with their motions to dismiss. If Talley had not abandoned this independent action, the court might have been able to presume that Talley (or his counsel) had concluded that an independent action that was not subject to the Rule 60(b) one-year time limit might have a better chance of success than Talley's

appeal of the Civil Action No. 2018-2003 decision denying relief based on that one-year time limit. Since it is now obvious that Talley has no interest in pursuing this independent action, the court can only conclude that it was only brought for the improper purposes of delay and harassment, and possibly also to increase the bank's litigation expenses. And a particular animus towards the defendants named in their personal capacities is apparent.

The court therefore imposes as Rule 11 sanctions on Talley's counsel, and awards the defendants the bank's costs and reasonable attorney's fees in bringing the defendants' motions to dismiss this action. The defendants shall submit their detailed statement of their costs, including reasonable attorney's fees, by June 18, 2021. Talley will have ten days to respond to the defendants' submission.

VI. CONCLUSION

The defendants are granted summary judgment and this case is dismissed. Rule 11 sanctions are imposed on the plaintiff's counsel.

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CHUUK STATE SUPREME COURT APPELLATE DIVISION

MARK MAILO and TAKAMICHY MORI, Appellants, vs. CHUUK ELECTION COMMISSION, Appellee, ALEXANDER NARRUHN and MEKIOSHY WILLIAM, Real Parties in Interest.	)	CIVIL APPEAL NO. 01-2021

OPINION AND ORDER

Decided: June 17, 2021

BEFORE:

Hon. Kerio Walliby, Associate Justice, Presiding
Hon. Larry Wentworth, Temporary Justice*
Hon. JK Kaminaga, Temporary Justice**

*Associate Justice, FSM Supreme Court
**Legal Counsel, Chuuk Environmental Protection Agency, Weno, Chuuk