

rendered unable to leave the FSM. The evidence supports an inference that he was getting paid enough before (as well as after) expiration of his entry permit to enable him to travel to Fiji. He was aware of his entry permit expiration, but did not leave. From his remaining and working in the FSM, knowing of the expiration of his permit, there can be inferred an “element of voluntariness or purposefulness in [his] failure to depart.” *Id.* at 384. His testimony that he was advised not to apply for an entry permit until his second contract was finalized is in dispute and not a basis for defeating probable cause. Even if it is to be believed that he was so advised, at that time it appears he had already overstayed his entry permit. This Court finds that the above-stated standard for probable cause for the one count of willfully and unlawfully remaining in the FSM after expiration of his entry permit has been met.

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FSM SUPREME COURT TRIAL DIVISION

FSM TELECOMMUNICATIONS CABLE CORPORATION (the Open Access Entity),	)	CIVIL ACTION NO. 2021-010
Plaintiff-Counter-Defendant,	)	
vs.	)	
FSM TELECOMMUNICATIONS CORPORATION,	)	
Defendant-Counterclaimant.	)	

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ORDER GRANTING IN PART MOTION TO DISMISS COUNTERCLAIMS

Larry Wentworth  
Associate Justice

Decided: October 19, 2021

APPEARANCES:

For the Plaintiff:	Aaron L. Warren, Esq. Mooney Wieland PLLC P.O. Box 3501 Pago Pago, American Samoa 96799
For the Defendant:	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonia, Pohnpei FM 96941

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HEADNOTES

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

If matters outside the pleading are presented to the court on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted and the court does not exclude those matters, the motion must be treated as one for summary judgment. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 439 (Pon. 2021).

Civil Procedure – Dismissal – Lack of Jurisdiction; Civil Procedure – Summary Judgment

Rule 12(b)(1) motions to dismiss for the lack of jurisdiction do not convert to summary judgment motions if outside matter is introduced and not excluded by the court because Rule 12(b) specifically states that only a “motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim” could be “treated as one for summary judgment,” and because, unlike summary judgment, a dismissal for the lack of jurisdiction is never an adjudication on the merits while a summary judgment always is. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 439 (Pon. 2021).

Administrative Law – Exhaustion of Remedies; Administrative Law – Judicial Review; Telecommunications

The general rule is that the court cannot exercise jurisdiction over a matter until the administrative process has been completed, and this applies to telecommunications regulatory matters. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 439-40 (Pon. 2021).

Administrative Law – Exhaustion of Remedies; Administrative Law – Judicial Review

Futility is a recognized exception to statutory requirements that administrative remedies must first be pursued and exhausted before a party may resort to judicial review. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 440 (Pon. 2021).

Administrative Law – Exhaustion of Remedies; Administrative Law – Judicial Review

When the court is not convinced that it would be futile for the counterclaimant to first pursue its remedies administratively and when the administrative relief that the counterclaimant seeks applies as much to a non-party to the action as it does to the counter-defendant, those counterclaims are best first addressed through the administrative regulatory process. The court will dismiss those counterclaims without prejudice, because the court lacks jurisdiction since the administrative process has not been exhausted. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 440 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading

Since a party can only assert its own claims and rights and not those of other parties or of non-parties, the court will dismiss a defendant’s counterclaim that the counter-defendant has unconstitutionally taken the property of various non-party states where it has acquired cable landing rights. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 440 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading

A cause of action should not be dismissed and a party precluded from relief because a claimant’s lawyer might have misconceived the proper legal theory of the claim since, if the claim shows that the claimant may be entitled to any relief which the court can grant, regardless of whether it asks for the proper relief, the claim is sufficient. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 440 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading

Dismissal of a counterclaim for the failure to state a claim will not be granted when, even if the counterclaimant is legally unable to assert an unconstitutional taking claim, it might be able to assert a general property law claim for the value of the mortgage satisfaction or exoneration. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 441 (Pon. 2021).

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## COURT’S OPINION

LARRY WENTWORTH, Associate Justice:

This is before the court on the plaintiff’s Motion to Dismiss FSMTC’s Counter-Claims, filed August 17, 2021; the defendant’s Opposition to Motion to Dismiss, filed August 27, 2021, with supporting exhibits;

Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion to Dismiss Defendant's Counter-claims filed September 3, 2021; the defendant's Surreply to opposition to Motion to Dismiss, filed September 6, 2021; Supplement to Opposition to Motion to Dismiss, filed October 1, 2021; and Plaintiff's Supplemental Reply to Defendant's Opposition to Plaintiff's Motion to Dismiss FSMTC's Counter-claims, filed October 7, 2021. The motion is granted to the extent described below.

#### I.

The plaintiff, the FSM Telecommunications Cable Corporation, often called the Open Access Entity (hereinafter "the OAE"), moves to dismiss the counterclaims brought by the defendant, the FSM Telecommunications Corporation ("Telecom"), that allege that the OAE is engaged in anti-competitive conduct through the OAE's involvement in fiber-to-the-home projects. The OAE also moves to dismiss a counterclaim that alleges that the OAE, as a governmental agency, unconstitutionally deprived Telecom of property without just compensation.

Telecom's counterclaims consist of six causes of action: (1) declaratory relief to set aside the Deed Granting Indefeasible Rights of Use ("IRU Deed") and to halt the OAE's involvement in fiber-to-the-home projects; (2) unconstitutional taking of property without just compensation; (3) intentional and negligent interference with a contract; (4) intentional or negligent interference with business opportunities; (5) breach of contract and the breach of the covenants of good faith and fair dealing; and (6) anti-competitive conduct.

The OAE moves to dismiss counterclaims (1), (3), (4) and (6) on the ground that the court lacks subject-matter jurisdiction over those causes of action because Telecom has not exhausted its administrative remedies and counterclaim (2) on the ground that that counterclaim fails to state a claim for which the court can grant relief or that Telecom lacks standing to raise.

#### II.

Telecom notes that much material outside the pleadings has been introduced in support of or in opposition to the motion and therefore concludes that the plaintiff's motion to dismiss is now converted into a summary judgment motion. If the court does not exclude the outside matter, that legal conclusion is correct for motions to dismiss for the failure to state a claim. FSM Civ. R. 12(b)(6) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").

Therefore, that legal posture could only apply to the OAE's motion to dismiss counterclaim (2). The grounds for dismissing counterclaims (1), (3), (4) and (6) is the lack of jurisdiction, which is a motion to dismiss under Civil Procedure Rule 12(b)(1). Rule 12(b)(1) motions do not convert to summary judgment motions if outside matter is introduced and not excluded. That should be obvious because Rule 12(b) specifically states that only a "motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim" could be "treated as one for summary judgment," FSM Civ. R. 12(b)(6), and because, unlike summary judgment, a dismissal for the lack of jurisdiction is never an adjudication on the merits, Waguk v. Waguk, 21 FSM R. 60, 73 (App. 2016) (dismissal for lack of subject-matter jurisdiction dismissal is not an adjudication upon the merits); see also FSM Civ. R. 41(b) ("any dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits"), while a summary judgment is always an adjudication on the merits.

#### III.

The general rule is that the court cannot exercise jurisdiction over a matter until the administrative process has been completed. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015) (exhaustion of administrative remedies is ordinarily a prerequisite for judicial jurisdiction and until those

remedies are completed the court expressly cannot review the action); Weriey v. Chuuk, 16 FSM R. 329, 332 (Chk. 2009) (exhaustion of administrative remedies is ordinarily a prerequisite for judicial jurisdiction). This applies to telecommunications regulatory matters too. FSM Pub. L. No. 18-52, § 29(2), 18th Cong., 3d Spec. Sess. (2014) (to be codified at 21 F.S.M.C. 325(2)).

Telecom contends that, even if it has not exhausted the administrative process, the court may still exercise jurisdiction because any attempt by Telecom to complete that process would be futile, and that this [futility] is a well-known exception to the general rule. Telecom is correct that futility is a recognized exception to statutory requirements that administrative remedies must first be pursued and exhausted before a party may resort to judicial review.

#### IV.

Telecom's Counterclaims (1), (3), (4), and (6) all involve Telecom's claims that the OAE is unfairly competing, or assisting unfair competition, against it in providing fiber-to-the-home services. The court, however, not convinced that it would be futile for Telecom to first pursue its remedies administratively. Furthermore, the [administrative] relief that Telecom seeks regarding fiber-to-the-home projects seems to apply as much to a non-party to this action, an entity (and telecommunications licensee) referred to as iBoom, as it does to the OAE. Telecom asserts that iBoom has now started to provide internet service in Yap and is therefore now, allegedly with the OAE's assistance, unfairly competing against Telecom in the Yap market where Telecom intends to provide, or is providing, fiber-to-the-home internet services. Those claims are best first addressed through the administrative regulatory process.

Accordingly, Telecom's counterclaims (causes of action) (1), (3), (4), and (6) are hereby dismissed, without prejudice, for the court's lack of jurisdiction because the administrative process has not been exhausted. This, of course, does not apply to the part of counterclaim (1) that duplicates Telecom's affirmative defense that the IRU Deed should be declared unconscionable and set aside. That remains as an affirmative defense.

#### V.

Counterclaim (cause of action) (2) is different. The OAE contends that this counterclaim does not state a claim for which the court could grant relief. In this counterclaim, Telecom alleges that the OAE, as a governmental entity, has unconstitutionally taken property. The "taken" property includes a half interest in the Hantru undersea cable between Pohnpei and Guam and the property of various states where the OAE has acquired cable landing rights.

The motion to dismiss is granted for Telecom's claims that various states' property was taken. A party can only assert its own claims and rights and not those of other parties or of non-parties. Fishy Choppers, Inc. v. M/V Marita 88, 22 FSM R. 187, 200 (Pon. 2019); Robert v. Chuuk Public Utility Corp., 22 FSM R. 150, 154 (Chk. 2019); College of Micronesia-FSM v. Rosario, 10 FSM R. 175, 185 (Pon. 2001), *aff'd*, 11 FSM R. 355, 360 (App. 2003). Therefore, Telecom has no standing to assert the various states' claims or rights against the OAE. That part of Telecom's second counterclaim must be dismissed.

The OAE also contends that, since Telecom is, itself, also a governmental entity, it cannot assert an unconstitutional taking of property claim against it, another governmental entity because both parties are creatures of the same government – the FSM national government. Telecom does not directly address this argument. Nor is its resolution clear to the court at this time. However, a cause of action should not be dismissed and a party precluded from relief because a plaintiff's lawyer might have misconceived the proper legal theory of the claim since, if the claim shows that the claimant may be entitled to any relief which the court can grant, regardless of whether it asks for the proper relief, the claim is sufficient. Semwen v. Seaward Holdings, Micronesia, 7 FSM R. 111, 114 (Chk. 1995).

The court notes that when the OAE acquired, through the IRU Deed, a half interest in the Hantru submarine cable, it acquired a half interest in a mortgaged property. The OAE's half of the Hantru marine cable (as had the whole before the OAE acquired half) carried a mortgage from the Rural Utilities Service, which had to be satisfied, and which Telecom did eventually satisfy or exonerate on its own. Since, even if Telecom is legally unable to assert an unconstitutional taking claim, it might be able to assert a general property law claim for the value of the mortgage satisfaction or exoneration, the court will deny the OAE's motion to dismiss Telecom's second counterclaim in its entirety or as it applies to the Hantru cable.

VI.

NOW THEREFORE IT IS HEREBY ORDERED that Telecom's Counterclaims (1), (3), (4), and (6) are dismissed, without prejudice, for the court's lack of jurisdiction until such time as Telecom's claims and assertions have gone through the required administrative process. IT IS FURTHER ORDERED that Telecom's counterclaim (2) is dismissed insofar as it asserts the rights of others – of the various states – and is denied for Telecom's claim that it may be owed compensation for its interests and rights in the Hantru marine cable now under the OAE's control and indefeasible right of use.

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FSM SUPREME COURT TRIAL DIVISION

IN THE MATTER OF ATTORNEY	)	DPA NO. 001-2006
MARSTELLA E. JACK, ESQ.	)	
	)	
Respondent Attorney.	)	
_____	)	

DECISION

Dennis L. Belcourt  
Associate Justice

Hearing: August 25, 2021  
Submitted: September 15, 2021  
Decided: November 9, 2021

APPEARANCES:

Disciplinary Counsel:	Johnson Asher, Esq. P.O. Box 1183 Kolonia, Pohnpei FM 96941
For the Respondent Attorney:	Marstella Jack, Esq. (pro se) P.O. Box 2210 Kolonia, Pohnpei FM 96941

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HEADNOTES

Attorney Discipline

The disciplinary rules do not encourage settlement or compromise between the disciplinary counsel and the respondent-attorney, and any settlement between them does not, in itself, justify abatement of the