FSM SUPREME COURT TRIAL DIVISION

BERYSIN SALOMON and NANCY SALOMON, Plaintiffs, vs. ANNA MENDIOLA, individually and in her capacity as President and Chief Executive Officer of FSM Development Bank; BRANDON TARA, in his capacity as Chief Financial Officer of the FSM Development Bank; and the FSM DEVELOPMENT BANK, Defendants.	CIVIL ACTION NO. 2021-021

ORDER DISMISSING CASE

Larry Wentworth
Associate Justice

Decided: August 9, 2022

APPEARANCES:

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HEADNOTES

Civil Procedure – Dismissal – Lack of Jurisdiction

Defendants in the complaint may be dismissed from an action without prejudice when the plaintiffs has failed to serve those defendants with the complaint and a summons. Salomon v. Mendiola, 23 FSM R. 623, 625 n.1 (Pon. 2022).

Evidence – Judicial Notice

A court may take judicial notice of its own files in related cases. Salomon v. Mendiola, 23 FSM R. 623, 625 n.2 (Pon. 2022).

Civil Procedure – Motions – Unopposed

A party's failure to oppose a motion is deemed that party's consent to the motion, but even then, the court needs good grounds before it can grant the motion. Salomon v. Mendiola, 23 FSM R. 623, 626 (Pon. 2022).

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. The absence of any one element of an independent action precludes relief, and, in particular, the failure to show any one element of a good defense, precludes relief. Salomon v. Mendiola, 23 FSM R. 623, 626 (Pon. 2022).

Judgments – Relief from Judgment – Independent Actions

Plaintiffs seeking relief from the judgment in a different case cannot show the needed absence of any adequate remedy at law when they have appealed the judgment in the other case and that appeal is currently pending because an appeal is an adequate legal remedy for an erroneous judgment. That alone is enough for their independent action to fail to state a claim. Salomon v. Mendiola, 23 FSM R. 623, 626 (Pon. 2022).

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. Salomon v. Mendiola, 23 FSM R. 623, 627 (Pon. 2022).

Civil Procedure – Pleading – With Particularity; Judgments – Relief from Judgment – Independent Actions; Torts – Fraud

When fraud is alleged, particularity is a pleading requirement that applies with equal force to independent actions brought under Rule 60(b). Salomon v. Mendiola, 23 FSM R. 623, 627 (Pon. 2022).

Civil Procedure – Pleading – 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. Salomon v. Mendiola, 23 FSM R. 623, 627 (Pon. 2022).

Civil Procedure – Pleading; Constitutional Law – Case or Dispute – Standing

A party generally cannot assert the rights of another (a third party) as the party's own. To the extent that the plaintiffs seek to adjudicate the rights of borrowers other than themselves, they fail to state a claim for which the court could grant them relief. Salomon v. Mendiola, 23 FSM R. 623, 627-28 (Pon. 2022).

Banks and Banking; Torts – Negligence – Gross Negligence

That a bank hat permitted the bank's attorney to obtain and pursue the collection of a judgment against borrowers is not gross negligence. Salomon v. Mendiola, 23 FSM R. 623, 628 (Pon. 2022).

Civil Procedure – Stare Decisis; Judgments

To be "controlling law," a 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. Salomon v. Mendiola, 23 FSM R. 623, 628 n.4 (Pon. 2022).

Banks and Banking; Torts

Title 30 does not create any private causes of action or defenses. Salomon v. Mendiola, 23 FSM R. 623, 628 (Pon. 2022).

Attorney Discipline; Civil Procedure – Sanctions – Rule 11

An attorney may argue for a change in the existing controlling law and thus preserve that issue for appeal, but the 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 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. 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. Salomon v. Mendiola, 23 FSM R. 623, 628 & n.6 (Pon. 2022).

Civil Procedure – Dismissal; Civil Procedure – Parties – Official Capacity

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. Salomon v. Mendiola, 23 FSM R. 623, 628 (Pon. 2022).

Civil Procedure – Dismissal – Lack of Jurisdiction; Civil Procedure – Injunctions; Courts

A complaint that seeks to enjoin a land auction sale authorized by an order in aid of judgment in a different civil action and any other enforcement action in that and other civil actions, including holding court hearings, fails to state a claim because one FSM Supreme Court trial division justice does not have subject matter jurisdiction to set aside orders entered in another separate trial division case, nor does the justice hold subject matter jurisdiction to grant injunctive relief against another trial division justice. This common sense principle is integral to the proper functioning of the FSM Supreme Court. Salomon v. Mendiola, 23 FSM R. 623, 628-29 (Pon. 2022).

Civil Procedure – Injunctions – Likelihood of Success

With no likelihood of success, an injunction would not issue, especially when there is an adequate remedy at law – a pending appeal. Salomon v. Mendiola, 23 FSM R. 623, 629 (Pon. 2022).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on the Motion to Dismiss the Complaint, filed by defendants Anna Mendiola, Brandon Tara, and the FSM Development Bank,[1] on August 24, 2021. The motion is granted. The reasons follow.

I. BACKGROUND

On June 12, 2014, the FSM Development Bank filed suit against Berysin Salomon and Nancy Salomon ("the Salomons") (Civil Action No. 2014-021) to collect a delinquent business loan, and on June 19, 2014, the Salomons counter sued the bank (and its Chief Executive Officer and President, Anna Mendiola, its Chief Financial Officer, Shina Lawrence (later replaced by Brandon Tara), and its Board of Directors Chairman, John Sohl) (Civil Action No. 2014-023) to void that same loan. These two cases were consolidated and some of the Salomons' claims were dismissed, including usury, Title 30 and public policy violations, tortious interference with business opportunities, and any action against Mendiola and Lawrence in their individual capacities. Salomon v. Mendiola, 20 FSM R. 138, 141-42 (Pon. 2015).[2] The Salomons'

[1] Peter Aten, Marie Laaw, Kun Sigrah, Senny Phillip, Florian Yatilman, and Nora E. Sigrah were also named as defendants in the complaint but were dismissed from this action on May 18, 2022, because the plaintiffs had failed to serve any of them with the complaint and a summons. FSM Civ. R. 4(j) (if a defendant is not served the complaint and summons within 120 days, that party may be dismissed without prejudice).

[2] A court may take judicial notice of its own files in related cases. Setik v. Perman, 22 FSM R. 105, 117 (App. 2018).

interlocutory appeal was dismissed. Salomon v. Mendiola, 20 FSM R. 357, 360 (App. 2016).

After much litigation,[3] the court granted summary judgment for the bank and dismissed the Salomons' remaining claims. FSM Dev. Bank v. Salomon, 22 FSM R. 468 (Pon. 2020). The trial court then denied the Salomons' request for a stay pending appeal, FSM Dev. Bank v. Salomon, 23 FSM R. 112 (Pon. 2020), as did the appellate division, Salomon v. FSM Dev. Bank, 23 FSM R. 426 (App. 2021).

On August 12, 2021, the Salomons filed this lawsuit, in which they seek not only to enjoin the enforcement of the bank's judgment in consolidated Civil Action No. 2014-021 and 2014-023, but also that that judgment be voided and they be granted judgment on their fraud and misrepresentation, gross negligence, and violation of Title 30 and public policy causes of action. On August 13, 2021, the Salomons filed a motion to enjoin the enforcement of an order in aid of judgment in consolidated Civil Action No. 2014-021 for an auction sale, which was noticed on June 8, 2021, and that took place on August 12, 2021.

On August 24, 2021, defendants Anna Mendiola, Brandon Tara, and the FSM Development Bank moved to dismiss the complaint because it failed to state a claim for which the court could grant relief. No opposition was ever filed to the motion. A party's failure to oppose a motion is deemed that party's consent to the motion, FSM Civ. R. 6(d), but even then, the court needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 442 (App. 1994). Good grounds existing, the motion is granted as explained below.

II. ANALYSIS

A. *Independent Action for Relief from Judgment*

The Salomons seek not only to enjoin the consolidated Civil Action No. 2014-021 order in aid of judgment auction sale but also to set aside the judgment it is based upon. Thus, this is an independent action in equity to set aside a 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. Setik v. Mendiola, 21 FSM R. 537, 552 (App. 2018). The absence of any one element of an independent action precludes relief, and, in particular, the failure to show any one element of a good defense, precludes relief. *Id.* at 558.

The Salomons cannot show the absence of any adequate remedy at law because they have appealed the consolidated Civil Action No. 2014-021 judgment, and that appeal is currently pending. An appeal is an adequate legal remedy for an erroneous judgment. *See* Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013) (appeal adequate legal remedy so writ of prohibition not available). That alone is enough for their independent action to fail to state a claim. This case could be dismissed on this ground alone.

And as discussed below, the Salomons' alleged defenses (their causes of action) are not "good

[3] *See, e.g.*, FSM Dev. Bank v. Salomon, 20 FSM R. 431 (Pon. 2016); FSM Dev. Bank v. Salomon, 20 FSM R. 565 (Pon. 2016); FSM Dev. Bank v. Salomon, 21 FSM R. 327 (Pon. 2017); FSM Dev. Bank v. Salomon, 22 FSM R. 175 (Pon. 2019). The appellate division dismissed other attempted interlocutory appeals, Salomon v, FSM Dev. Bank, 22 FSM R. 280 (App. 2019); Salomon v. Mendiola, 22 FSM R. 283 (App. 2019); Salomon v. FSM Dev. Bank, 22 FSM R. 286 (App. 2019); Salomon v. Mendiola, 22 FSM R. 289 (App. 2019), and also denied a petition for a writ of prohibition directed toward the trial court justice, Salomon v. Wentworth, 23 FSM R. 215 (App. 2021).

defenses" and the Salomons were not, as mentioned above, prevented from raising those defenses since they did raise them at the start of the litigation in Civil Action No. 2014-023, Salomon v. Mendiola, 20 FSM R. at 141-42, consolidated with Civil Action No. 2014-021.

B. *Individual Causes of Action*

The Salomons assert three causes of actions as good defenses to the consolidated Civil Action No. 2014-021 judgment – 1) fraud and misrepresentation, 2) gross negligence, and 3) the violation of Title 30 and public policy.

1. *Fraud and Misrepresentation*

The Salomons allege that they are entitled to relief from the Civil Action Nos. 2014-021 and 2014-023 consolidated judgment because the bank, and its employees, sought that the bank be paid more interest then the total repayment amount in the promissory note.

"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). The Salomons' complaint does not plead the fraud and misrepresentation allegation with any particularity, let alone with the particularity required by Civil Procedure Rule 9(b). It only alleges that the Salomons paid more on the loan than the amount on the promissory note.

The Salomons do not identify any particular statement as a misrepresentation or plead what that statement was and why that statement is a misrepresentation, and how they relied on that misrepresentation to their detriment. Their allegation thus does 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, the Salomons' fraud and misrepresentation allegation is merely a conclusory allegation and does not plead a claim for which relief could be granted. It does not plead a claim at all.

2. *Defendants' Alleged Gross Negligence*

The Salomons allege that the bank and its board of directors 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. The Salomons allege that the bank thereby breached its fiduciary duty to the public and to its borrowers. The Salomons further allege that the bank and its officers structured loans to charge excessive interest and pursue 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, including extensive concerns about the bank obtaining default judgments against them. The judgment against the Salomons is not a default judgment. The Salomons are 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 the Salomons seek to

adjudicate the rights of borrowers other than themselves, it fails to state a claim for which the court could grant the Salomons relief.

To the extent that the Salomons allege that permitting the bank's attorney to obtain and pursue the collection of a judgment against them is gross negligence, that allegation also fails to state a claim for which the court could grant relief.

3. *Title 30 (and Public Policy) Violations*

The Salomons allege that they are entitled to relief because Title 30 of the FSM Code, the statute creating and governing 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 their view, is not authorized to generate a "profit."

As a matter of controlling law[4] in the FSM, Title 30 does not create any private causes of action or defenses. Setik v. Mendiola, 21 FSM R. 537, 556 (App. 2018). Thus, the Salomons' Title 30 allegations do not provide them with a viable defense or state a claim for which relief could be granted.

The Salomons may, of course, argue for a change or modification of the existing controlling law[5] and thus preserve that issue for appeal. But 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 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.[6] The complaint did not do so. The Salomons' counsel is warned that such ethical lapses may not only put her in Rule 11 jeopardy, but may also leave the clients in the difficult position of not having the benefit of reasoned advocacy that might improve the clients' position.

4. *Individual Capacity*

The Salomons sued Anna Mendiola in both her individual and official capacities. All of Mendiola's acts or omissions that the Salomons complain of were taken in the bank's interest and in her capacity as a bank officer. 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 Anna Mendiola in her personal capacity is proper on this ground alone.

C. *Injunctive Relief*

The Salomons also sought to enjoin a land auction sale authorized by an order in aid of judgment in Civil Action No. 2014-021 and any other enforcement action in Civil Action Nos. 2014-021 and 2014-023, including holding court hearings. This fails to state a claim because one FSM Supreme Court trial division justice "does not have subject matter jurisdiction to set aside orders entered in another separate Trial

[4] To be "controlling law," a 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.

[5] The Salomons' counsel should not need to do much research to determine that this was 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.

[6] 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).

Division case, nor does he hold subject matter jurisdiction to grant injunctive relief against another Trial Division justice." Ehsa v. FSM Dev. Bank, 19 FSM R. 253, 257 (Pon. 2014). "[T]his common sense principle is . . . integral to the proper functioning of the FSM Supreme Court . . . ." *Id.*

Also, as discussed above, the Salomons have no likelihood of success on their causes of action. With no likelihood of success, an injunction would not issue. *See* Rodriguez v. Ninth Pohnpei Legislature, 21 FSM R. 276, 281 (Pon. 2017) (injunction denied because no likelihood of success on the merits when court lacks jurisdiction over non-justiciable political question); Marsolo v. Esa, 17 FSM R. 377, 382 (Chk. 2011) (if movant has absolutely no likelihood of success, no injunction could issue). Furthermore, as already noted, the Salomons have an adequate remedy at law – their appeal.

III. CONCLUSION

Accordingly, the motion to dismiss this case is granted.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2021-511
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CASSIDY SHONIBER,	)	
	)	
Defendant.	)	
_____	)	

ORDER DENYING MOTION TO DISMISS; SETTING DEADLINE FOR MOTION TO SUPPRESS

Dennis L. Belcourt
Associate Justice

Hearing: March 16, 2022
Decided: August 16, 2022

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