

FSM SUPREME COURT TRIAL DIVISION

YOSILYN CARL, in her legal capacity as the)
Administrator for the Estate of Linda Carl, and the)
ESTATE OF LINDA CARL,)
)
Plaintiffs,)
)
vs.)
)
ANNA MENDIOLA, individually and in her capacity)
as President and Chief Executive Officer of FSM)
Development Bank; PETER ATEN, in his official)
capacity as Chairman of the FSM Development)
Bank Board of Directors; MARIA LAAW, in her)
official capacity as Board Director; KUN SIGRAH,)
in his official capacity as Board Director; SENNY)
PHILLIP, in her official capacity as Board Director;)
FLORIAN YATILMAN, in his official capacity as)
Board Director; BRANDON TARA, in his capacity)
as Chief Financial Officer of the FSM Development)
Bank; NORA E. SIGRAH, individually and in her)
capacity as the attorney for FSM Development)
Bank; and the FSM DEVELOPMENT BANK,)
)
Defendants.)
)
_____)

CIVIL ACTION NO. 2021-012

ORDER OF DISMISSAL

Larry Wentworth
Associate Justice

Decided: September 27, 2022

APPEARANCES:

For the Plaintiffs: Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

For the Defendants: Nora E. Sigrah, Esq.
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HEADNOTES

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. Carl v. Mendiola, 23 FSM R. 653, 657 (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. Carl v. Mendiola, 23 FSM R. 653, 658-59 (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 because a direct appeal is an adequate legal remedy for an erroneous judgment. That alone is enough for their independent action to fail to state a claim, and just because an appeal is unsuccessful does not mean it was not an adequate remedy at law. Carl v. Mendiola, 23 FSM R. 653, 659 & n.4 (Pon. 2022).

Judgments – Action on a Judgment

A defendant in an action on a judgment can defend by claiming that one or more of the foundational elements of an action on a judgment is absent. Carl v. Mendiola, 23 FSM R. 653, 659 (Pon. 2022).

Judgments – Action on a Judgment

The judgment upon which the action on a judgment is founded must be a definite and personal judgment for the payment of money, final in its character and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement, and an action on a judgment must be prosecuted by the owner of it. Carl v. Mendiola, 23 FSM R. 653, 659 (Pon. 2022).

Judgments – Action on a Judgment

An action on a judgment must be brought against the defendant of record in the judgment or his or her successor in interest, and not an entity or person not named in the judgment. Carl v. Mendiola, 23 FSM R. 653, 659 (Pon. 2022).

Judgments – Action on a Judgment

The defenses against an action on a judgment are very limited because in an action on a judgment, the original cause of action is merged in the judgment, and, unless void, the judgment is conclusive, and no defense is available which was, or might have been, urged in defense of the original action. Carl v. Mendiola, 23 FSM R. 653, 659 (Pon. 2022).

Judgments – Action on a Judgment

In an action upon the judgment, the defendant cannot avail himself or herself of defenses he or she might have interposed, or did interpose, in the first action. Carl v. Mendiola, 23 FSM R. 653, 659-60 (Pon. 2022).

Common Law

While FSM courts are not bound to adopt common-law principles, they are authorized by statute, 1 F.S.M.C. 203, to use the Restatements of the Law to determine and apply the common law in the absence of written law while keeping in mind its suitability for the FSM. The FSM Code permits the restatements to be used when applying rules of common law in the absence of written law. Courts are statutorily authorized, under both FSM national and Pohnpei state law, to consider the common law as expressed in the ALL Restatements of Law. Carl v. Mendiola, 23 FSM R. 653, 660 n.5 (Pon. 2022).

Judgments – Action on a Judgment

In an action on the judgment the defendant may interpose matters which have arisen since the rendition of the judgment and constitute defenses to its enforcement such as payment, release, accord and

satisfaction, or the statute of limitations. Carl v. Mendiola, 23 FSM R. 653, 660 (Pon. 2022).

Judgments – Action on a Judgment; Judgments – Relief from Judgment – Grounds – Fraud on the Court

Fraud could be an available defense to an action on a judgment, but only if there was fraud on the court in obtaining the judgment. The defenses of fraud, misrepresentation, and illegality are otherwise unavailable unless they are part of the recognized defenses to an action on a judgment – payment, release, accord and satisfaction, or the statute of limitations – in which case, one of those defenses would be used. Carl v. Mendiola, 23 FSM R. 653, 660 (Pon. 2022).

Judgments – Action on a Judgment; Judgments – Payment and Satisfaction

Since 6 F.S.M.C. 801 provides that a judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered, the alleged violation of 6 F.S.M.C. 801 is a defense that could not have interposed as a defense to the original judgment. Carl v. Mendiola, 23 FSM R. 653, 660 (Pon. 2022).

Judgments – Payment and Satisfaction

The 6 F.S.M.C. 801 presumption of the payment and satisfaction of twenty-year-old judgments is a rebuttable presumption. This is controlling law in the FSM. Carl v. Mendiola, 23 FSM R. 653, 661 (Pon. 2022).

Courts; 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. Carl v. Mendiola, 23 FSM R. 653, 661 n.7 (Pon. 2022).

Judgments – Action on a Judgment; Judgments – Relief from Judgment – Independent Actions

When none of the plaintiff's causes of action (other than 6 F.S.M.C. 801) are defenses that could be used to support an independent action for relief from the judgment in an action on a judgment because no defense is available against an action on a judgment which was, or might have been, urged in defense of the original action, the analysis could easily end there since the plaintiff's allegations fail to satisfy more than one of the essential elements of an independent action for the relief from a judgment, and the case can be dismissed for the lack of any one of those elements alone. Carl v. Mendiola, 23 FSM R. 653, 661 (Pon. 2022).

Judgments – Relief from Judgment – Independent Actions

Just as successive Rule 60(b) motions for relief from judgment are impermissible unless the later motion is brought on a different ground and that ground was not available when the first Rule 60(b) motion was made, successive independent actions for relief from the same judgment are impermissible when made on the same grounds because that would be the relitigation of matters already decided. Carl v. Mendiola, 23 FSM R. 653, 661 (Pon. 2022).

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

A successive independent action for relief from the same judgment cannot be used to relitigate matters decided in the first independent action for relief from judgment because the res judicata doctrine bars the relitigation by parties or their privies of all matters that were or could have been raised in a prior action that was concluded by a final judgment on the merits, which has been affirmed on appeal or for which time for appeal has expired. Carl v. Mendiola, 23 FSM R. 653, 661-62 (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. Carl v. Mendiola, 23 FSM R. 653, 662 (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). Carl v. Mendiola, 23 FSM R. 653, 662 (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. Carl v. Mendiola, 23 FSM R. 653, 662 (Pon. 2022).

Banks and Banking; Torts

Title 30 does not create any private causes of action or defenses. Carl v. Mendiola, 23 FSM R. 653, 662 (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. Thus, 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. Carl v. Mendiola, 23 FSM R. 653, 662 (Pon. 2022).

Banks and Banking; Torts – Negligence – Gross Negligence

That a bank which permitted the bank's employees and the bank's attorney to obtain and pursue the collection of a judgment against borrowers is not gross negligence, especially when a defendant, represented by competent counsel, stipulates to a judgment and then to an order in aid of judgment. It is not gross negligence for the judgment-creditor bank and its officers to permit the bank's employees to seek to enforce that judgment and order in aid of judgment. Carl v. Mendiola, 23 FSM R. 653, 663 (Pon. 2022).

Torts – Interference with Prospective Business Opportunity

The elements for the tort of lost business profits and lost prospective business advantage or opportunities are 1) plaintiff's existing or reasonable expectation of economic benefit or advantage; 2) defendant's knowledge of that expectancy; 3) defendant's wrongful intentional interference with that expectancy; 4) reasonable probability that the plaintiff would have received anticipated economic benefit in absence of interference; and 5) damages resulting from interference. Carl v. Mendiola, 23 FSM R. 653, 663 (Pon. 2022).

Torts – Interference with Prospective Business Opportunity

When the complaint does not allege any wrongful intentional interference with the expectancy or damages resulting that interference but only alleges that the plaintiff signed the loan documents and made numerous loan payments and when there is no allegation that the bank or its employees intentionally interfered in her bakery business in any way or that the plaintiff suffered damages from that (unalleged) interference, the complaint does not state a claim for the tort of lost business profits and lost prospective business advantage or opportunities cause of action. Carl v. Mendiola, 23 FSM R. 653, 663 (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. Carl v. Mendiola, 23 FSM R. 653, 664 (Pon. 2022).

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

Since a person cannot be sued in his or her "former official capacity," persons sued in their official capacity as board members cannot remain as named parties defendant when they are no longer board members. Carl v. Mendiola, 23 FSM R. 653, 664 (Pon. 2022).

Civil Procedure – Dismissal; Jurisdiction – Personal

A defendant who was never served the complaint and summons will be dismissed because she was not brought within the court's (personal) jurisdiction since she was never subjected to the service of process. Carl v. Mendiola, 23 FSM R. 653, 664 (Pon. 2022).

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

A complaint that seeks to enjoin any court hearings, collection action, or orders in aid of judgment in a different civil action 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. Carl v. Mendiola, 23 FSM R. 653, 664 (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. Carl v. Mendiola, 23 FSM R. 653, 664 (Pon. 2022).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on the Defendants' Motion to Dismiss the Complaint, filed May 17, 2021, by all defendants except Maria Laaw, who was never served the complaint and a summons and who thus has not appeared, and on Defendants' Motion to Dismiss this Action Against Maria Laaw, filed August 11, 2021. No opposition was filed to either 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 motions are granted.

I. BACKGROUND

On September 1, 1993, Linda Carl and her spouse, Yoshiro Carl, borrowed \$70,000 from the FSM Development Bank at 7% interest for 54 months. The purpose of the loan was to finance a bakery. Payments on this bakery loan ceased in 1996. (Yoshiro Carl died in 1995.) The bakery eventually went out of business.

On July 17, 1996, the bank filed suit against Linda Carl and Yoshiro Carl. Separate defense counsel appeared for Linda Carl and for the Estate of Yoshiro Carl. Trial was set for August 11, 1998, but was continued because the parties had settled. On February 11, 1999, the court entered the parties' stipulated judgment and a stipulated order in aid of judgment. Other orders in aid of judgment were entered later.

Although the Civil Action No. 1996-060 judgment had not been fully paid off, no installment payments were made after June 2014, except for one made in April 2017. On March 17, 2015, Linda Carl, with new counsel, filed an independent action for relief from the Civil Action No. 1996-060 judgment, which was docketed as Civil Action No. 2015-010.¹ It raised as defenses against the Civil Action No. 1996-060 judgment causes of action or defenses based on violation of Title 30 of the FSM Code; violation of FSM usury law; duty of good faith and fair dealing; gross negligence; and tortious interference with business relationships.

¹ Civil Action No. 2015-010 was later dismissed because it failed to state a claim for which the court could grant relief. Carl v. Mendiola, 23 FSM R. 251, 257-60. (Pon. 2021) (Yamase, C.J.).

On March 18, 2015, Linda Carl filed a Rule 60(b) motion for relief from the judgment in Civil Action No. 1996-060. That motion was denied because it was untimely and because she had already filed an independent action seeking relief from the judgment and, although Rule 60(b) allows the court to entertain an independent action to relieve a party from a judgment, the procedure for obtaining relief from a judgment is either by a Rule 60(b) motion or by an independent action, but not by both, and Linda Carl had first chosen to proceed by an independent action. FSM Dev. Bank v. Carl, 20 FSM R. 70, 72 (Pon. 2015).

The bank engaged in further collection efforts with a minimal amount of success. See, e.g., FSM Dev. Bank v. Carl, 20 FSM R. 70 (Pon. 2015); FSM Dev. Bank v. Carl, 20 FSM R. 329 (Pon. 2016); FSM Dev. Bank v. Carl, 20 FSM R. 592 (Pon. 2016); In re Contempt of Fujita, 21 FSM R. 634, 638 (Pon. 2018); FSM Dev. Bank v. Carl, 21 FSM R. 640 (Pon. 2018). Linda Carl died in July, 2017. Yosilyn Carl was appointed the administrator of Linda Carl's Estate.

On January 8, 2019, the bank, seeking to renew the Civil Action No. 1996-060 judgment, filed an action on a judgment lawsuit against Yosilyn Carl, as the administrator of the Estate of Linda Carl, and the Estate of Yoshiro Car. This new case was docketed as Civil Action No. 2019-003. Yosilyn Carl moved to dismiss. The court denied the motion; granted the bank summary judgment that the defendants were jointly and severally liable for the unpaid part of the Civil Action No. 1996-060 judgment; and ordered the bank to submit to submit new evidentiary calculations of how much of the Civil Action No. 1996-060 judgment remained unpaid. FSM Dev. Bank v. Carl, 22 FSM R. 365, 376-77 (Pon. 2019). When the new calculations were received and not challenged by the defendants, the court, on December 30, 2019, entered judgment for the bank in Civil Action No. 2019-003. Yosilyn Carl, as the Linda Carl Estate administrator, timely appealed that judgment.

On April 12, 2021, Yosilyn Carl, in her capacity as the Administrator for the Estate of Linda Carl, and the Estate of Linda Carl (collectively, the "Linda Carl Estate") filed this action,² alleging that the FSM Development Bank's judgment in Civil Action No. 2019-003 must be voided; that any further collection action in that case be enjoined; and that they be granted judgment on their causes of action for fraud and misrepresentation, violation of 6 F.S.M.C. 801, violation of Title 30 and public policy, gross negligence, and tortious interference with business relations and loss of business profits.³ The defendants, except for Maria Laaw, who was not served the complaint and a summons, then moved to dismiss this independent action for the relief from the Civil Action No. 2019-003 judgment because it failed to state a claim for which the court could grant relief. The Linda Carl Estate did not respond to or oppose the motion.

II. ANALYSIS

A. *Independent Action for Relief from Judgment*

The Linda Carl Estate asks the court to set aside and invalidate the Civil Action No. 2019-003 judgment (and apparently also deem the Civil Action No. 1996-060 judgment as satisfied). Thus, this is an independent action in equity to set aside a the Civil Action No. 2019-003 judgment.

1. *Elements of an Independent Action for Relief from Judgment*

An independent action in equity to set aside a judgment must satisfy five essential elements: 1) a

² Although the Estate of Yoshiro Carl was the co-defendant and fellow judgment-debtor to Yosilyn Carl, as the Estate of Linda Carl administrator, in Civil Action No. 2019-003, and was also Linda Carl's co-defendant and fellow judgment-debtor in Civil Action No. 1996-060, it is not a party to this action.

³ Except for the 6 F.S.M.C. 801-violation and the fraud claims, these claims are the same claims, based on the same facts, as those raised in the Civil Action No. 2015-010 independent action for relief of the Civil Action No. 1996-060 judgment.

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 of these elements precludes relief, and, in particular, the failure to show any one element of a good defense, precludes relief. *Id.* at 558.

2. Adequate-Remedy-at-Law Element

The Linda Carl Estate cannot show the absence of any adequate remedy at law because it had an adequate remedy at law, and it availed itself of that remedy. It timely appealed the Civil Action No. 2019-003 judgment.⁴ A direct appeal is an adequate legal remedy for an erroneous judgment. See Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013) (appeal is adequate legal remedy so writ of prohibition not available). That alone is enough for this independent action to fail to state a claim. An independent action cannot be made a vehicle for relitigation of issues between the parties. Arthur v. Pohnpei, 16 FSM R. 581, 599-600 (Pon. 2009).

3. Good-Defenses Element

The Linda Carl Estate has not alleged any good defense to the cause of action [action-on-a-judgment] on which the judgment in Civil Action No. 2019-003 is founded. There are only a few defenses that are good against an action on a judgment. Only one of the Linda Carl Estate's alleged defenses (its causes of action) is even a plausible defense against the Civil Action No. 2019-003 judgment.

a. Foundational or Standing Defenses

A defendant in an action on a judgment can defend by claiming that one or more of the foundational elements of an action on a judgment is absent.

First, the judgment upon which the action on a judgment is founded "must be a definite and personal judgment for the payment of money, final in its character and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement." 50 C.J.S. *Judgment* § 957, at 545 (1997). Second, "[a]n action on a judgment must be prosecuted by the owner of it." *Id.* § 963, at 552. There is no dispute that, when Civil Action No. 2019-003 was filed, the Civil Action No. 1996-060 judgment met these requirements and that the FSM Development Bank owned the Civil Action No. 1996-060 judgment.

And third, an action on a judgment must "be brought against the defendant of record in the judgment or his successor in interest, and not an entity or person not named in the judgment." *Id.* § 963, at 553 (footnote omitted). The Civil Action No. 1996-060 judgment was rendered against defendants Linda Carl and the Estate of Yoshiro Carl. The defendants in Civil Action No. 2019-003 were the Estate of Yoshiro Carl and Yosilyn Carl, as administrator of Linda Carl's estate, undisputedly Linda Carl's successor in interest.

The Linda Carl Estate does not raise any of these foundational defenses.

b. Defenses to an Action on a Judgment

The defenses against an action on a judgment itself are very limited. "In an action on a judgment, the original cause of action is merged in the judgment, and, unless void, the judgment is conclusive. . . . [N]o defense is available which was, or might have been, urged in defense of the original action." 50 C.J.S. *Judgment* § 962.a, at 550 (1997). Thus, "[i]n an action upon the judgment, the defendant cannot avail

⁴ That appeal was unsuccessful. It was dismissed on its merits. Carl v. FSM Dev. Bank, 23 FSM R. 525 (App. 2022). Just because an appeal is unsuccessful does not mean it was not an adequate remedy at law.

himself of defenses he might have interposed, or did interpose, in the first action." RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (1982).⁵

When the plaintiff brings an action upon the judgment, the defendant cannot avail himself of defenses which he might have interposed in the original action. It is immaterial whether he interposed the defense or failed to do so or even defaulted in the original action. Nor does the fact that the judgment was erroneous preclude the plaintiff from maintaining an action upon it.

In an action on the judgment the defendant may interpose matters which have arisen since the rendition of the judgment and constitute defenses to its enforcement such as payment, release, accord and satisfaction, or the statute of limitations. . . .

RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. c (1982) (citations omitted). The Linda Carl Estate does not allege that it was prevented from raising as defenses in Civil Action No. 2019-003 matters that arose after the Civil Action No. 1996-060 judgment – payment, release, accord and satisfaction, or the statute of limitations.

The defenses raised by the Linda Carl Estate of fraud and misrepresentation; violation of Title 30 and public policy; gross negligence; and tortious interference with business relations and loss of business profits, are all defenses that either were or could have been interposed in Civil Action No. 1996-060, if there had been a factual basis for them. Fraud could be an available defense, but only if there was fraud on the court in obtaining the judgment, 50 C.J.S. *Judgment* § 962.a, at 551 (1997), but there is no evidence or allegation of that. The defenses of fraud, misrepresentation, and illegality are otherwise unavailable unless they are part of the recognized defenses to an action on a judgment – payment, release,⁶ accord and satisfaction, or the statute of limitations – in which case, one of those defenses would be used.

c. *Violation of 6 F.S.M.C. 801*

The Linda Carl Estate raises 6 F.S.M.C. 801 as a defense. The Linda Carl Estate obviously could not have interposed the alleged violation of 6 F.S.M.C. 801 as a defense in Civil Action No. 1996-060 because 6 F.S.M.C. 801 provides that “[a] judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered.” It is thus a matter that arose twenty years after the Civil Action No. 1996-060 judgment was rendered.

The Linda Carl Estate contends that 6 F.S.M.C. 801 entitles it to relief from the Civil Action No. 2019-003 judgment because the February 11, 1999 Civil Action No. 1996-060 judgment was over twenty years old when the 2019-003 judgment was entered on December 30, 2019. This, presumably, is either a defense that the statute required that the Civil Action No. 1996-060 judgment be considered paid and satisfied (payment defense) or that the statute itself released the Civil Action No. 1996-060 judgment, or that the statute provides a statute-of-limitations defense.

⁵ While FSM courts are not bound to adopt common-law principles, they are authorized by statute, 1 F.S.M.C. 203, to use the Restatements of the Law to determine and apply the common law in the absence of written law while keeping in mind its suitability for the FSM. *Iriarte v. Individual Assurance Co.*, 18 FSM R. 340, 365 (App. 2012); *Loch v. FSM*, 1 FSM R. 566, 570 n.2 (App. 1984); *FSM v. GMP Hawaii, Inc.*, 17 FSM R. 555, 580 n.14 (Pon. 2011). “The FSM Code permits the restatements to be used when applying rules of common law in the absence of written law.” *Pohnpei v. AHPW, Inc.*, 14 FSM R. 1, 24 (App. 2006) (citing 1 F.S.M.C. 203). Courts are statutorily authorized, under both FSM national and Pohnpei state law, to consider the common law as expressed in the ALL Restatements of Law. *Iriarte*, 18 FSM R. at 355 n.3 (citing 1 Pon. C. § 1-123 and 1 F.S.M.C. 203).

⁶ A discharge in bankruptcy of a judgment debt would likely constitute a good defense to an action on a judgment as a release.

However, the FSM Supreme Court appellate division in the Linda Carl Estate's appeal of the Civil Action No. 2019-003 judgment recently ruled that the 6 F.S.M.C. 801 presumption of the payment and satisfaction of twenty-year-old judgments is a rebuttable presumption. *Carl v. FSM Dev. Bank*, 23 FSM R. 525, 531-32 (App. 2022). This is now controlling law⁷ in the FSM. The appellate court further ruled that, in Civil Action No. 2019-003, the bank had successfully rebutted the 6 F.S.M.C. 801 presumption; that the Civil Action No. 1996-060 judgment had only been partially paid and satisfied; and that therefore the bank could proceed to enforce its Civil Action No. 2019-003 judgment. *Id.* at 532-35. Therefore, as a matter of law and fact, 6 F.S.M.C. 801 is not a good defense against the cause of action that the Civil Action No. 2019-003 judgment is founded upon.

4. *Prevented-from-Obtaining-Benefit-of-Defenses Element*

The Linda Carl Estate also has not alleged any fraud, accident, or mistake that prevented the Linda Carl Estate defendant in Civil Action No. 2019-003 from obtaining the benefit of its defense to the Civil Action No. 2019-003 judgment.

5. *Case Subject to Dismissal*

As noted above, none of the Linda Carl Estate's causes of action (other than 6 F.S.M.C. 801) are defenses that could be used to support an independent action for relief from the Civil Action No. 2019-003 judgment because "no defense is available [against Civil Action No. 2019-003] which was, or might have been, urged in defense of the original action" of Civil Action No. 1996-060. 50 C.J.S. *Judgment* § 962.a, at 550 (1997), and, except for 6 F.S.M.C. 801, they all could have been raised in defense of Civil Action No. 1996-060. The analysis could easily end here because the Linda Carl Estate's allegations fail to satisfy more than one of the essential elements of an independent action for the relief from a judgment, and this case could be dismissed for the lack of any one of these elements alone.

Furthermore, an independent action is a rare and unusual case and resort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances. *Setik*, 21 FSM R. at 552. The Linda Carl Estate has not shown any unusual and exceptional circumstances.

C. *Linda Carl Estate's Individual Causes of Action*

1. *As Addressed to Civil Action No. 1996-060 Judgment*

It is unclear, but possible that someone might have conceived that this action was also an independent action for relief from the Civil Action No. 1996-060 judgment. If so, then these claims – violation of Title 30; gross negligence; and tortious interference with business relations and loss of business profits – are unavailable for that purpose because they were previously raised in the Civil Action No. 2015-010 independent action for relief from the Civil Action No. 1996-060 judgment and were denied on the merits, *Carl v. Mendiola*, 23 FSM R. 251, 257-60 (Pon. 2021), *appeal dismissed*, Order of Dismissal slip op. (App. No. P11-2021 Apr. 4, 2021).

Just as successive Rule 60(b) motions for relief from judgment are impermissible unless the later motion is brought on a different ground and that ground was not available when the first Rule 60(b) motion was made, *Setik*, 21 FSM R. at 552-53, successive independent actions for relief from the same judgment are impermissible when made on the same grounds because that would be the relitigation of matters already decided. This action cannot be used to relitigate matters decided in Civil Action No. 2015-010 because the *res judicata* doctrine bars the relitigation by parties or their privies of all matters that were or could have been

⁷ 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.

raised in a prior action that was concluded by a final judgment on the merits, which has been affirmed on appeal or for which time for appeal has expired. See Iriarte v. Etscheit, 8 FSM R. 231, 236-37 (App. 1998).

2. *As Addressed to Civil Action No. 2019-003 Judgment*

The court will nevertheless address the viability of the Linda Carl Estate's causes of action against the Civil Action No. 2019-003 judgment lest anyone presume they were avoided because they had some viability.

a. *Fraud and Misrepresentation*

The Linda Carl Estate alleges that it is entitled to relief from the Civil Action No. 2019-003 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. "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). "[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)).

The 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 does not identify any particular statement as a misrepresentation or plead what that statement was and why that statement is a misrepresentation, and how she relied on that misrepresentation to her detriment. Its allegations thus do not satisfy Rule 9(b)'s pleading requirements. The 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.

b. *Title 30 Violations*

The Linda Carl Estate alleges that it is entitled to relief from judgment because Title 30 of the FSM Code, the statute that created 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 its view, is not authorized to generate a profit. The Linda Carl Estate also alleges that Yoshiro Carl's 1995 death or Linda Carl's 2017 death required the bank to write off the bakery loan.

As a matter of controlling law in the FSM, the Title 30 provisions do not create any private causes of action or defenses. Setik v. Mendiola, 21 FSM R. 537, 556 (App. 2018). Thus, the allegations based on Title 30 do not provide the Linda Carl Estate with a viable defense or state a claim for which relief could be granted.⁸

⁸ The Linda Carl Estate could 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, an attorney is ethically bound "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 already disclosed, FSM MRPC R. 3.3(a)(3), and then make a non-frivolous argument why the controlling law should be altered, modified, or reversed. The plaintiffs' counsel did not.

c. Defendants' Alleged Gross Negligence

The Linda Carl Estate alleges 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 Estate asserts that the bank thereby breached its fiduciary duty to the public and to its customers.

Any alleged breach of a fiduciary duty to the public and to its customers would be an allegation directed against the bank's loans to, and loan collection efforts regarding, other borrowers. The Linda Carl Estate cannot assert the rights of borrowers other than itself because a party 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). To the extent that this allegation seeks to adjudicate the rights of borrowers other than the Linda Carl Estate, it fails to state a claim for which a court could grant relief.

To the extent that the Linda Carl Estate alleges that permitting the bank's employees and the bank's in-house attorney to pursue collection efforts against Linda Carl herself constitutes gross negligence, that allegation also fails to state a claim for which the court could grant relief. If a defendant, represented by competent counsel, stipulates to a judgment and then to an order in aid of judgment, it is not gross negligence for the judgment-creditor bank and its officers to permit the bank's employees to seek to enforce that judgment and order in aid of judgment. This gross negligence allegation is thus frivolous and fails to state a claim for which the Linda Carl Estate could be granted relief.

d. Tortious Interference with Business Relations and Loss of Profits

The Linda Carl Estate alleges that the bank's and its agents' wrongful acts contributed to the demise of Linda Carl's bakery business and thereby caused lost business profits and lost prospective business advantage or opportunities. The elements for this tort are 1) plaintiff's existing or reasonable expectation of economic benefit or advantage; 2) defendant's knowledge of that expectancy; 3) defendant's wrongful intentional interference with that expectancy; 4) reasonable probability that the plaintiff would have received anticipated economic benefit in absence of interference; and 5) damages resulting from interference. *Jano v. Fujita*, 16 FSM R. 323, 327, 327-28 (Pon. 2009).

The complaint does not allege any wrongful intentional interference with that expectancy or damages resulting from that interference. It only alleges that Linda Carl signed the loan documents and made numerous loan payments. There is no allegation that the bank or its employees intentionally interfered in her bakery business in any way or that Linda Carl suffered damages from that (unalleged) interference. The complaint does not state a claim for this cause of action.

C. Defendants' Individual and Official Capacities

There are also various grounds on which to dismiss certain defendants.

1. Mendiola's and Sigras's Individual Capacities

The Linda Carl Estate sued Nora Sigras in her individual capacity and in her capacity as the bank's attorney and sued Anna Mendiola in both her individual and official capacities. All of Sigras's and Mendiola's acts or omissions of which the Linda Carl Estate complains 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, then dismissing them in their individual capacities is proper. *Setik*, 21 FSM R. at 556. Thus, dismissal of Nora Sigras and of Anna Mendiola in their personal capacities is proper on this ground alone.

2. *Yatilman's and Phillip's Official Capacities*

The defendants also move to dismiss Senny Phillip, in her official capacity as Board Director, and Florian Yatilman, in his official capacity as Board Director, [because those persons no longer serve on the bank's board of directors. Since a person cannot be sued in his or her "former official capacity," FSM Dev. Bank v. Salomon, 20 FSM R. 565, 573 (Pon. 2016); Herman v. Bisalen, 16 FSM R. 293, 296 (Chk. 2009), Phillip and Yatilman cannot remain as named parties defendant.

3. *Maria Laaw in Her Official Capacity*

The other defendants' motion to dismiss Maria Laaw gave the Linda Carl Estate notice that Maria Laaw was never served the complaint and summons. The motion is granted and Maria Laaw is now dismissed as a party defendant because she was never subjected to the service of process (served the complaint and summons), FSM Civ. R. 4(j), and was thus not brought within the court's (personal) jurisdiction. Setik v. FSM Dev. Bank, 21 FSM R. 505, 516 (App. 2018); Lee v. Lee, 13 FSM R. 252, 256 (Chk. 2005).

D. *Injunctive Relief*

The Linda Carl Estate also seeks to enjoin any court hearings, collection action, or orders in aid of judgment in Civil Action No. 2019-003. 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 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). This common sense principle is integral to the court's proper functioning. *Id.*

And, as discussed above, the Linda Carl Estate has no likelihood of success on the merits of their causes of action. With no likelihood of success, an injunction will 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 can issue). And, as already noted, the Linda Carl Estate had adequate remedies at law, and has exhausted them.

III. CONCLUSION

Accordingly, the motion to dismiss this case is granted. The court should not permit the needless protraction of litigation.

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