FSM SUPREME COURT APPELLATE DIVISION

FEDERATED STATES OF MICRONESIA DEVELOPMENT BANK, Petitioner, vs. HON. LOURDES MATERNE and FSM SUPREME COURT TRIAL DIVISION, Pohnpei Venue, Respondents, MARIANNE B. SETIK, THE ESTATE OF MANNY SETIK, ATANASIO SETIK, VICKY SETIK IRONS, IRENE SETIK WALTER, MARLEEN SETIK, JUNIOR SETIK, ELEANOR SETIK SOS, JOANITA SETIK PANGELINAN, MERIAM SETIK, CHRISTOPHER JAMES SETIK, JERMINA SETIK, and AREEN SETIK, Respondents/Real Parties in Interest.	APPEAL CASE NO. P10-2019 (Civil Action Nos. 2007-008 & 2010-006)

ORDER DENYING PETITION FOR REHEARING

Decided: September 4, 2020
Amended: September 22, 2020

BEFORE:

Hon. Larry Wentworth, Associate Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Mayceleen J.D. Anson, Specially Assigned Justice, FSM Supreme Court**

*Chief Justice, Yap State Court, Colonia, Yap
**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCE:

For the Real Parties in Interest: Yoslyn G. Sigrah, Esq.
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HEADNOTES

Appellate Review – Rehearing

An appellate panel cannot have "overlooked or misapprehended" an issue that was not presented to it. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 (App. 2020).

Appellate Review – Rehearing

Rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, an appellate court will not entertain arguments raised for the first time in a petition for rehearing because a party may not raise new and additional matters for the first time in a petition for rehearing. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 (App. 2020).

Appellate Review – Rehearing

Issues that were not presented initially will seldom be considered when presented for the first time by petition for rehearing. The most promising basis for presenting new issues would be supervening decisions or legislation that could not reasonably be foreseen at the time of initial argument. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 (App. 2020).

Statutes

A Congressional resolution is not legislation – it is only a resolution, and a resolution is not legislation or law. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 n.2 (App. 2020).

Appellate Review – Rehearing; Jurisdiction – Subject-Matter

The one point that can always be raised (if there are grounds for it) for the first time in a rehearing petition (because it can be raised at any time) is subject-matter jurisdiction. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 (App. 2020).

Jurisdiction – Subject-Matter; Property –Mortgages

The FSM Supreme Court's jurisdiction is unquestionable when the FSM Development Bank forecloses on a real estate mortgage. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 (App. 2020).

Appellate Review – Rehearing

A petition for rehearing is not an opportunity for another bite of the apple, and arguments that merely rehash prior unsuccessful arguments offer nothing. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33 (App. 2020).

Appellate Review – Rehearing

A petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings. A petition for rehearing need not, and should not, repeat arguments previously made nor rehearse facts discussed in the opinion. FSM Dev. Bank v. Materne, 23 FSM R. 30, 33-34 (App. 2020).

Appellate Review – Rehearing

Petitions for rehearing are usually summarily denied, but, when clarification may be useful, some reasons may be given. FSM Dev. Bank v. Materne, 23 FSM R. 30, 34 (App. 2020).

Courts – Judges – Temporary Judges; Mandamus and Prohibition – Authority and Jurisdiction

A temporary justice is not an article XI, section 3 justice, but is an article XI, section 9(b) justice when she was the judge of another court to whom the acting Chief Justice gave a special assignment, and a writ of mandamus can be directed towards the temporary justice. FSM Dev. Bank v. Materne, 23 FSM R. 30, 34 (App. 2020).

Civil Procedure; Debtors' and Creditors' Rights – Orders in Aid of Judgment; Judgments

The contention that a court order "dies" when the justice who signed it dies is so outlandish as to be utterly absurd. FSM Dev. Bank v. Materne, 23 FSM R. 30, 34 (App. 2020).

Appellate Review; Courts – Judges

Arguments that a later appellate panel must consist of three completely new justices who were not involved in a previous appeal, are devoid of merit. FSM Dev. Bank v. Materne, 23 FSM R. 30, 34 (App. 2020).

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COURT'S OPINION

PER CURIAM:

On August 5, 2020, we issued a writ of mandamus directing the Honorable Lourdes Materne, or her successor, to enter, in Civil Actions No. 2007-008 and 2010-006, an order to transfer the title to Parcel No. 023-A-70 to Pacific Realtors Inc. free of all claims by that property's previous owners, mortgagors, or mortgagee. [FSM Dev. Bank v. Materne, 23 FSM R. 1 (App. 2020).] On August 19, 2020, the Respondents/Real Parties in Interest ("the Setiks") filed their Petition for Re-hearing. That petition is denied.

I. BANK'S PETITION FOR A WRIT

On December 3, 2019, the FSM Development Bank filed a petition for a writ of mandamus, in which it asked the FSM Supreme Court appellate division to order FSM Supreme Court Temporary Justice Lourdes Materne to issue an order transferring title to Parcel No. 023-A-70 to Pacific Realtors Inc., the successful bidder on that property in an auction held pursuant to the trial court's order in aid of judgment in Civil Actions No. 2007-008 and 2010-006, because the temporary justice had failed to do so after repeated requests. On April 16, 2020, a single article XI, section 3 justice directed that an answer to the petition be filed because the single justice reviewing the petition was not of the opinion that it was clear the writ should be denied.

On May 8, 2020, the Setiks filed a Motion to Dismiss Petition, which constituted their answer to the petition. In this answer, the Setiks raised issues about article XI, section 3 justices; the validity of Temporary Justice Lourdes Materne's appointment and the extent of her authority; the validity of Chief Justice Martin Yinug's December 24, 2020 order in aid of judgment; and whether an order transferring title to land can ever be a ministerial order. On May 28, 2020, the bank filed its reply to the Setiks' filing. We then granted the petition and issued the writ on August 5, 2020.

II. SETIKS' PETITION FOR REHEARING

In their petition for rehearing, the Setiks contend that we overlooked or misapprehended numerous points of law or fact. These are: that the underlying judgment was a default judgment; that the five elements considered for a writ of mandamus were not addressed; that the order to be compelled was not ministerial; that the state court had exclusive jurisdiction over all land matters and the FSM Supreme Court cannot ever exercise any; that Justice Materne's appointment was invalid; that Justice Materne was not a retired FSM Supreme Court justice or an article XI, section 3 FSM Supreme Court justice; that Chief Justice Yinug's order in aid of judgment's validity died when he died; that Chief Justice Yinug's order in aid of judgment was otherwise invalid because the bank had not yet applied the credit life insurance proceeds to the outstanding debt when the order was issued; that this is a case of first impression; that the Judicial Guidance Clause is somehow transgressed; and that the bank's only remedy (and thus its adequate legal remedy) should be to ask for a new order in aid of judgment hearing, at which the bank would be required to prove all past

payments and all amounts owed (essentially, to grant the Setiks relief from the final judgment and to require the bank to prove its judgments all over again). The Setiks attached to their petition a 2015 Congress resolution that asked the FSM Development Bank for a temporary moratorium on mortgage foreclosures.[1]

The Setiks did not raise most of these "overlooked or misapprehended" points in their answer. We therefore could not have overlooked or misapprehended them. "It goes without saying that the panel cannot have 'overlooked or misapprehended' an issue that was not presented to it. . . . [R]ehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing." Easley v. Reuss, 532 F.3d 592, 593-94 (7th Cir. 2008). "[A] party may not raise new and additional matters for the first time in a petition for rehearing." American Policyholders Ins. Co. v. Nyacol Prods., Inc., 989 F.2d 1256, 1264 (1st Cir. 1993). Issues that were not presented initially "will seldom be considered when presented for the first time by petition for rehearing. The most promising basis for presenting new issues would be supervening decisions or legislation that could not reasonably be foreseen at the time of initial argument." 16AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3986.1, at 609-10 (4th ed. 2008) (footnote omitted). The Setiks do not contend that there were any supervening decisions or legislation[2] since their May 8, 2020 answer.

Moreover, we note that most of the Setiks' new points are points they had raised earlier in other proceedings, both at the trial level and again on the appellate level, and that those points were consistently rejected. Any that could have been raised then but were not, were thus waived.

The one point that can always be raised (if there are grounds for it) for the first time in a rehearing petition (because it can be raised at any time) is subject-matter jurisdiction. The Setiks argue that the court does not have jurisdiction because land is involved. But the FSM Supreme Court's jurisdiction is unquestionable when the FSM Development Bank forecloses on a real estate mortgage. *See, e.g.*, Sam v. FSM Dev. Bank, 20 FSM R. 409, 416 (App. 2016); FSM Dev. Bank v. Gilmete, 21 FSM R. 159, 172 (Pon. 2017); Helgenberger v. FSM Dev. Bank, 18 FSM R. 498, 500 (App. 2013); FSM Dev. Bank v. Ifraim, 10 FSM R. 1, 5 (Chk. 2001); FSM Dev. Bank v. Mori, 2 FSM R. 242, 244 (Truk 1987).

The Setiks' rehearing petition repeats a few of the points made in their answer to the bank's petition for a writ of mandamus. But a petition for rehearing is not an opportunity for another bite of the apple, and arguments that merely rehash prior unsuccessful arguments offer nothing. Heirs of Henry v. Heirs of Akinaga, 21 FSM R. 310, 314 (App. 2017). We note that "[i]t should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings . . . ." WRIGHT, MILLER, COOPER & STRUVE, *supra*, § 3986.1, at 608. A petition for rehearing "need not, and should not, repeat arguments previously made . . . nor rehearse facts discussed in the opinion." United States v. Molina-Tarazon, 285 F.3d 807, 808 (9th Cir. 2002).

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[1] The proposed version of this resolution asked the FSM Development Bank impose a temporary moratorium on mortgage foreclosures. This is the version the Setiks attached to their rehearing petition and which, inexplicably, is the version available on the FSM Congress website. The actual adopted resolution, FSM Cong. Res. 19-129, 19th Cong., 2d Reg. Sess. (2015), asked "the President to look into the FSM Development Bank to address the concerns of our citizens, and report back to Congress before the next Special Session in November 2015."

[2] The 2015 Congressional resolution is not supervening legislation because it is not supervening – it was not adopted after the Setiks filed their answer. It is also not supervening legislation because it is not legislation – it is only a resolution, and a resolution is not legislation or law. *See, e.g.*, Taylor v. City of Gadsden, 767 F.3d 1124, 1132 (11th Cir. 2014); Zilich v. Longo, 34 F.3d 359, 364 (6th Cir. 1994); Joiner v. City of Dallas, 380 F. Supp. 754, 770 (N.D. Tex. 1974); Newport News Firefighters Ass'n v. City of Newport News, 307 F. Supp. 1113, 1115 (E.D. Va. 1969); 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 29.05, at 505-06 (5th ed. 1992).

Petitions for rehearing are usually summarily denied, but, when clarification may be useful, some reasons may be given. Lee v. Kosrae, 20 FSM R. 229, 231 (App. 2015); Iriarte v. Individual Assurance Co., 18 FSM R. 406, 408 (App. 2012); Goya v. Ramp, 14 FSM R. 305, 307 (App. 2006). This petition warrants a summary denial. We have carefully reviewed the Setiks' petition and our previous order granting the writ of mandamus and conclude that we have neither overlooked nor misapprehended any essential points of law or fact.

We do, however, wish to address two novel "points" raised by the Setiks, which may be useful in the future. First, is the spurious claim that no writ of mandamus could be directed towards Temporary Justice Materne because she is not an article XI, section 3 justice, and thus not a judicial or other officer. She is not an article XI, section 3 justice, but she is an article XI, section 9(b) justice because she is a judge of another court to whom the then acting Chief Justice gave a special assignment. That is enough. Second, we find the contention that a court order "dies" when the justice who signed it dies to be so outlandish as to be utterly absurd.

Lastly, the Setiks also question the composition of this appellate panel. This point is without merit. Arguments that a later appellate panel must consist of three completely new justices who were not involved in a previous appeal, are devoid of merit. Heirs of Henry, 21 FSM R. at 314.

III. CONCLUSION

Accordingly, the Setiks' petition for rehearing is denied.

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