

FSM SUPREME COURT TRIAL DIVISION

TRACY ARDOS,)	CIVIL ACTION NO. 2020-009
)	
Petitioner,)	
)	
vs.)	
)	
POHNPEI STATE GOVERNMENT,)	
)	
Respondent.)	
_____)	

ORDER DISMISSING CASE

Beauleen Carl-Worswick
Associate Justice

Decided: November 30, 2020

APPEARANCES:

For the Petitioner: Salomon M. Saimon, Esq.
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Kolonia, Pohnpei FM 96941

For the Respondent: Monaliza Abello-Pangelinan, Esq.
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HEADNOTES

Civil Procedure – Service of Process

The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity to defend. Ardos v. Pohnpei, 23 FSM R. 91, 92-93 (Pon. 2020).

Civil Procedure – Service of Process

Service of a summons and complaint can be made by any person who is not a party and is not less than 18 years of age. Service of process – service of the complaint and summons – with one exception may not be effected by the plaintiff himself, but generally must be made by some authorized, disinterested person. The only method by which a plaintiff may himself serve a complaint and summons is by registered or certified mail, return receipt requested and delivery restricted to the addressee. Ardos v. Pohnpei, 23 FSM R. 91, 93 (Pon. 2020).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Service of Process

A case may be dismissed for insufficiency of service of process. Ardos v. Pohnpei, 23 FSM R. 91,

93 (Pon. 2020).

Civil Procedure – Service of Process

When the plaintiff's attorney serves the summons and complaint, service of process of those documents is insufficient under Rule 4(c)(1) because the attorney is deemed as a party to the action. Ardos v. Pohnpei, 23 FSM R. 91, 93 (Pon. 2020).

Civil Rights – Acts Violating; Jurisdiction – Arising Under; Public Officers and Employees – Pohnpei

When the plaintiff's state employment contract provided that either party may terminate the contract by giving written notice; when the plaintiff received written notice that the contract was being terminated; when the plaintiff does not allege that she was terminated for any unlawful reason, such as gender or race, but maintains that she had a continued expectation of employment and a right to be heard before her termination; and when no contract provision provided the plaintiff with either a right to a hearing upon the contract's termination or a right to future employment, both of which are necessary to support her assertion that her civil rights were violated, the plaintiff's claimed civil rights violation is misplaced, as is her assertion that the FSM Supreme Court has subject-matter jurisdiction over the case based upon Pohnpei's alleged violation of the national civil rights law. Ardos v. Pohnpei, 23 FSM R. 91, 93 (Pon. 2020).

Constitutional Law – Taking of Property; Public Officers and Employees – Pohnpei – Termination

When the plaintiff's state employment contract was terminated before its term naturally expired, but she was paid for all work she performed, this does not constitute a taking by the state. Ardos v. Pohnpei, 23 FSM R. 91, 93 (Pon. 2020).

Federalism – Abstention

It is only in rare instances when the court declines to adjudicate a case in favor of allowing a state court to do so. But in order to invoke the doctrine of abstention, the court must first have subject-matter jurisdiction over the case, and when the court lacks subject-matter jurisdiction over the case, the court lacks jurisdiction to even invoke the doctrine of abstention. Ardos v. Pohnpei, 23 FSM R. 91, 93-94 (Pon. 2020).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

This matter comes before the Court on the parties' respective briefs concerning the Court's subject-matter jurisdiction to adjudicate this case. In addition, the Plaintiff also filed what she deems to be her return of service for the Summons and Complaint in this case. For the reasons stated below, this case is dismissed for lack of subject-matter jurisdiction. This dismissal is without prejudice.

To begin, the return of service filed by the Plaintiff for her service of the Summons and Complaint in this case shows that the Plaintiff's counsel failed to comply with the FSM Supreme Court's Rules of Civil Procedure. Indeed, the affidavit of service of process filed by the Plaintiff shows that it was signed by Sherri Barker-Saimon, who is the wife of the Plaintiff's counsel and an employee of the law firm where the Plaintiff's counsel is also employed. This affidavit is dated November 10, 2020, yet it purports to cover a period in which service was performed on July 8, 2020. There is no explanation why a return of service was not filed in July 2020, shortly after service was purported perfected.

Service of process in civil matters in the FSM is governed by FSM Civil Rule 4. The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity

to defend. Berman v. Santos, 6 FSM R. 532, 534 (Pon. 1994) (where a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed, but will be dismissed without prejudice). Under FSM Civil Rule 4, service of a summons and complaint shall be made by any person who is not a party and is not less than 18 years of age. Service of process – service of the complaint and summons, with one exception – may not be effected by the plaintiff himself, but generally must be made by some authorized, disinterested person. Lee v. Lee, 13 FSM R. 252, 256 (Chk. 2005). The only method by which a plaintiff may himself serve a complaint and summons is by registered or certified mail, return receipt requested and delivery restricted to the addressee. A case may be dismissed for insufficiency of service of process. See Puchonong v. Chuuk, 14 FSM R. 67, 69 (Chk. 2006).

In this case, service of the Summons and Complaint by Mrs. Barker-Saimon constitutes service of the same documents by counsel for the Plaintiff as both Mrs. Barker-Saimon and Mr. Saimon are employed at the same organization: Mr. Saimon's law firm which is a corporation organized under the laws of the State of Pohnpei. As this Court has explained, when the plaintiff's attorney served the summons and complaint, service of process of those documents was insufficient under Rule 4(c)(1) because the attorney is deemed as a party to the action. Heirs of Jonah v. Department of Transp. & Infrastructure, 20 FSM R. 118, 120 (Kos. 2015).

That aside, a review of the briefs submitted by each party confirms that this Court lacks subject-matter jurisdiction over this case. The briefs filed by both parties confirm that the Plaintiff was employed for the State of Pohnpei under the terms of a contract, and is not covered by any type of public service system established under state law. The terms of the contract employing the Plaintiff provide that either party may terminate the contract by giving written notice. Here, it is undisputed that the Plaintiff received written notice that the contract between the parties was being terminated. In her Complaint, the Plaintiff does not allege that she was terminated for any unlawful reason, such as her gender, race, *etc.* Instead, she apparently maintains that she had a continued expectation of employment and a right to be heard prior to her termination. To the Plaintiff, this violates her civil rights, as provided for under national law. There is, however, no provision in her contract of employment that provides her with either a right to a hearing upon the termination of her contract, or a right to future employment, both of which are necessary to support her assertion that her civil rights were violated. Thus, since the Plaintiff's claimed civil rights violation appears to be misplaced, so too does her assertion that this Court has subject-matter jurisdiction over this case based upon a violation of the national civil rights law by the State of Pohnpei. Trance v. Penta Ocean Constr. Co., 7 FSM R. 147, 148 (Chk. 1995) (when it appears that the court lacks subject matter jurisdiction the case will be dismissed). See Island Dev. Co. v. Yap, 9 FSM R. 220, 222 (Yap 1999) (whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action; thus subject-matter jurisdiction may never be waived, and may be raised at any time, even after judgment).

In her brief on the Court's subject-matter jurisdiction, or lack thereof, the Plaintiff misconstrues the recently-adjudicated case of Linter v. FSM, 20 FSM R. 553 (Pon. 2016). Indeed, in Linter, the plaintiffs continued to engage in work on behalf of the Plaintiff while awaiting for their contracts to be finalized and presented to them, just as they had previously done over the course of several years. This resulted in a situation in which the plaintiffs in Linter had worked, but not been paid for their efforts. This alone constituted a taking of property by the government. The same cannot be said for the Plaintiff in the case at hand, as she was compensated for all the time that she worked under her contract. The fact that her contract for employment was terminated before its term naturally expired does not change this conclusion, nor does the Plaintiff allege in the Complaint that she has not been compensated for work she may have performed.

Similarly, the Plaintiff's assertions that the Court should not invoke its power of abstention, thereby allowing this case to be adjudicated by the Pohnpei State Court, is also misplaced. The doctrine of abstention is only applicable in matters that this Court has subject-matter jurisdiction to adjudicate. It is only

in rare instances when this Court declines to adjudicate a case in favor of allowing a state court to do so, in the furtherance of the state court's development over an area of law that is clearly within the state's interest. Ponape Transfer & Storage, Inc. v. Federated Shipping Co., 4 FSM R. 37, 39 (Pon. 1989) (a cautious, reasoned use of the doctrine of abstention is not a violation of the litigants' constitutional rights under the FSM Constitution). In those cases, however, in order to invoke the doctrine of abstention, this Court must first conclude that it has subject-matter jurisdiction over the case. Here, this Court lacks subject-matter jurisdiction over this case. Thus, the Court lacks jurisdiction to even invoke the doctrine of abstention. Ponape Transfer & Storage, Inc., 4 FSM R. at 42-43 (while the FSM Constitution provides initial access to the FSM Supreme Court for any party in article XI, section 6(b) litigation, the court may, having familiarized itself with the issues, invoke the doctrine of abstention and permit the case to proceed in a state court, since the power to grant abstention is inherent in the jurisdiction of the FSM Supreme Court, and nothing in the FSM Constitution precludes the court from abstaining in cases which fall within its jurisdiction under article XI, section 6(b)).

In short, based upon the allegations set forth in the Complaint, this Court lacks subject-matter jurisdiction to adjudicate this case. As such, this case is hereby dismissed. This dismissal is without prejudice. The Plaintiff is free to refile a Complaint arising from the termination of her employment contract, provided that the Complaint includes allegations that will invoke the provisions of the FSM's national civil rights statute, such as discrimination based upon race, gender, religion, *etc.*

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