

FSM SUPREME COURT TRIAL DIVISION

SANAJATAMITRA BASU,)	CIVIL ACTION NO. 2019-029
)	
Petitioner and Plaintiff,)	
)	
vs.)	
)	
EUGENE AMOR, in his official capacity as)	
the Secretary of Finance, Government of)	
the Federated States of Micronesia, and)	
the FSM NATIONAL GOVERNMENT,)	
)	
Respondents and Defendants.)	
_____)	
SANAJATAMITRA BASU,)	CIVIL ACTION NO. 2021-014
)	
Plaintiff/ Counterdefendant,)	
)	
vs.)	
)	
CARLSON D. APIS, in his official capacity)	
as the Secretary of Transportation,)	
Communications, and Infrastructure for the)	
Federated States of Micronesia, and the)	
FSM NATIONAL GOVERNMENT,)	
)	
Defendants/Counterclaimants.)	
_____)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT; ORDER OF CONSOLIDATION

Larry Wentworth
Associate Justice

Hearing: July 27, 2021
Decided: October 1, 2021

APPEARANCES:

For the Plaintiff: Michael J. Sipos, Esq.
P.O. Box 2069
Kolonia, Pohnpei FM 96941

For the Defendants: Lori J. Williams, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

* * * *

HEADNOTES

Civil Procedure – Summary Judgment – Grounds

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, and it is the moving party's burden to show the lack of triable issues of fact. Basu v. Amor, 23 FSM R. 429, 432 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds; Employer-Employee; Public Officers and Employees

Under the common law rules to determine whether someone is an employee or an independent contractor, a factual inquiry is usually necessary. Since that is so, material facts, in particular, whether the plaintiff was an independent contractor or an employee, are genuinely in dispute and summary judgment cannot be granted. Basu v. Amor, 23 FSM R. 429, 432-33 (Pon. 2021).

Civil Procedure – Pleadings; Judgments; Taxation – Gross Revenue Tax

Since, except as to a party against whom a judgment is entered by default, every final judgment must grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in the party's pleadings, if the plaintiff were to prove he was an independent contractor, the court would then have to grant him whatever relief he would then be entitled to based on whatever difference there might be between his alleged wages and salaries tax liability and his actual gross revenue tax liability (plus penalties and interest for not having paid the gross revenue tax), even though he did not demand that relief in his complaints. Basu v. Amor, 23 FSM R. 429, 433 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Taxation Wages and Salaries Tax

The court can grant, as a matter of law, partial summary judgment on a plaintiff's claim that, when the FSM retained the plaintiff's \$18,854.57, the plaintiff bore no liability for wages and salaries tax since his putative employer had not withheld any wages and salaries tax and had not paid those sums itself out of its own funds and that therefore, as a matter of law, the FSM's later retention of the \$18,854.57, was, when retained, unlawful, and remained unlawful until that amount was paid out of the employer's own funds. Basu v. Amor, 23 FSM R. 429, 433 (Pon. 2021).

Civil Procedure – Consolidation

Consolidation of cases involving the same property is desirable to avoid the possibility of inconsistent decisions, to expedite the matter's ultimate resolution, and to avoid expensive and unnecessary duplication. Basu v. Amor, 23 FSM R. 429, 433 (Pon. 2021).

Civil Procedure – Consolidation

When the two cases pending before the court involve the same property and common questions of law and fact, and, if allowed to proceed separately, present the danger of inconsistent results, the court will order the cases consolidated and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Basu v. Amor, 23 FSM R. 429, 433 (Pon. 2021).

Civil Procedure – Consolidation; Civil Procedure – Filings

When two cases are consolidated, the court may order that all future filings for the consolidated cases be docketed under one docket number with a combined caption. Basu v. Amor, 23 FSM R. 429, 433 (Pon. 2021).

Civil Procedure – Consolidation; Civil Procedure – Pleadings – Amendment

Once the two cases are consolidated, the defendants' motion to amend their answer and to supplement their pleadings with a counterclaim in the first case become superfluous since those pleadings are before the court in the consolidated case through the answer and counterclaim in the second case. Therefore no ruling on the two motions is necessary since the two cases are consolidated under one docket number with the defendants' affirmative defenses and counterclaim currently pending herein. Basu v. Amor,

23 FSM R. 429, 433 (Pon. 2021).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On July 27, 2021, the court heard: 1) the plaintiff's Motion for Summary Judgment, filed in Civil Action No. 2019-029 on April 20, 2021; 2) the Civil Action No. 2019-029 defendants' Motion for Leave to File Amended Answer to Add Affirmative Defenses, filed May 27, 2021; 3) the Civil Action No. 2019-029 defendants' Motion for Leave to File a Supplemental Pleading to Include Counterclaim, filed May 27, 2021; 4) the Civil Action No. 2019-029 defendants' Motion to Request Court to Hold Funds at Issue in this Matter in Trust, Pending Resolution of the Case, filed May 27, 2021; 5) the plaintiff's Opposition to Motion to Amend to Add Affirmative Defenses and a Counterclaim and to Hold Funds in Trust, filed June 9, 2021; and, based on the court's own query about whether the two above-captioned cases should be consolidated, 6) the plaintiff's Brief Re Consolidation, filed July 26, 2021; and 7) both cases' Defendants' Position and Response to Court Order Regarding Consolidation of Court Cases, filed July 26, 2021. These filings are resolved as discussed below.

I.

The plaintiff, Sanajatamitra Basu, moves, in Civil Action No. 2019-029, for summary judgment based on the administrative proceedings compelled by the court's May 26, 2020 order, Basu v. Amor, 22 FSM R. 557 (Pon. 2020), and Secretary Eugene Amor's resulting August 29, 2020 administrative ruling, which Basu notes was partially adverse to him.

Secretary Amor ruled that the exemption from local taxes referred to in the loan agreements between the FSM and the Asian Development Bank ("ADB"), which financed Basu's employment, did not apply to wages and salaries income taxes; that Basu was obviously an FSM employee because his employment contract was with the FSM national government; that Basu was therefore subject to the FSM wages and salaries tax under Title 54 of the FSM Code; that the wages and salaries tax is collected by the employer withholding the required amount when paying the employee [54 F.S.M.C. 131]; that that was not done when Basu was paid under his initial contracts; that the amount of Basu's unpaid wage and salary tax was correctly assessed; that the employer (the FSM) is initially liable for the wages and salaries tax not withheld from Basu's pay (plus penalties and interest [54 F.S.M.C. 134]); and that the government may recover from Basu the sums that should have been withheld from his salary only once his employer, the FSM, has first been required to pay that amount out of its own funds [54 F.S.M.C. 135(3)].

Secretary Amor further found that Basu's position was not tax exempt; that his employment contract was drafted by the ADB and negotiated between the FSM Department of Transportation, Communications, and Infrastructure (TC&I) and Basu; that the ADB's position is that only local taxes (not income taxes) are exempted; that the Department of Foreign Affairs was not involved in negotiating Basu's contract; that the government's standard practice is to exempt consultants directly contracted with international organizations like the ADB and to tax consultants who are contracted with the FSM government; and that the amount not paid to Basu at the end of his last FSM contract was \$1,163.25 (last paycheck of \$500.15 and \$663.10 for Basu's airfare to Chuuk).

Basu contends that Secretary Amor, while correctly stating that Basu was not liable for penalties and interest, did not address that the government's unjustified taking of money from Basu's later non-tax-exempt paychecks to pay the unlawful tax assessment, violated the law because the FSM had not paid the taxes assessed as the Secretary had just ruled that the FSM needed to do in order to have any claim against Basu for unpaid taxes. Basu asserts that Secretary Amor then unlawfully reissued the same assessment against

him (minus the penalties and interest). Basu asserts that this is a civil rights violation for which the FSM bears liability because, based on its unlawful assessment, the FSM took money that was Basu's property. Basu further asserts that he is entitled not only to an order that the taking was unlawful but also to an order that Basu's earned salary and withheld benefits, totaling \$18,854.57, be immediately returned to him, plus 9% interest from the date of each taking plus reasonable attorney's fees.

The defendants oppose Basu's summary judgment motion. They contend that Secretary Amor's actions do not rise to civil rights violations because not every wrong or incorrect decision by a government official is automatically a civil rights violation. The defendants acknowledge that the Secretary did not have the authority to recover from Basu what he believed were unpaid taxes, unless and until Basu's employer (the FSM) had first been required to pay, out of its own funds, the amounts it should have initially withheld from its employee's (Basu's) pay (plus the added employer's penalties and interest). The defendants assert, and Basu does not dispute, that, after appropriation by Congress, the defendants have now paid the taxes that they believe should have been withheld from Basu's pay, plus the employer's penalties and interest for not doing so when paying Basu.

The defendants assert that this is an affirmative defense, which Basu must overcome to obtain summary judgment, and, in separate Civil Action No. 2019-029 motions, move for leave to file an amended answer and to file a supplemental pleading to add this affirmative defense and to also assert a counterclaim to recover from Basu the sums (\$33,805) that it contends should have been withheld from his pay, but were not [after allowing credit for the \$18,854.57 that the FSM has already taken and still retains and that Basu wants returned].

Basu contends that nothing should have been withheld from his initial contracts because the evidence showed (but was ignored in the administrative proceeding) that he was not an FSM employee, but was an independent contractor. Basu further argues that the defendants in Civil Action No. 2019-029 should not, and need not, be granted leave to amend and supplement their Civil Action No. 2019-029 pleadings because those defenses and counterclaims are already raised in Civil Action No. 2021-014 by that case's defendants. Basu asserts that he should be granted summary judgment in the entirety in Civil Action No. 2019-029; that immediate payment of that judgment should be ordered; that Civil Action No. 2019-029 should then be closed; and that Civil Action No. 2021-014 should proceed on its way as a separate case, with the FSM's affirmative defenses and counterclaims to be considered therein and adjudicated in due course. Therefore, in Basu's view, consolidation of the two cases is unnecessary because Civil Action No. 2019-029 should result in an immediate judgment in his favor, and the FSM may proceed with its defenses and counterclaims in Civil Action No. 2021-014 as it sees fit.

II.

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, and it is the moving party's burden to show the lack of triable issues of fact. Arthur v. Pohnpei, 16 FSM R. 581, 593 (Pon. 2009). Thus, summary judgment can only be granted if there are no material facts genuinely in dispute. Kosrae v. Skilling, 11 FSM R. 311, 315 (App. 2003); AHPW, Inc. v. FSM, 12 FSM R. 114, 117 (Pon. 2003). Here, Basu disputes the Secretary's finding and conclusion that Basu was, from the start, an FSM employee. Basu asserts that he was instead an independent contractor. (Earlier, Basu asserted that he was a tax-exempt foreign aid organization employee under 54 F.S.M.C. 112(13)(k), but he may have abandoned that position in light of the court's and the Secretary's conclusion that, based on Basu having contracted with the FSM, he was not.)

Under the common law rules to determine whether someone is an employee or an independent contractor, a factual inquiry is usually necessary. See, e.g., Professional & Executive Leasing, Inc. v. Commissioner, 862 F.2d 751, 753 (9th Cir. 1988); Air Terminal Cab, Inc. v. United States, 478 F.2d 575,

433
Basu v. Amor
23 FSM R. 429 (Pon. 2021)

5778 (8th Cir. 1973); E.P.M. Inc. v. Buckman, 300 S.W.3d 510, 513 (Mo. Ct. App. 2009); Silver v. Statz, 849 N.E.2d 320, 323 (Ohio Ct. App. 2006). Since that is so, material facts, in particular, whether Basu was an independent contractor or an employee, are genuinely in dispute and summary judgment cannot be granted.

During the hearing, Basu argued that, in these case(s), he pled only that he owed no wages and salaries tax and that the cases do not raise or include the issue of whether, as an independent contractor, he owed any gross revenue tax, so any discussion along that line is irrelevant. The court cannot agree. Civil Procedure Rule 54(c), commands that “[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.” Thus, if Basu were to prove he was an independent contractor, the court would then have to grant him whatever relief he would then be entitled to based on whatever difference there might be between his alleged wages and salaries tax liability and his actual gross revenue tax liability (plus penalties and interest for not having paid the gross revenue tax), even though he did not demand that relief in his complaints.

The court can, of course, and does grant, as a matter of law, partial summary judgment on Basu’s claim that, when the FSM retained Basu’s \$18,854.57, Basu bore no liability for wages and salaries tax since his putative employer (the FSM TC&I Department) had failed to withhold any wages and salaries tax and had not paid those sums itself out of its own funds and that therefore, as a matter of law, the FSM’s later retention of the \$18,854.57, was, when retained, unlawful, and remained unlawful until that amount was paid out of the employer’s [FSM’s] own funds. See 54 F.S.M.C. 135(3). Basu’s summary judgment motion is otherwise denied. Material facts are genuinely in dispute.

III.

Consolidation of cases involving the same property is desirable to avoid the possibility of inconsistent decisions, to expedite the matter’s ultimate resolution, and to avoid expensive and unnecessary duplication. Ruben v. Hartman, 15 FSM R. 100, 113 (Chk. S. Ct. App. 2007). “When actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” FSM Civ. R. 42(a).

These two cases involve the same property and common questions of law and fact, and, if allowed to proceed separately, present the danger of inconsistent results. NOW THEREFORE IT IS HEREBY ORDERED that Civil Action No. 2019-029 and Civil Action No. 2021-014 ARE CONSOLIDATED and that all future filings for the now-consolidated cases shall be docketed under Civil Action No. 2019-029, with the combined caption.

IV.

Since these two cases are now consolidated, the Civil Action No. 2019-029 defendants’ motion to amend their answer and to supplement their pleadings with a counterclaim are now superfluous because those pleadings are now before the court in this consolidated case through the answer and counterclaim in Civil Action No. 2021-014. Therefore no ruling on these two motions is necessary. The Civil Action No. 2019-029 defendants’ motion to hold funds in trust is denied without prejudice because no party has identified any appropriated funds from which the court might order immediate payment to Basu. The motion may be renewed if the circumstances warrant.

V.

Accordingly, these two cases are consolidated under docket number 2019-029 with the FSM’s affirmative defenses and counterclaim currently pending herein. Basu is granted partial summary judgment that the government’s retention of \$18,854.57 was unlawful when retained and remained unlawful until the

employer paid out of its own funds that amount to the tax authorities, although, now the rightful ownership of those funds is genuinely in dispute, as is the FSM's pending counterclaim for \$33,805.

* * * *