

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,

Plaintiff,

vs.

YONE H. ROBERT also known as Yone Henry,
individually and in her capacity as Administratrix
of the ESTATE OF HENRY E. ROBERT, also
known as Henry Edwin, MICHAELA G. NODA,
Administratrix of the Estate of Gideon Noda and
the KOSRAE HOUSING AND RURAL
DEVELOPMENT AUTHORITY,

Defendants.

CIVIL ACTION NO. 2019-2000

ORDER ON MOTION TO DISQUALIFY DEFENDANTS' COUNSEL FROM REPRESENTING TWO
DEFENDANTS

Dennis L. Belcourt
Associate Justice

Hearing: January 14, 2022
Decided: February 17, 2022

APPEARANCES:

For the Plaintiff: Nora E. Sigrah, Esq.
P.O. Box M
Kolonia, Pohnpei FM 96941

For the Defendants: Yoslyn G. Sigrah, Esq.
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HEADNOTES

Attorney and Client

“Consult” or “Consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. FSM Dev. Bank v. Robert, 23 FSM R. 495, 498 n.2 (Kos. 2022).

Civil Procedure – Motions – Unopposed

The opposing party’s failure to file a memorandum of points and authorities constitutes a consent to the granting of the motion, but even when there is no opposition, the court still needs good grounds before it can grant the motion. FSM Dev. Bank v. Robert, 23 FSM R. 495, 498 (Kos. 2022).

Civil Procedure – Motions – Unopposed; Attorney and Client – Disqualification of Counsel

In the context of an unopposed motion to disqualify counsel, the court will only grant the requested relief to the extent a *prima facie* basis for doing so is before the court and evidence sufficient to support all of the elements warranting such relief must be of record, even if there may be evidence negating the basis for disqualifying the attorney. FSM Dev. Bank v. Robert, 23 FSM R. 495, 498 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

Rule 1.7 recognizes two different conflicts as potential violations, (a) direct and (b) materially limiting. FSM Dev. Bank v. Robert, 23 FSM R. 495, 498 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

Co-defendants are not considered directly adverse under Rule 1.7(a), but rather fall under Rule 1.7(b) because paragraph (a) prohibits representation of opposing parties in litigation while common representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b), but a cross-claim between co-defendants would bring their common representation by counsel within Rule 1.7(a). FSM Dev. Bank v. Robert, 23 FSM R. 495, 499 & n.3 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

Counsel would be prohibited from representing co-defendants to the extent that the representation of one or more of them would be materially limited by counsel’s responsibility to the other or others, unless she reasonably believes that her representation of the parties will not be adversely affected and she obtains consent from each of them after consultation. FSM Dev. Bank v. Robert, 23 FSM R. 495, 499 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

If the evidence points to a conflict, then the counsel representing conflicted co-defendants is prohibited from the representation of both unless 1) she reasonably believes that her representing both would

not be adversely affected, and 2) the clients consent after consultation, but not all conflicts are waivable. The test is whether a disinterested lawyer would conclude that the client should not agree to representation under the circumstances. FSM Dev. Bank v. Robert, 23 FSM R. 495, 499 (Kos. 2022).

Civil Procedure – Pleadings – Answer

An answer that fails to deny the existence of the transaction or any other information in the paragraph to which the answer is interposed, therefore admits it. FSM Dev. Bank v. Robert, 23 FSM R. 495, 500 (Kos. 2022).

Civil Procedure – Pleadings – Answer

When the co-defendants' answer to a paragraph that contains an express admission from only one co-defendant as to the allegations in that paragraph; when there is no mention as to whether the other defendants admit or deny the allegations; and when the only answer on file is that made behalf of all of the defendants, the other defendants, having failed to expressly deny that paragraph, are deemed to have admitted that paragraph. FSM Dev. Bank v. Robert, 23 FSM R. 495, 500 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

If a co-defendant represented by common counsel has a claim against another co-defendant, it would be subject to the analysis of whether it might be asserted or otherwise affected by the subject litigation, and, if so, the next question is whether the parties can consent to the conflict, i.e., whether the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and, if so, whether each client consents after consultation. FSM Dev. Bank v. Robert, 23 FSM R. 495, 500 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

Courts must view with caution any motion to disqualify opposing counsel because such motions can be misused as a harassment technique. Resolving conflict-of-interest questions is primarily the responsibility of the lawyer undertaking the representation. FSM Dev. Bank v. Robert, 23 FSM R. 495, 501 (Kos. 2022).

Attorney and Client – Disqualification of Counsel

The court may defer ruling on a motion to disqualify the defendants' common counsel from representing them, pending counsel's provision of an affidavit of compliance with Rule 1.7. FSM Dev. Bank v. Robert, 23 FSM R. 495, 501-02 (Kos. 2022).

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COURT'S OPINION

DENNIS L. BELCOURT, Associate Justice:

On January 14, 2022, at 1:30 pm, this matter came on for hearing set for all pending motions. Plaintiff's Counsel Nora Sigráh appeared remotely, and Defendants' Counsel Yoslyn G. Sigráh ("Defendants' Counsel") appeared at the Kosrae courtroom. At that hearing, this Court granted Plaintiffs' motion to substitute court-appointed administratrixes, of the respective Estates of Henry Robert and Gideon Noda for the named defendants, filed February 6, 2020, as well as a related motion to enlarge time, filed December 23, 2019.¹ This order addresses Plaintiff's March 6, 2019 motion to disqualify Defense Counsel from Representing two defendants, finding Defendants' counsel's common representation of all the Defendants may implicate the conflict limitations in MRPC 1.7(a) or (b) and requiring Defendants' Counsel to file and serve within thirty (30) days of this order an Affidavit of Compliance with MRPC 1.7, specifying the steps that

¹ The substitution-related changes are made to the caption. For ease of reference, in this motion the Estate of Henry Robert and Yone Robert are referred to as the Roberts, and the Estate of Gideon Noda is referred to as Noda. Kosrae Housing and Rural Development Authority are referred to as KHRDA.

she has taken, including consulting with and obtaining the consent² of her clients to the common representation after full disclosure of the potential conflicts it entails. Plaintiff shall have fifteen (15) days thereafter to respond.

MOTION TO DISQUALIFY

Plaintiff filed the motion to disqualify contending that Defendants' Counsel's representation of all defendants puts her in an impermissible and unwaivable conflict of interest under this Court's rules of professional conduct (MRPC) Rule 1.7. The remedy requested by Plaintiff is that, at a minimum, Defendants' Counsel be ordered disqualified from representing Defendants Kosrae Housing and Rural Development Authority and Noda. Depending on whether Defendants' Counsel has received confidential information from her clients, Plaintiff raises the possibility that the order of disqualification of Defendants' Counsel may need to extend to the Roberts.

DEFENDANTS' CONSENT TO THE MOTION

The motion to disqualify was filed over two years and nine months before this Court heard it. At no time during that period did Defendants file an opposition to the motion or otherwise express disagreement with the motion. It was only during the hearing on pending motions that Defendants express disagreement with or lack of consent to the motion.

One of the most often cited provision of the FSM Rule of Civil Procedure is Rule 6(d), which states in pertinent part that "failure by the opposing party [to file a memorandum of points and authorities] shall constitute a consent to the granting of the motion."

Thus, Defendants consented to grant the motion to disqualify, "but even when there is no opposition, the court still needs good grounds before it can grant the motion." *Yoruw v. FSM Dep't of Educ.*, 22 FSM R. 596, 598 (Yap 2020) (citing, *inter alia*, *Senda v. Mid-Pacific Constr. Co.*, 6 FSM R. 440, 442 (App. 1994) ("*proper* grounds for granting of the motion must still exist before the court may grant [the motion]" (emphasis added))). In the context of this motion to disqualify, this Court will only grant the requested relief to the extent a *prima facie* basis for doing so is before the Court—in other words, evidence sufficient to support all of the elements warranting such relief must be of record, even if there may be evidence negating the basis for disqualifying the attorney.

ELEMENTS OF A VIOLATION OF MRPC 1.7(a) OR (b)

MRPC 1.7 recognizes two different conflicts as potential violations, (a) direct and (b) materially limiting:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected;

and

(2) the client consents after consultation. When repre

² As defined in the MRPC, "'Consult' or 'Consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." [FSM MRPC pmb].]

sentation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Plaintiff contends that the Roberts are directly adverse to both Noda and KHRDA, and thus MRPC 1.7(a) applies. However, codefendants are not considered directly adverse under MRPC 1.7(a), but rather fall under MRPC 1.7(b).³

Under MRPC 1.7(b), Defendants' Counsel would be prohibited from representing the Roberts, Noda, and KHRDA to the extent that the representation of one or more of them would be materially limited by Defendants' Counsel's responsibility to the other or others, unless she reasonably believes that her representation of the parties will not be adversely affected and she obtains consent from each of them after consultation.

ROBERTS V. KHRDA CONFLICT ANALYSIS

Plaintiff raises the concern that common representation of the Roberts and KHRDA creates a conflict because of the Roberts' relationship as trustor to KHRDA as beneficiary. Concretely, this would be a problem if they are in dispute over the proceeds left over after Plaintiff is paid what it is entitled to under the law (i.e., under Kosrae State Code section 11.831) after the foreclosure sale, if such occurs. However, without knowing the terms of the loan agreement between the Roberts and KHRDA's predecessor on the loan, and without knowing whether there is any prospect of proceeds from the sale in an amount sufficient to exceed FSMDB's claim to proceeds, we do not have a basis for knowing at this time whether the Roberts and KHRDA's legal positions are conflicting under MRPC 1.7(b).

If further evidence points to a conflict, then Defendants' Counsel is prohibited from the representation of both unless (1) she reasonably believes that her representing both the Roberts and KHRDA would not be adversely affected, and (2) the Roberts' and KHRDA's consent after consultation. Not all conflicts are waivable, however, the test being whether "a disinterested lawyer would conclude that the client should not agree to representation under the circumstances." FSM MRPC R. 1.8 cmt.

ROBERTS V. NODA CONFLICT ANALYSIS

Plaintiff bases the contention that the Roberts and Noda are in a conflict on the basis of what it contends to be an ostensible inconsistency between the Defendants' answer to paragraph 29 and 30.

Complaint, paragraph 29:

On or about April 26, 2013, Defendant Henry Robert, also known as Henry Edwin, conveyed a 990 square meter subdivided portion of parcel no. 008-K-26, designated as parcel no. 008-K-28, to Defendant Gideon Noda by a deed of sale.

Answer, paragraph 29:

In answering paragraph 29, Defendants are without sufficient knowledge to form a belief as to the truth or falsity of the allegations of the parcel numbers contained therein, therefore deny the same.

³ See comments to MRPC 1.7: "Paragraph (a) prohibits representation of opposing parties in litigation. Common representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b)." Plaintiff contends the absence of a counterclaim between KHRDA and the Roberts represents a sign of conflict of interest. As noted herein, a counterclaim between KHRDA would and the Roberts would clearly bring their common representation by Defendants' Attorney within the purview of MRPC 1.7(a). The absence of such means that analysis comes under of MRPC 1.7(b).

Complaint, paragraph 30:

On or about May 2, 2013, a certificate of title for parcel no. 008-K-28 with an area of 990 square meters was issued to Defendant Gideon Noda. True and correct copies of the original certificate of title for parcel 008-K-28, portion of plat map 008-K-05 and the deed of sale for parcel 008-K-28 are attached hereto as Exhibit "H" and made a part of this complaint.

Answer, paragraph 30:

In answering paragraph 30, Defendant Gideon Noda does not contest same.

Plaintiff interprets the above allegations to mean that the Roberts are denying that they transferred the land at issue, while the Nodas are admitting it. While the pleading leaves something to be desired in terms of clarity, Plaintiff appears to be reading something into the pleadings that is not there.

The answer to paragraph 29 denies on information and belief only the *parcel numbers* in the Robert-Noda transfer. On behalf of all four defendants, it fails to deny the existence of the transaction or any other information in the paragraph to which the answer is interposed. It therefore admits it. FSM Civ. R. 8(d) ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.") See also *Yarnell v. Roberts*, 66 F.R.D. 417, 423 (E.D. Pa. 1975) ("If the answer is not sufficiently definite to give reasonable notice of the allegations in the complaint sought to be placed in issue, the opponents' averments may be treated as admitted. 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1261 (1969)."). In other words, while in answering paragraph 29, all the Defendants—the Roberts, Noda, and KHRDA—deny the parcel numbers conveyed to Noda by Henry Roberts. There is no inconsistency among the Defendants in the answer to paragraph 29 that would suggest of material limitations hinder the attorney from representing them both.

Paragraph 30 of the Complaint relates to the certificate of title issued to Noda. By its express terms, the Defendants' answer to paragraph 30 contains an express admission only from Noda as to issuance of the certificate of title and other allegations in that paragraph. There is no mention as to whether the other Defendants admit or deny the allegations. However, as the only answer on file is that made behalf of all of the Defendants, the other Defendants, having failed to expressly deny that paragraph, are deemed to have admitted paragraph 30. FSM Civ. R. 8(d).

Thus, reading Defendants' answer according to rules of pleading, it does not raise an issue among the Defendants as to the transfer of the parcel to Noda.

If the pleadings do not give an indication of a conflict to common representation of the Roberts and Noda, they do not exclude the possibility that there is in fact such a conflict. What is necessary to determine whether Noda and the Roberts are conflicted is an indication neither Noda or the Roberts have a potentially nonfrivolous claim against the other. A nonfrivolous claim could be based on the transaction whereby Noda ostensibly paid \$20,000 for the parcel. If Noda has such a claim, it would be subjected to the analysis of whether it might be asserted or otherwise affected by the subject litigation. If so, the next question is whether the parties *can* consent to the conflict, i.e., whether "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client," and, if so, whether "each client consents after consultation." FSM MRPC R. 1.7(b).

Also, as with the Roberts and KHRDA, the representation of Roberts and Noda in this action by one attorney may be conflicted in the event that there is money left over after the payment of the Development Bank's priority expenses, principal and interest are paid.⁴

⁴ There is no indication whether the sale of the real property subject to the mortgage will be sufficient to more than pay off priority categories under Kosrae State Code Section 11.831.

KHRDA AND NODA CONFLICT ANALYSIS

Defendants' Counsel needs to conduct a conflict analysis with respect to KHRDA and Noda, as well.

RELIEF WARRANTED

This Court has previously recognized a limited role for motions to disqualify brought by opposing counsel in civil litigation:

Courts must view with caution any motion to disqualify opposing counsel because such motions can be misused as a harassment technique. McVey v. Etscheit, 14 FSM Intrm. 207, 210 (Pon. 2006). Resolving conflict-of-interest questions is primarily the responsibility of the lawyer undertaking the representation. Nix v. Etscheit, 10 FSM Intrm. 391, 396 (Pon. 2001). But a court may, in civil litigation, raise the question when there is reason to infer that the lawyer has neglected the responsibility. *Id.*

Marsolo v. Esa, 17 FSM R. 480, 484 (Chk. 2011).

Based on its review of the file and representations at the hearing, this Court defers ruling at this time on the motion to disqualify Defendants' Counsel from representing Defendants, pending Defendants' Counsel's provision of an affidavit as set forth below. See Nix v. Etscheit, 10 FSM R. 391, 395-98 (Pon. 2001).

This Court finds that the subject motion and discussions at hearing give it reason to require that Defendant's Counsel provide, filed and served within thirty (30) days of this order, an affidavit of compliance with Rule 1.7.

The affidavit of compliance with Rule 1.7 shall substantially include the following, as applicable:

- (a) That Defendants' Counsel has met with her clients, consulted with them about conflicts in the litigation, potential and actual, and
- (b)(1) That Defendants' Counsel has reached the conclusion that there is no material limitation on her ability to represent all clients; or
- (2)(i) if there is such a limitation, she reasonably believes that her representation will not be thereby adversely affected;
- (ii) and that her clients have consented after such consultation, which consultation shall include explanation of the implications of the common representation and the advantages and risks involved; or
- (c)(i) if there is a material limitation to her representation created by common representation of multiple clients;
- (ii) which Defendants' Counsel believes adversely affects said representation, or to which the client or clients refuse to consent;
- (iii) That Defendants' Attorney intends to withdraw from representation of her clients and will file a motion to do so.
- (iv) Whether Defendants' Attorney has received any confidential information from Defendants.

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The Plaintiff will have fifteen (15) days to respond to Defendants' Attorneys' Affidavit of Compliance.

The Court's ruling on the remaining pending motions will be deferred pending submission of the affidavit and any response thereto.

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