

FSM SUPREME COURT TRIAL DIVISION

PATERSON GALLEN, BRYAN GALLEN, EDWARD )	CIVIL ACTION NO. 2017-003
GALLEN, ARVIN GALLEN, QUINCY GALLEN, )	
PATRICK GALLEN, and HERBERT GALLEN, )	
)	
Plaintiffs, )	
)	
vs. )	
)	
GOVERNOR OF THE STATE OF POHNPEI, )	
POHNPEI STATE GOVERNMENT, SPEAKER OF )	
THE POHNPEI LEGISLATURE, and the PUBLIC )	
LANDS TRUST BOARD OF POHNPEI STATE, )	
)	
Defendants. )	
)	

---

ORDER OF ABSTENTION (DISMISSAL WITHOUT PREJUDICE)

Hearing: September 9, 2020  
Decided: September 21, 2020

APPEARANCES:

For the Plaintiffs: Vincent Kallop, Esq.  
Micronesia Legal Services Corporation  
P.O. Box 129  
Kolonias, Pohnpei FM 96941

For the Defendants: Judah C. Johnny  
Assistant Attorney General  
Pohnpei Department of Justice  
P.O. Box 1555  
Kolonias, Pohnpei FM 96941

\* \* \* \*

HEADNOTES

Jurisdiction – Diversity; Jurisdiction – Exclusive FSM Supreme Court

The FSM Supreme Court's jurisdiction over a case involving a foreign country's embassy, or its personnel, falls under the FSM Supreme Court's exclusive jurisdiction in cases affecting officials of foreign governments, not under the court's concurrent diversity jurisdiction. Gallen v. Governor, 23 FSM R. 24, 27 n.1 (Pon. 2020).

Jurisdiction – Exclusive FSM Supreme Court

The FSM Supreme Court's jurisdiction over a case where the Chinese Embassy is a party likely arises not from diversity of citizenship but from the FSM Supreme Court's "exclusive jurisdiction in cases affecting officials of foreign governments. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Jurisdiction – Arising Under; Jurisdiction – Pendent

The FSM Supreme Court has "arising under" jurisdiction when the plaintiffs' claims are that their FSM constitutional and civil rights were violated, with the related state law claims subject to the court's pendent jurisdiction. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Jurisdiction

The general principle is that if the FSM Supreme Court had subject matter jurisdiction over the case or dispute when it was first filed, the court retains subject matter jurisdiction over the case until it reaches final disposition, even though a change in the parties or some other subsequent event results in a case over which the court would not have jurisdiction if it were newly filed. Courts have consistently held that if jurisdiction exists when an action is commenced, such jurisdiction may not be divested by subsequent events. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Federalism – Abstention; Jurisdiction – Pendent

Even when the FSM Supreme Court has subject-matter jurisdiction over a case in which there are pendent state law claims, the court may still abstain from part or all of the case so that it may be brought in the proper state court. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Federalism – Abstention

The choice to abstain from a decision lies wholly within the trial court's sound discretion. The major rationale for abstention is that the state court is the better forum to decide an issue which involves state powers and particularly strong, identifiable state interests. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Federalism – Abstention

Certain circumstances give rise to an inclination in favor of abstention, such as a state request for abstention where there are identifiable, particularly strong state interests such as monetary claims against the state or questions concerning ownership of land, but the national court still has the obligation to carry out its own jurisdictional responsibilities. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Federalism – Abstention

The FSM Supreme Court may and should abstain in a case when land use rights are at issue, when the state is trying to develop a coherent policy concerning the disposition of public lands; when there is similar state court litigation already pending; when the state requests abstention as the defendant in an action that may expose it to monetary damages; when Congress has not asserted any national interests that may be affected by the litigation's outcome; and when abstention will not result in delay or injustice to the parties. Gallen v. Governor, 23 FSM R. 24, 28 (Pon. 2020).

Federalism – Abstention

When the case involves both monetary claims against the state and questions about whether the plaintiffs should have been awarded entrymen status or title to public land under the Pohnpei Department of Land's usual practices and procedures, and thus been compensated for their loss; when the state is attempting to develop a coherent policy for the disposition of its public lands and it requests abstention; when Congress has not asserted any national interest that may be affected by the litigation's outcome; when, although there is no similar litigation currently pending in the state court, an abstention should not result in any further delay or injustice if the plaintiffs promptly pursue their claims in the Pohnpei Supreme Court; and when the plaintiffs' claim that their civil rights and FSM national constitutional rights were violated are wholly dependent upon what property rights they had, or did have, under the Pohnpei state laws governing Pohnpei public land and entrymen, the FSM Supreme Court may and will abstain. Gallen v. Governor, 23 FSM R. 24, 29 (Pon. 2020).

Civil Rights; Constitutional Law – Taking of Property; Courts

A state court is perfectly competent to adjudicate a civil rights claim against the state made under 11 F.S.M.C. 701(3) (violation of national constitutional rights) and also claims made under the state's own constitutional provisions barring the taking of property without just compensation and providing for due process and the corresponding FSM constitutional provisions. Gallen v. Governor, 23 FSM R. 24, 29 (Pon. 2020).

\* \* \* \*

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On September 9, 2020, the court heard the defendants' Motion to Dismiss, filed June 29, 2018; the plaintiffs' Motion in Opposition to Defendants' Motion to Dismiss, filed August 20, 2018; and the Plaintiffs' Supplemental Filing, filed August 14, 2020. These filings came after the court's June 11, 2018 order that the parties should be prepared to consider whether this had become an appropriate case for abstention and asked for briefs on that point.

The defendants' motion is granted, the court abstains from further action in this case, and hereby dismisses the matter without prejudice. The reasons follow.

I. PROCEDURAL BACKGROUND

A. *Plaintiffs and Their Claims*

This case was filed on February 16, 2017, as an action by the Estate of Elihna Gallen and by Paterson, Bryan, Edward, Arvin, Quincy, Patrick, and Herbert Gallen against the Pohnpei Governor, the State of Pohnpei, the Pohnpei Legislature's Speaker, the Pohnpei Public Lands Trust Board, and the Embassy of the People's Republic of China. They alleged that the late Elihna Gallen had, pursuant to Pohnpei state law, designated certain former leasehold public lands (in excess of the amount she, herself, could acquire title to), as land on which her sons and her husband were to be entrymen, but for which the title was never transferred to them, and on which Pohnpei, by statute (Pon. S.L. No. 8L-79-15), later authorized the People's Republic of China to build its embassy. The plaintiffs sought a declaration that the Pohnpei statute was unconstitutional and asked that both Pohnpei and the Chinese Embassy compensate them for their loss of the land and the violation of their civil rights.

B. *The Trial Court's 2018 Dismissals*

On March 12, 2018, the court dismissed the Embassy of the People's Republic of China as a party because an embassy is immune from suit, and any case against one must be dismissed since no court can exercise jurisdiction over it, and because an embassy is also immune from attachment or execution, and cannot be ejected from its premises. Estate of Gallen v. Governor, 21 FSM R. 457, 462 (Pon. 2018). The court promptly entered a Rule 54(b) final judgment in the Chinese Embassy's favor. No one appealed this final judgment.

On April 9, 2018, the court dismissed as parties plaintiff the Estate of Elihna Gallen and Herbert Gallen and Patrick Gallen in their capacities as the administrators of her estate, because res judicata barred their claims since they had already litigated the estate's claims in the Pohnpei Supreme Court, which held that the estate did not have standing to sue on behalf of Elihna Gallen's husband and sons. Estate of Gallen v. Governor, 21 FSM R. 477, 486-89 (Pon. 2018). The court promptly entered a Rule 54(b) final judgment

in the defendants' favor against the Estate of Elihna Gallen and against Herbert Gallen and Patrick Gallen only in their capacities as the administrators of Elihna Gallen's estate.

*C. Appeal Case No. P3-2018 and its Dismissal*

On May 8, 2018, the dismissed plaintiffs appealed the April 9, 2018 final judgment. The appeal was docketed as Appeal Case No. P3-2018. Later, the parties all agreed that the remainder of this case should be stayed pending the appeal's outcome. At their request, the court entered an order of abeyance on October 2, 2018.

The appeal was dismissed on April 1, 2020. Estate of Gallen v. Governor, 22 FSM R. 539 (App. 2020). Once notified of the appellate dismissal, the court, on July 23, 2020, vacated the order of abeyance and, noting that a June 29, 2018 motion to dismiss and an August 20, 2018 opposition to that motion were currently pending and due to be decided, ordered that any party could supplement those filings and could also indicate whether they wanted oral argument or were willing to submit them on the papers. The remaining plaintiffs (hereinafter "Gallen designees") filed a supplemental filing, on August 14, 2020. The defendants did not file one. Argument on the pending motion(s) was heard on September 9, 2020.

II. PARTIES' POSITIONS

The defendants move to dismiss because, in their view, the dismissal of the Chinese Embassy "remove[d] diversity between the remaining parties"<sup>1</sup> and left the plaintiffs' claim of right to Pohnpei public land; because the court's later partial summary judgment determined the issues that were appropriate for the FSM Supreme Court's judicial determination; because Elihna Gallen's designees, since they were not parties or privies to a party in prior litigation, may pursue their claims as designees in a later case; because any such later case should be in the Pohnpei Supreme Court since land issues are involved; because the Pohnpei Supreme Court earlier ruled that designees do not have an automatic right but must also apply for the land as entrymen and there was no proof the Gallen designees had ever done so; because a remand is not appropriate since there is no pending Pohnpei Supreme Court action to remand it to; because no part of the subject land – Tract No. T-73181 – remains available for residential or agricultural use; and because the FSM Supreme Court gives deference to the States in addressing their local laws and circumstances.

The Gallen designees oppose dismissal. They contend that the Pohnpei Supreme Court decision, that the defendants rely upon, is contrary to the Pohnpei Department of Land's usual past practice for similarly situated Pohnpeians; that their civil rights and FSM constitutional rights to equal protection and due process were therefore violated and those rights should be enforced in the FSM Supreme Court; that the court must exercise its pendent jurisdiction; and that dismissal or abstention is proper only if the case involves only state law. The Gallen designees further contend that it was the defendants' failures and omissions that caused them not to be able to properly apply pursuant to Elihna Gallen's designations. The Gallen designees ask that the court deny the motion and allow them to conduct discovery.

---

<sup>1</sup> More accurately, the FSM Supreme Court's jurisdiction over a case, such as this, involving a foreign country's embassy, or its personnel, falls under the FSM Supreme Court's "exclusive jurisdiction in cases affecting officials of foreign governments," FSM Const. art. XI, § 6(a), not under the court's concurrent diversity jurisdiction. The Gallen designees' remaining FSM constitutional claims would fall under the FSM Supreme Court's concurrent "arising under" jurisdiction. FSM Const. art. XI, § 6(b).

III. ANALYSIS

A. *Subject Matter Jurisdiction*

The defendants are incorrect when they argue that the court "lost" diversity jurisdiction when it dismissed the Chinese Embassy. Although diversity jurisdiction may have been pled, the court's jurisdiction over a case where the Chinese Embassy is a party likely arises not from diversity of citizenship but from the FSM Supreme Court's "exclusive jurisdiction in cases affecting officials of foreign governments." FSM Const. art. XI, § 6(a). See *supra* note 1. The court's other basis for subject matter jurisdiction would be its "arising under" jurisdiction because the plaintiffs' claims that their FSM constitutional and civil rights were violated made this a case "arising under the {FSM} Constitution [and] national law," FSM Const. art. XI, § 6(b), with the related state law claims subject to the court's pendent jurisdiction. See, e.g., *Esa v. Elimo*, 14 FSM R. 216, 220 (Chk. 2006); *Mailo v. Chuuk*, 12 FSM R. 597, 600 (Chk. 2004); *Estate of Mori v. Chuuk*, 11 FSM R. 535, 537 (Chk. 2003); *Foods Pacific, Ltd. v. H.J. Heinz Co. Australia*, 10 FSM R. 200, 205 (Pon. 2001); *Ponape Constr. Co. v. Pohnpei*, 6 FSM R. 114, 116 (Pon. 1993).

Furthermore, the general principle is that if the FSM Supreme Court had subject matter jurisdiction over the case or dispute when it was first filed, the court retains subject matter jurisdiction over the case until it reaches final disposition, even though a change in the parties or some other subsequent event results in a case over which the court would not have jurisdiction if it were newly filed. *Carlos Etscheit Soap Co. v. Do It Best Hardware*, 14 FSM R. 152, 157 (Pon. 2006). Courts "have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428, 111 S. Ct. 858, 860, 112 L. Ed 2d 951, 954 (1991).

But even when the FSM Supreme Court has subject-matter jurisdiction over a case in which there are pendent state law claims, the court may still abstain from part or all of the case so that it may be brought in the proper state court. *Gimnang v. Yap*, 5 FSM R. 13, 19 (App. 1991); *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM R. 37, 42-43 (Pon. 1989); *Ponape Chamber of Commerce v. Nett Mun. Gov't*, 1 FSM R. 389, 397 (Pon. 1984). The court will therefore now consider abstention.

B. *When Abstention Is Appropriate*

The choice to abstain from a decision lies wholly within the trial court's sound discretion. *Nanpei v. Kihara*, 7 FSM R. 319, 322 (App. 1995). The major rationale for abstention is that the state court is the better forum to decide an issue which involves state powers and particularly strong, identifiable state interests. *Gilmete v. Carlos Etscheit Soap Co.*, 13 FSM R. 145, 148 (App. 2005). Certain circumstances give rise to an inclination in favor of abstention, such as a state request for abstention where there are identifiable, particularly strong state interests such as monetary claims against the state or questions concerning ownership of land, but the national court still has the obligation to carry out its own jurisdictional responsibilities. *Damarlane v. Damarlane*, 19 FSM R. 97, 107 (App. 2013).

The FSM Supreme Court may and should abstain in a case when land use rights are at issue, when the state is trying to develop a coherent policy concerning the disposition of public lands; when there is similar state court litigation already pending; when the state requests abstention as the defendant in an action that may expose it to monetary damages; when Congress has not asserted any national interests that may be affected by the litigation's outcome; and when abstention will not result in delay or injustice to the parties. *Carius v. Johnson*, 20 FSM R. 143, 146 (Pon. 2015); *Ponape Transfer & Storage, Inc. v. Federated Shipping Co.*, 4 FSM R. 37, 39 (Pon. 1989).

*C. Appropriateness of Abstention in this Case*

This case involves both monetary claims against the state and questions about whether the Gallen designees should have been awarded entrymen status or title to public land in Tract No. T-73181 under the Pohnpei Department of Land's usual practices and procedures, and thus been compensated for their loss. The state is attempting to develop a coherent policy for the disposition of its public lands. It (and the other state governmental defendants) request abstention (dismissal in this court and any later case filed in the Pohnpei Supreme Court) as defendants in an action that may expose the state to monetary damages if the Gallen designees are able to prove that they should have been awarded entrymen status or title to public land in Tract No. T-73181. Congress has not asserted any national interest that may be affected by the litigation's outcome. And, although there is no similar litigation currently pending in the state court, an abstention should not result in any further delay or injustice to the parties if the Gallen designees promptly pursue their claims in the Pohnpei Supreme Court.

The Gallen designees contend that their claims that their civil rights and FSM national constitutional rights were violated are sufficient grounds to deny abstention. But whether any of those national law claims are viable is wholly dependent upon what property rights the Gallen designees had, or did have, under the Pohnpei state laws governing Pohnpei public land and entrymen and whether the Gallen designees were improperly deprived of those property rights. Thus, whether the Gallen designees had state law property rights in Tract No. T-73181 must first be determined before any ruling could be made on whether their civil and constitutional rights were violated by being deprived of those alleged property rights.

*D. Abstention Ordered*

The state court is thus the best forum for that. And then, if the Gallen designees prevail there on their Pohnpei state law property right claims, the state court can address their constitutional and civil rights claims. A state court is perfectly competent to adjudicate a civil rights claim against the state made under 11 F.S.M.C. 701(3) (violation of national constitutional rights) and also claims made under the state's own constitutional provisions barring the taking of property without just compensation and providing for due process and the corresponding FSM constitutional provisions. Narruhn v. Chuuk, 16 FSM R. 558, 564 (Chk. 2009).

The Gallen designees may therefore file, in the Pohnpei Supreme Court, their claims that they should have been afforded entrymen status for Tract No. T-73181 land and that they were thus improperly deprived of these Pohnpei state law rights by the defendants, and proceed to an adjudication of those claims in that court. They may also conduct any permissible or needed discovery in that forum, and any needed evidentiary hearings or trial can be held there. If the Gallen designees prevail on their claims there, the Pohnpei Supreme Court can then proceed to determine and award them damages under 11 F.S.M.C. 701(3).

IV. CONCLUSION

Accordingly, the court hereby abstains from any further determination of the Gallen designees' claims. This case is dismissed without prejudice to any future proceedings the Gallen designees may institute in the Pohnpei Supreme Court.

\* \* \* \*