

FSM SUPREME COURT TRIAL DIVISION

MAYLIZA ARIOTE and EUGENE EDMUND,) CIVIL ACTION NO. 2018-030
)
Plaintiffs,)
)
vs.)
)
SHONAL GOUNDER,)
)
Defendant.)
_____)

ORDER RE: MOTION FOR SUMMARY JUDGMENT; INVITATION FOR *AMICUS CURIAE* BRIEF;
SCHEDULING ORDER

Beauleen Carl-Worswick
Associate Justice

Decided: April 19, 2021

APPEARANCES:

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HEADNOTES

Civil Procedure – Pleadings – Affirmative Defenses

Normally, a defendant who has failed to raise any affirmative defenses in his answer, or to amend his answer to add any, has waived and lost his right to assert affirmative defenses, but, when a party has mistakenly designated a counterclaim as a defense, the court, on such terms as justice requires, shall treat the pleading as if there had been a proper designation. Ariote v. Gounder, 23 FSM R. 234, 237 (Pon. 2021).

Civil Procedure – Summary Judgment – Procedure

A party seeking to recover upon a claim, counterclaim, or cross-claim may, at any time after the expiration of 20 days from the action's commencement, move, with or without supporting affidavits, for a summary judgment in the party's favor upon all or any part of the party's complaint, counterclaim or crossclaim, whichever the case may be. Ariote v. Gounder, 23 FSM R. 234, 237 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

Summary judgment must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ariote v. Gounder, 23 FSM R. 234, 237 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

A summary judgment motion may be granted only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Ariote v. Gounder, 23 FSM R. 234, 237 (Pon. 2021).

Civil Procedure – Motions – Unopposed; Civil Procedure – Summary Judgment – Grounds

Although failure to timely oppose a summary judgment motion is deemed a consent to that motion, there still must be proper grounds to grant the motion. Ariote v. Gounder, 23 FSM R. 234, 237-38 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds; Civil Procedure – Summary Judgment – Procedure

Regardless of whether the non-movants have filed a written opposition, a plaintiff, when moving for summary judgment, must also overcome all of the adverse party's affirmative defenses in order to be entitled to summary judgment – the plaintiff must not only show that there is no issue of material fact, but must also show that the affirmative defenses are insufficient as a matter of law. When, even though the defendant has failed to denominate it as such, the defendant has raised the affirmative defense of immunity and the plaintiff has not addressed it, the plaintiff's summary judgment motion will be denied without prejudice. Ariote v. Gounder, 23 FSM R. 234, 238 (Pon. 2021).

Civil Procedure – Filings; Civil Procedure – Motions

A proper motion that is already pending before the court is itself the motion for relief that the court will rule on. A subsequent filing that simply requests that the court dispense with justice by ruling on a motion that is already before the court is a filing that can be viewed as redundant or immaterial, and, as such, stricken from the record. Ariote v. Gounder, 23 FSM R. 234, 238 (Pon. 2021).

Civil Procedure; Civil Procedure – Discovery

The court, in its discretion, may order the parties to appear before it for the purpose of mapping out pretrial activities. Ariote v. Gounder, 23 FSM R. 234, 238 (Pon. 2021).

International Law – Diplomatic Relations

International organizations, their property, and their assets wherever located, and by whomsoever held, are accorded the same immunity from suit and every form of judicial process by the FSM government that it accords to foreign governments, but the nature of the immunity the FSM affords foreign governments is still an open question. Ariote v. Gounder, 23 FSM R. 234, 239 (Pon. 2021).

Civil Procedure – Pleadings – Affirmative Defenses; International Law – Diplomatic Relations

A defendant's assertion of diplomatic immunity, set forth in his answer to the complaint, is treated as an affirmative defense. Ariote v. Gounder, 23 FSM R. 234, 239 (Pon. 2021).

Amicus Curiae; International Law – Diplomatic Relations

The FSM national government may present the court with an amicus curiae brief on the issue of a defendant's immunity from suit, including the presentation of any diplomatic notes recognizing the defendant's diplomatic status. Ariote v. Gounder, 23 FSM R. 234, 239, 240 (Pon. 2021).

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

Previously, on February 18, 2020, the Court issued an Order addressing the parties' various motions that concerned their discovery activities. That Order also provided for the parties to file any pretrial motion that might have by March 13, 2020. On March 12, 2020, the Plaintiffs filed their motion for summary judgment. To date, this motion for summary judgment is unopposed. See *Marcus v. Truk Trading Corp.*, 10 FSM R. 387, 389-90 (Chk. 2001) (although failure to timely oppose a motion is deemed a consent to that motion, good grounds are still needed before the motion may be granted). Thereafter, the Plaintiffs also filed three separate motions for a status conference, on July 8, 2020, January 13, 2021, and March 17, 2021.

A. *Overview of Court Order*

For the reasons stated below, the Plaintiffs' motion for summary judgment is denied without prejudice. The Plaintiffs may refile their dispositive motion for this case following the June 2, 2021 hearing scheduled in this case, as discussed below. This denial of the motion for summary judgment is without prejudice. In addition, and as discussed more fully below, the parties shall have thirty days from the date this Order is received in which to file a brief setting forth their respective position as to whether the named-party Defendant, Shonal Gounder, may invoke immunity from suit, as set forth in his answer to the complaint.

That aside, the FSM national government may, if it so chooses, present this Court with its *amicus curiae* brief on the issue of the Defendant's immunity from suit, including the presentation of any diplomatic notes recognizing the Defendant's diplomatic status. The deadline for such a submission by the FSM national government shall be thirty days from the date that this Order is received. The *amicus curiae* brief of the FSM national government shall *not* be e-filed with the Court, but instead shall be filed in person with the clerk of court. In addition, the *amicus curiae* brief shall be served on counsel for each party by hand delivery, rather than mail. FSM Civ. 5. Thereafter, the parties may each have ten days from the date that the FSM national government's *amicus curiae* brief is served upon them in which to file their respective response.

As set forth below, a hearing is hereby scheduled for June 2, 2021, at 10:00 o'clock a.m. The FSM Attorney General may appear at that proceeding, along with a representative of the FSM Department of Foreign Affairs who is authorized and prepared to testify as to the Defendant's apparent claim of diplomatic immunity. The parties, if they so choose, may also present evidence and testimony in support of their respective position on this matter. See FSM Civ. R. 45 (issuance of subpoenas). At the conclusion of the hearing, the Court will, if necessary, address the scheduling of future proceedings in this case with the parties.

B. *Background*

This case arises out of the Defendant's lease of a residential dwelling from the Plaintiffs. The term of the parties' lease agreement was from the beginning of August 2017, until the end of July 2018. This appears to be a period of one year. According to the Plaintiffs, the Defendant breached the lease agreement when he vacated the property before the expiration of the lease term. In addition, the Plaintiffs claims that the property was left in an unacceptable condition, which they cleaned.

In his answer, the Defendant admits residing in the Plaintiffs' property, but denies any liability. The Defendant's answer also raises what appears to be an affirmative defense, although it is not denominated as such: the Defendant apparently claims that he enjoys diplomatic status, and is therefore immune from suit. *FSM v. Ezra*, 19 FSM R. 486, 491 (Pon. 2014) (members of diplomatic missions, and their families and

private servants, and diplomatic couriers assigned to the mission must be afforded the privileges, immunities, protections, and exemptions specified in the April 18, 1961 Vienna Convention on Diplomatic Relations).

Normally, a defendant who has failed to raise any affirmative defenses in his answer, or to amend his answer to add any, has waived and lost his right to assert affirmative defenses. FSM Social Sec. Admin. v. Fefan Municipality, 14 FSM R. 544, 546 (Chk. 2007). However, when a party has mistakenly designated a counterclaim as a defense, the court, on such terms as justice requires, shall treat the pleading as if there had been a proper designation. Senda v. Semes, 8 FSM R. 484, 503 (Pon. 1998). See In re: Sanction of Berman, 7 FSM R. 654, 657 (App. 1996) (counsel does not risk waiver of affirmative defenses if she does not list them immediately, because additional time may be obtained in which to respond to a complaint, or after an answer is filed the answer may be amended within twenty days without leave of court; similarly, if pretrial investigation and discovery uncovers an unanticipated defense, a defendant can move to amend the pleading, for which leave will be freely given when justice so requires; and finally, the pleadings do not necessarily bind the parties because issues not raised in the pleadings may be tried by the parties' express or implied consent).

C. *Motion for Summary Judgment*

Under FSM Civil Rule 56, a party seeking to recover upon a claim, counterclaim, or cross-claim may, at any time after the expiration of 20 days from the commencement of the action, move, with or without supporting affidavits, for a summary judgment in the party's favor upon all or any part of the party's complaint, counterclaim or crossclaim, whichever the case may be. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It has been well recognized by this Court that a motion for summary judgment under Rule 56 may be granted only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Manahane v. FSM, 1 FSM R. 161, 164 (Pon. 1982). See Zacchini v. Hainrick, 19 FSM R. 403, 410 (Pon. 2014) (Rule 56(c) requires that summary judgment be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; the court must view facts and inferences in a light that is most favorable to the party opposing the judgment; a fact is material only if it might affect the outcome of the suit and the failure to prove an essential element of the nonmoving party's case necessarily renders all other facts immaterial); Peniknos v. Nakasone, 18 FSM R. 470, 488 (Pon. 2012) (unsupported statements of counsel at oral argument do not qualify as competent evidence upon which a court could find a genuine issue at trial. The court cannot be expected to draw inferences that are supported by only speculation or conjecture since the nonmoving party must do more than raise some metaphysical doubt as to the material facts: she must come forward with specific facts showing that there is a genuine issue for trial); Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 75-76 (Pon. 2013) (summary judgment motion must be granted when, viewing the facts and inferences in a light most favorable to the party opposing the motion, the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law).

In this case, the Plaintiffs' motion for summary judgment is unopposed. Although failure to timely oppose a motion is deemed a consent to that motion, good grounds are still needed before the motion may be granted. Marcus v. Truk Trading Corp., 10 FSM R. 387, 389-90 (Chk. 2001). When a party has not responded to a summary judgment motion, the party is deemed to have consented to the granting of the motion, and the court may, in its discretion, decline to hear oral arguments from that party. While that failure

to file a timely opposition is deemed a consent to the granting of the motion, there still must be proper grounds to grant the motion. Ramirez v. College of Micronesia, 20 FSM R. 254, 265 (Pon. 2015).

Here, and as discussed above, the Defendant has apparently raised as an affirmative defense the fact that he enjoys some form of diplomatic immunity. As this Court has previously explained, regardless of whether the non-movants have filed a written opposition, a plaintiff, when moving for summary judgment, must also overcome all of the adverse parties' affirmative defenses in order to be entitled to summary judgment – the plaintiff must not only show that there is no issue of material fact but must also show that the affirmative defenses are insufficient as a matter of law. Pacific Fin. Corp. v. David, 21 FSM R. 5, 6 (Chk. 2016). Here, however, at this time, there is no evidence of whether the Defendant is actually entitled to his claim of diplomatic immunity. Indeed, even the Plaintiffs in their pending motion for summary judgment state that since the Defendant has failed to raise any affirmative defense in his case, they are not addressing any such defenses. Here, there is an affirmative defense: immunity from suit.

Accordingly, under these circumstances, and given the need to adjudicate this material issue of fact, the Plaintiffs' motion for summary judgment is, as a matter of law, hereby denied. This denial is without prejudice. Following the June 2, 2021 hearing scheduled in this case, the Plaintiffs may renew their request for summary judgment in his case.

D. *Plaintiffs' Motions for Status Conference*

Under FSM Civil Rule 16, the Court may in its discretion direct the attorneys or trial counselors for the parties to appear before it for a conference or conferences before trial for such purposes as: 1) the simplification of the issues; 2) the necessity or desirability of amendments to the pleadings; 3) the possibility of obtaining admission of fact and of documents which will avoid unnecessary proof; and/or 4) such other matters as may aid in the disposition of the action. The court may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the action, unless modified by a subsequent order or at the trial to prevent manifest injustice.

In this instance, and as noted above, following the submission of their motion for summary judgment, the Plaintiffs filed three separate motions for the Court to hold a status conference in this case. In doing so, however, the Plaintiffs have not simply requested that the Court schedule a status conference, as permitted under FSM Civil Rule 16. Indeed, the Plaintiffs have actually requested that the Court *either* hold a status conference in this case, *or issue a ruling on their pending motion for summary judgment*.

The Court's rules of civil procedure, by contrast, do not permit a party to file a motion requesting that the Court issue a ruling on an already-pending motion for relief. Indeed, a proper motion that is already pending before the Court is itself the motion for relief that the Court will rule on. Filing a subsequent pleading that simply requests that the Court dispense with justice by ruling on a motion that is already before the Court does not result in filing a permissible pleading. See FSM Civ. R. 7 (permissible pleadings defined). Instead, such a pleading is one that can be viewed as redundant or immaterial, and, as such, stricken from the record. FSM Civ. R. 12(f). See Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM R. 112, 115 (Kos. 2001) (the court may order stricken from any pleading any redundant matter. Generally, courts will strike a claim as redundant when it essentially repeats another claim in the same complaint); Damarlane v. United States, 7 FSM R. 167, 170 (Pon. 1995) (the court has inherent power to strike those portions of a pretrial statement that do not comport with its order for pretrial statements). Moreover, it is the Court, in its discretion, which may order the parties to appear before it for the purpose of mapping out pretrial activities. FSM Civ. R. 16.

In this instance, the Plaintiffs' three motions for a status conference at issue here are denied. Moreover, and as set forth below, a status conference has been scheduled by the Court for June 2, 2021, at 10:00 o'clock a.m.

E. *Future Proceedings and Scheduling Order*

As noted above, the parties are provided with a period of thirty days from the date this Order is received in which to file a brief setting forth their position as to whether the named-party Defendant Shonal Gounder may invoke immunity from suit, as set forth in his answer to the complaint. This briefing is required as it is well recognized that international organizations, their property, and their assets wherever located, and by whomsoever held, are accorded the same immunity from suit and every form of judicial process by the Federated States of Micronesia government that it accords to foreign governments, but the nature of the immunity the FSM affords foreign governments is still an open question. *Kosrae v. M/V Voea Lomipeau*, 9 FSM R. 366, 373 n.5 (Kos. 2000). In this instance, the Court treats the Defendant's assertion of immunity, as set forth in his answer to the complaint as an affirmative defense.

In addition, the FSM national government may, if it so chooses, present this Court with its *amicus curiae* brief on the issue of the Defendant's immunity from suit, including the presentation of any diplomatic notes recognizing the Defendant's diplomatic status. See *FSM v. Ezra*, 19 FSM R. 486, 491 (Pon. 2014) (under the Vienna Convention, the receiving country is under a special duty to protect diplomatic persons, places, and things against any intrusion or damage, and to prevent any disturbance of peace of the mission or impairment of its dignity); *M/V Voea Lomipeau*, 9 FSM R. at 373 (the determination of whether [a foreign government] and its agents are immune from suit is a decision that is better made by the FSM government's executive branch because the FSM Constitution expressly delegates the power to conduct foreign affairs to the President and because whether a party claiming immunity from suit has the status of a foreign sovereign is a matter for the executive branch's determination and is outside the competence of the courts). The deadline for such a submission by the FSM national government shall be thirty days from the date that this Order is received. The *amicus curiae* brief of the FSM national government shall *not* be e-filed with the Court, but instead shall be filed in person with the clerk of court. In addition, the *amicus curiae* brief shall be served on counsel for each party by hand delivery, rather than mail. Thereafter, the parties may each have ten days from the date that the FSM national government's *amicus curiae* brief is served upon them in which to file their respective response.

As set forth below, a hearing is hereby scheduled for June 2, 2021, at 10:00 o'clock a.m. The FSM Attorney General may appear at that proceeding, along with a representative of the FSM Department of Foreign Affairs who is authorized and prepared to testify as to the Defendant's apparent claim of diplomatic immunity. The parties, if they so choose, may also present evidence and testimony in support of their respective position on this matter. See FSM Civ. R. 45 (issuance of subpoenas). A determination will, in turn, be made whether the Defendant in this case is entitled to immunity from suit. See *Kosrae v. Kingdom of Tonga*, 9 FSM R. 522, 523 (Kos. 2000) (a suit over an incident involving a foreign vessel, will not be dismissed when the vessel was engaged in commercial activity, and not in sovereign acts). At the conclusion of the hearing, the Court will, if necessary, address the scheduling of future proceedings in this case with the parties.

F. *Conclusion*

In conclusion, and for the reasons stated above, the Plaintiffs' motion for summary judgment as well as their three motions for a status conference are all hereby denied. The parties shall have thirty days from the date this Order is received in which to file a brief setting forth their respective position as to whether the named-party Defendant may invoke immunity from suit, as set forth in his answer to the complaint.

In addition, the FSM national government may, if it so chooses, present this Court with its *amicus curiae* brief on the issue of the Defendant's immunity from suit, including the presentation of any diplomatic notes recognizing the Defendant's diplomatic status. The deadline for such a submission by the FSM national government shall be thirty days from the date that this Order is received. The *amicus curiae* brief of the FSM national government shall *not* be e-filed with the Court, but instead shall be filed in person with the clerk of court. In addition, the *amicus curiae* brief shall be served on counsel for each party by hand delivery, rather than mail. Thereafter, the parties may each have ten days from the date that the FSM national government's *amicus curiae* brief is served upon them in which to file their respective response.

As discussed above, a hearing is hereby scheduled for June 2, 2021, at 10:00 o'clock a.m. The FSM Attorney General may appear at that proceeding, along with a representative of the FSM Department of Foreign Affairs who is authorized and prepared to testify as to the Defendant's apparent claim of diplomatic immunity. The parties, if they so choose, may also present evidence and testimony in support of their respective position on this matter. See FSM Civ. R. 45 (issuance of subpoenas). At the conclusion of the hearing, the Court will, if necessary, address the scheduling of future proceedings in this case with the parties.

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