

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,) CIVIL ACTION NO. 2021-016
)
Plaintiff,)
)
vs.)
)
TAIYO CHUUK, a purse seiner fishing vessel, with)
her fishing gear, furniture, appurtenances, stores,)
cargo, and catch, KAZUAKI NISHIMURA (operator)
of fishing vessel), TAIYO MICRONESIA)
CORPORATION (permit holder and the company),)
)
Defendants.)
_____)

ORDER MEMORIALIZING BOND HEARING AND SETTING OF BOND

Larry Wentworth
Associate Justice

Hearing: August 4, 2021
Decided: August 4, 2021
Order Memorialized: August 9, 2021

APPEARANCES:

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HEADNOTES

Jurisdiction – In Rem; Marine Resources – Regulation of – Penalties

Whenever a thing, and not a natural or juridical person, is the defendant in a civil action, it is an action

in rem, at least as far as that defendant is concerned. Thus all forfeiture actions against a thing are actions in rem, but not all actions in rem are forfeitures. FSM v. Taiyo Chuuk, 23 FSM R. 366, 369 (Pon. 2021).

Jurisdiction – In Rem

In order for a court to exercise in rem jurisdiction over a thing, the thing or its substitute, such as a bond, must be physically present in the jurisdiction and under the court's control. FSM v. Taiyo Chuuk, 23 FSM R. 366, 369 (Pon. 2021).

Jurisdiction – In Rem; Marine Resources – Regulation of – Penalties

When the government's complaint seeks, among other things, a vessel's forfeiture under 24 F.S.M.C. 801(1), the case is, in part, an in rem proceeding, albeit one created by the marine resources statute. FSM v. Taiyo Chuuk, 23 FSM R. 366, 369 (Pon. 2021).

Admiralty – Ships; Marine Resources – Regulation of – Penalties; Torts – Damages

Since forfeitures are generally abhorrent to the law, they are strictly construed, and the language effecting a forfeiture must clearly spell that fact out. FSM v. Taiyo Chuuk, 23 FSM R. 366, 369 (Pon. 2021).

Marine Resources – Regulation of – Penalties; Statutes – Construction

A statute making provision for a forfeiture is a penal statute, and it is an ancient rule of statutory construction that penal statutes should be strictly construed against the government. FSM v. Taiyo Chuuk, 23 FSM R. 366, 369 (Pon. 2021).

Marine Resources – Regulation of – Penalties

Any fishing vessel that violates Title 24's provisions while within the FSM's territorial sea or within its internal waters is subject to forfeiture, but the FSM EEZ is outside of the FSM's territorial waters. FSM v. Taiyo Chuuk, 23 FSM R. 366, 369 (Pon. 2021).

Marine Resources – Regulation of – Penalties

Subsection 801(2) does not provide for a fishing vessel's forfeiture when its Title 24 violations all occur within the EEZ. Instead, it commands the vessel's release upon the posting of a bond or other surety. FSM v. Taiyo Chuuk, 23 FSM R. 366, 370 (Pon. 2021).

Marine Resources – Regulation of – Penalties

Congress did not intend that fishing vessels should be subject to forfeiture for Title 24 violations committed in the EEZ. Congress intended to punish violations within the FSM's territorial seas and internal waters more harshly – with the vessel's forfeiture – than violations within the EEZ, for which Congress instead imposed substantial fines. FSM v. Taiyo Chuuk, 23 FSM R. 366, 370 (Pon. 2021).

Statutes – Construction

Statutes are to be construed as Congress intended, which is first and foremost determined by the statute's language. FSM v. Taiyo Chuuk, 23 FSM R. 366, 370 n.2 (Pon. 2021).

Marine Resources – Regulation of – Penalties; Statutes – Construction

Since Congress has specifically prohibited the use of section headings as the means of interpretation, the court must reject the suggestion that since the heading of § 801 reads "Forfeiture of Property," that the vessels whose violations fell within § 801(2) (violations in the EEZ), are also subject to forfeiture even though neither "forfeiture" or "forfeit" is mentioned in § 801(2). FSM v. Taiyo Chuuk, 23 FSM R. 366, 370 (Pon. 2021).

Statutes – Construction

Congress has ordered that the classification of the titles, chapters, subchapters, and sections of the FSM Code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference, or presumption of a legislative construction can be drawn

therefrom. FSM v. Taiyo Chuuk, 23 FSM R. 366, 370 (Pon. 2021).

Marine Resources – Regulation of – Penalties; Statutes – Construction

If Congress had intended that all vessels committing Title 24 violations within the EEZ would also be subject to forfeiture, Congress could easily have included language to that effect in either § 801(1) or § 801(2), but it did not. The only possible conclusion is that Title 24 violations within the EEZ generally do not subject vessels to forfeiture. FSM v. Taiyo Chuuk, 23 FSM R. 366, 370 (Pon. 2021).

Admiralty – Interpretation of Rules; Separation of Powers – Judicial Powers; Statutes – Construction

It is well established that if there is a conflict between the Supplemental Admiralty and Maritime Rules and Title 24, then Title 24 must prevail. Since the Constitution permits the Chief Justice to promulgate procedural rules, which Congress may amend by statute; since the Constitution gives Congress the authority to amend or create procedural rules by statute; and since the Chief Justice does not have the authority to amend Congressionally-enacted statutes, if the statute applies and the statute and the rule conflict, the statute must prevail. FSM v. Taiyo Chuuk, 23 FSM R. 366, 370-71 (Pon. 2021).

Marine Resources – Regulation of – Penalties; Statutes – Construction

A long-standing norm of statutory construction holds that provisions of law must be read so as to be internally consistent and sensible, and provisions should be considered against the background of the entire act so as to arrive at a reasonable interpretation consistent with other specific provisions and the general design of the act. FSM v. Taiyo Chuuk, 23 FSM R. 366, 371 (Pon. 2021).

Marine Resources – Regulation of – Penalties; Statutes – Construction

It would not be sensible for the bond amount to be set under § 806(3) at not be less than the fair market value of the fishing vessel to be released or the aggregate minimum fine or penalty for each offense charged, whichever is greater when the vessel and its co-defendants are alleged to have committed a violation for which the maximum possible penalty is a small fraction of the vessel's value. The court therefore concludes that § 806(3) applies only to those cases where forfeiture is an available remedy. FSM v. Taiyo Chuuk, 23 FSM R. 366, 371 (Pon. 2021).

Marine Resources – Regulation of – Penalties

When the fishing vessel is not subject to forfeiture, its bond amount will be set based on the possible maximum and minimum fines that could be imposed on the defendants. FSM v. Taiyo Chuuk, 23 FSM R. 366, 371 (Pon. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On August 4, 2021, this came before the court to hear the request that the arrested purse seiner F/V *Taiyo Chuuk* have a bond amount set for its release. The *Taiyo Chuuk*, an FSM-flagged vessel, was arrested for six alleged violations of FSM fisheries law, Title 24, four of which are reported to have occurred in the FSM Exclusive Economic Zone ("EEZ"), one in the Republic of the Marshall Islands EEZ, and one in the Papua New Guinea EEZ.¹ This order memorializes the court's findings, the court's conclusions, and its setting of the bond amount from the bench at \$1.9 million.

¹ The Federated States of Micronesia, the Republic of the Marshall Islands, and the Independent State of Papua New Guinea are all Parties to Nauru Agreement governing vessels with regional fishing licenses.

I.

The court concluded that the existence (or non-existence) of a mortgage on the vessel has no bearing on determining a vessel's fair market value for the purpose of a forfeiture or for any other purpose. If there is a mortgage, the mortgagee, as a secured party, would be paid first from the proceeds of any forced sale. The court found that, because of the vessel's age, the *Taiyo Chuuk's* fair market value was in the range of \$9 million.

II.

This civil action against the *Taiyo Chuuk* is, of course, an action in rem. Whenever a thing, and not a natural or juridical person, is the defendant in a civil action, it is an action in rem, at least as far as that defendant is concerned. Thus all forfeiture actions against a thing are actions in rem, but not all actions in rem are forfeitures. *Cf. In re Nahnsen*, 1 FSM R. 97, 103 (Pon. 1982) (proceedings in rem are those based on court's control of specific property). In order for a court to exercise *in rem* jurisdiction over a thing, the thing or its substitute, such as a bond, must be physically present in the jurisdiction and under the court's control. *In re Kuang Hsing No. 127*, 7 FSM R. 81, 82 (Chk. 1995).

This action was brought, in part, as a forfeiture action against the *Taiyo Chuuk* under 24 F.S.M.C. 801. This is because, when the government's complaint seeks, among other things, a vessel's forfeiture under 24 F.S.M.C. 801(1), the case is, in part, an in rem proceeding, albeit one created by the marine resources statute. *FSM v. Kana Maru No. 1*, 14 FSM R. 365, 367 (Chk. 2006).

III.

Since forfeitures are generally abhorrent to the law, they are strictly construed, and the language effecting a forfeiture must clearly spell that fact out. *See Uehara v. Chuuk*, 14 FSM R. 221, 227 (Chk. 2006). A statute making provision for a forfeiture is a penal statute. 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 59.02, at 96 (rev. 5th ed. 1992). "It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . ." *Id.* § 59.03, at 102 (footnote omitted).

IV.

The FSM seeks the *Taiyo Chuuk's* forfeiture for its alleged fishing violations. The Marine Resources Act of 2002 provides that:

Any fishing vessel, including its fishing gear, furniture, appurtenances, stores and cargo used in or connected with the commission of any act prohibited by this subtitle, within the territorial sea or internal waters of the Federated States of Micronesia, shall be subject to forfeiture to the Government of the Federated States of Micronesia pursuant to a civil proceeding under this section.

24 F.S.M.C. 801(1). This subsection is crystal clear. Any fishing vessel that violates Title 24's provisions while within the FSM's territorial sea or within its internal waters is subject to forfeiture. The FSM EEZ is outside of the FSM's territorial waters. 18 F.S.M.C. 104 ("[t]he inner boundary of the exclusive economic zone . . . is the seaward boundary of the Territorial Sea").

The Marine Resources Act of 2002 further provides that:

Any fishing vessel, including its fishing gear, furniture, appurtenances or stores used in or connected with the commission of any act prohibited by this subtitle, within the exclusive economic zone outside the territorial seas of the Federated States of Micronesia, shall be released upon the posting of a bond or other surety.

24 F.S.M.C. 801(2). This subsection does not provide for a fishing vessel's forfeiture when its Title 24 violations all occur within the EEZ. Instead, it commands the vessel's release "upon the posting of a bond or other surety."

Since § 801(2)'s language does not clearly spell out that a fishing vessel is subject to forfeiture for Title 24 violations within the EEZ, the court can only conclude that, in general, Congress did not intend² that fishing vessels should be subject to forfeiture for Title 24 violations committed in the EEZ (and seems to indicate otherwise). (This, of course, would not include acts for which forfeiture is specifically provided for even though it occurred in the EEZ or elsewhere. See, e.g., 18 F.S.M.C. 317(2).) The court must infer that Congress intended to punish violations within the FSM's territorial seas and internal waters more harshly – with the vessel's forfeiture – than violations within the EEZ, for which Congress instead imposed substantial fines.

The FSM further suggested that, since the § 801 reads "Forfeiture of Property," Congress intended that the vessels whose violations fell within § 801(2) (violations in the EEZ), are also subject to forfeiture even though neither "forfeiture" or "forfeit" is mentioned in § 801(2). But Congress has, in 1 F.S.M.C. 210, specifically prohibited the use of section headings as the means of interpretation. FSM v. Buchun, 22 FSM R. 529, 535-36 & n.5 (Yap 2020); FSM v. Ehsa, 20 FSM R. 106, 110 (Pon. 2015); FSM v. Wainit, 14 FSM R. 51, 54 (Chk. 2006). Congress has ordered that "[t]he classification of the titles, chapters, subchapters, and sections of this code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference, or presumption of a legislative construction can be drawn therefrom." 1 F.S.M.C. 210. The court must therefore reject that suggestion.

If Congress had intended that all vessels committing Title 24 violations within the EEZ would also be subject to forfeiture, Congress could easily have included language to that effect in either § 801(1) or § 801(2). It did not. The only possible conclusion is that Title 24 violations within the EEZ generally do not subject vessels to forfeiture.³

V.

The FSM contends that, even if the *Taiyo Chuuk* is not subject to forfeiture, the bond amount must be based upon the *Taiyo Chuuk's* estimated value. For this proposition, it relies upon 24 F.S.M.C. 806(3), which provides that "the amount determined by the Court under this section shall not be less than the fair market value of the property to be released or the aggregate minimum fine or penalty for each offense charged, whichever is greater."

The defendants argue that the court should rely on Supplemental Admiralty and Maritime Rule E(6)(a), which provides:

If the parties are unable to stipulate to the amount and nature of the security, the court shall fix the principal sum of the bond at an amount sufficient to cover the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisal, whichever is smaller.

It is well established that if there is a conflict between the Supplemental Admiralty and Maritime Rules and Title 24, then Title 24 must prevail. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18

² Statutes are to be construed as Congress intended, which is first and foremost determined by the statute's language. FSM v. GMP Hawaii, Inc., 16 FSM R. 601, 604 (Pon. 2009).

³ Congress can always amend the statute to clarify or to alter its intent.

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FSM R. 532, 539 (Yap 2013); People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM R. 307, 312-13 n.4 (Yap 2012); FSM v. Kana Maru No. 1, 14 FSM R. 365, 367 n.1 (Chk. 2006). Since the Constitution permits the Chief Justice to promulgate procedural rules, which Congress may amend by statute; since the Constitution gives Congress the authority to amend or create procedural rules by statute; and since the Chief Justice does not have the authority to amend Congressionally-enacted statutes, if the statute applies and the statute and the rule conflict, the statute must prevail. F/V Teraka No. 168, 18 FSM R. at 539; F/V Teraka No. 168, 18 FSM R. at 312-13 n.4; Kana Maru No. 1, 14 FSM R. at 367 n.1.

The question thus becomes whether § 806(3) applies to this case. The court notes that a long-standing norm of statutory construction holds that provisions of law must be read so as to be internally consistent and sensible. McCaffrey v. FSM Supreme Court, 6 FSM R. 279, 281 (App. 1993). Furthermore, provisions should be considered against the background of the entire act so as to arrive at a reasonable interpretation consistent with other specific provisions and the general design of the act. Bank of the FSM v. FSM, 6 FSM R. 5, 8 (Pon. 1993).

It would not be sensible for the bond amount to be “not be less than the fair market value of the property to be released or the aggregate minimum fine or penalty for each offense charged, whichever is greater” when the vessel and its co-defendants are alleged to have committed a violation for which the maximum possible penalty is a small fraction of the vessel’s value. The court therefore concludes that § 806(3) applies only to those cases where forfeiture is an available remedy, and therefore not to this case, where it is not.

VI.

Accordingly, the bond amount shall be set based on the possible maximum and minimum fines that could be imposed on the defendants. For the six alleged violations, these range from a minimum total of \$465,000 to a total of \$2.3 million if the maximum was imposed for each allegation. Weighing the seriousness of the allegations and the estimated total fines likely to be imposed, the court therefore set the bond amount for the *Taiyo Chuuk*’s release at \$1.9 million.

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