

JESUS A. SONODA, Plaintiff

v.

**HAROLD W. BURNETT, Chief Justice, Trust Territory of the
Pacific Islands, EDWARD E. JOHNSTON, High Commissioner,
Trust Territory of the Pacific Islands, and TRUST TERRITORY
OF THE PACIFIC ISLANDS, Defendants**

Civil Case No. 103-74

Trial Division of the High Court

Mariana Islands District

December 11, 1974

Action by judge seeking to hold office after appointment had run out. The Trial Division of the High Court, Hefner, Associate Justice, held that where judge had held over after appointment he was serving at the discretion of the High Commissioner, who had authority to reappoint.

1. Prohibition—Prerequisites for Writ

A writ of prohibition will issue only when there has been an action by an inferior court which is either in excess of its jurisdiction or which is such as to constitute an abuse of that jurisdiction.

2. Prohibition—Particular Cases

Attack on judge assigned to hear case involved was not a proper basis for a writ of prohibition.

3. Civil Procedure—Motion To Dismiss—Tests

Upon a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff, the allegations being treated as facts, and there should be no dismissal if it is reasonably conceivable that at the trial the plaintiff might establish a cause of action.

4. Civil Procedure—Motion To Dismiss

The purpose of a motion to dismiss is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial.

5. Civil Procedure—Complaint

Complaint containing conclusions and opinions without facts upon which to base them and incorporating by reference an exhibit of complainant, was poor pleading but would not be dismissed on motion if the court could sort out a short and plain statement of a claim upon which relief could be granted. (Rules Civil Proc. 8c(1))

6. Judges—Tenure

After term of appointment as Associate Judge of District Court ended, appointee served as a holdover de facto judge until reappointment or until a new appointee replaced him pursuant to statute or until his holdover status was terminated by the High Commissioner, and he

simply served at the discretion of the High Commissioner. (5 TTC § 251)

7. Judges—Tenure

Judge who continued to serve without reappointment after end of term to which he was appointed was entitled to salary received during holdover period, and estoppel would apply should the government or its officials attempt to recover the salary.

8. Estoppel—Generally

Estoppel precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by the person's acts, deeds or representations, either express or implied.

9. Judges—Tenure

Judge could not prevail upon claim that government was estopped from denying reappointment to his position where he conceded that the appointing authority had made no reappointment.

10. Judges—Tenure

Judge seeking injunction against removal from office could not prevail where High Commissioner had discretion to reappoint him and did not do so.

11. Civil Procedure—Complaint

Claim for damages must fail where facts upon which the claim could be based were not alleged.

Plaintiff's Counsel:
Defendant's Counsel:

BENJAMIN ABRAMS, ESQ.
HARLEY EARWICKER, ESQ., *Dis-*
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all Islands

HEFNER, *Associate Justice*

Defendants' motion for dismissal of this action was originally set for 9:30 A.M., December 2, 1974 at Saipan, Mariana Islands. At that time counsel for the plaintiff requested a continuance and the court granted it. Upon agreement by counsel for both parties, the matter was heard in Majuro, Marshall Islands, at 1:00 P.M., December 6, 1974.

Counsel for the plaintiff has requested that the record show that he objected to any further hearings in this mat-

ter pending his application for a Writ of Prohibition to the Appellate Division of the High Court.

[1, 2] If this court determined that there was any merit or basis for the Writ of Prohibition, it would not proceed further and wait until the application for the Writ of Prohibition is heard. Rather than belabor the point, since the application for the Writ of Prohibition must be determined by the Appellate Division, it is sufficient to point out that a Writ of Prohibition will issue only where there has been an action by an inferior court which is either in excess of its jurisdiction or which is such as to constitute an abuse of that jurisdiction. *Lajuan v. Makroro*, 6 T.T.R. 209. Plaintiff's application is not attacking the jurisdiction of this court but simply the assignment of the judge to hear this case. This is not a proper basis for a Writ of Prohibition. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 90 S.Ct. 1648.

The Trust Territory courts authorize a motion to dismiss for failing to state a claim for relief or for other listed grounds pursuant to the Federal Rules of Civil Procedure, Rule 12b, *Guerrero Family Inc. v. Micronesian Line Inc.*, 5 T.T.R. 87; Rule 9b, Trust Territory Rules of Civil Procedure.

[3] The complaint must be construed in the light most favorable to the plaintiff, and the complaint should not be dismissed if it is reasonably conceivable that at the trial the plaintiff might establish a cause of action. *Brauch v. Birmingham*, 49 F.Supp. 229. For purposes of the motion to dismiss the complaint, the allegations of the complaint are treated as facts. *Latrobe Electric Steel Co. v. Vascoloy Ramet Corp.*, 55 F.Supp. 347.

[4] The purpose of a motion to dismiss is to pierce the pleadings and assess the proof in order to see whether there

is a genuine need for a trial. *Sansone v. Ocean Accident and Guarantee Corp.*, 228 F.Supp. 554.

Plaintiff has alleged that he was appointed an Associate Judge of the Marianas Islands District Court for a period of three years, commencing August 2, 1971. On November 7, 1974, over three years later, he was notified that he was not reappointed (Exhibit B attached to plaintiff's complaint). Paragraphs 9 and 10 of the plaintiff's complaint allege that the Chief Justice told the plaintiff that "he would continue as a judge after August 2, 1974," and the High Commissioner "informed plaintiff that he was to continue to perform his position as Associate District Judge after August 2, 1974." Paragraph 11 alleges that the Attorney General advised the plaintiff that, in the Attorney General's opinion, "Plaintiff was still a judge and would continue to serve as such unless he were later removed."

These are the basic factual allegations which, for the purpose of this motion, must be construed as true and upon which plaintiff's complaint rests.

[5] Plaintiff's complaint is not a model of good pleading or practice. It is not a short and plain statement required by Rule 8c(1), Rules of Civil Procedure. Statements of various conclusions or opinions without alleging some facts upon which to base the conclusions or opinions does not give sufficient notice to support a claim or satisfy the requirements of the basic rule of pleading. *Toomey v. Wickwine Spencer Steel Co.*, 3 Fed.R. Dec. 243. The incorporation by reference of the various documents described as Exhibit A is poor practice and not favored. If the plaintiff's popularity or qualifications are an issue, the proper procedure is to call as witnesses the persons signing the documents at the time of trial. The complaint attempts to argue plaintiff's case, not plead it. However, the court will not grant the motion to dismiss if it can sort out and determine

a short and plain statement of plaintiff's claim sufficient to meet the tests set forth above.

The defendants base their motion on the ground that under 5 TTC Sec. 251 the plaintiff served the three-year term and has not been reappointed. He served as a de facto judge or holdover judge after August 2, 1974 until his successor was appointed or until his holdover status was terminated by the High Commissioner. Defendants cite 46 Am.Jur.2d, Judges, Sections 11, 13 and 16, and 52 Am.Jur.2d, Mandamus, Sec. 275 in support of their position.

The plaintiff argues four points upon which he bases his claim for relief.

1. The pleadings support a theory of "de facto appointment".

2. Estoppel.

3. That any removal of plaintiff requires a hearing by the Trial Division of the High Court pursuant to 5 TTC Sec. 251.

4. Plaintiff was denied due process as he was not given 90 days prior written notice pursuant to the Trust Territory Personnel Regulations. That if 90 days notice is given employees of the Executive Branch, 90 days notice must be given the plaintiff in the Judicial Branch or he is denied the equal protection of the law. In addition, plaintiff claims the actions of the defendants violated the United Nations Trusteeship Agreement and Interior Department Order No. 2918.

As for the first point, plaintiff's counsel concedes he has never heard of a "de facto appointment" and was unable to provide any authority for that proposition. In fact, and as stated in the court's opinion denying the request for a preliminary injunction, counsel for the plaintiff has stipulated and stated emphatically that there was no reappointment.

Plaintiff's theory up until this hearing; and as a matter of fact strenuously urged at the preliminary hearing, was that the plaintiff was terminated and plaintiff refers to Exhibit B, attached to the complaint, as the basis for this. Whatever theory plaintiff wishes to proceed on, the facts pleaded do not plead a reappointment, "de facto" or otherwise.

[6] There is no "holdover" provision in the Trust Territory law. However, the conclusion is inescapable that the plaintiff served as a holdover, de facto judge until reappointed by the High Commissioner or until a new appointee replaced him pursuant to 5 TTC Sec. 251 or until his holdover status was terminated by the High Commissioner. There are no facts pled which establish a specific term the plaintiff was to serve after August 2, 1974. There are no facts pled which change the plaintiff's status to a civil servant or Trust Territory employee of the government entitling him to a 90-day notice or hearing or any of the normal personnel termination requirements. The plaintiff simply served at the discretion of the High Commissioner unless he received a subsequent reappointment for a specified time. If that had occurred, then the plaintiff could only have been removed by the Trial Division of the High Court for cause after a hearing during that specified term.

If plaintiff bases his claim upon the discretionary act of the High Commissioner in not reappointing him, then the claim is barred by 6 TTC 252(2).

[7] Secondly, the estoppel theory is applicable if the defendants would attempt to recover the salary paid to plaintiff after August 2, 1974. There is no doubt that plaintiff is entitled to keep his salary for the holdover period. The issue is whether paragraphs 9 and 10 of the complaint are sufficient to withstand defendant's motion to dismiss on the basis of estoppel.

[8] No authorities have been cited by plaintiff to show how estoppel can be applied with the facts pled here. Estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by acts, deeds or representations, either express or implied. Estoppel, 28 Am.Jur.2d 600. The key to equitable estoppel is whether the plaintiff had a right to rely upon the words of the High Commissioner alleged in paragraph 10 of the complaint and, as a consequence, changed his position in such a way that plaintiff will suffer injury if a contrary assertion by the High Commissioner is allowed. 28 Am.Jur.2d, 627-628.

[9] Since plaintiff's appointment comes from no one other than the High Commissioner, what the Chief Justice told plaintiff pursuant to paragraph 9 has no bearing on the theory of estoppel under the above definitions. Plaintiff has not pled reliance on the High Commissioner's statement to him and in fact three days later, by plaintiff's very own allegation in paragraph 11, it is apparent that he was advised by the Attorney General that he would continue to serve unless later removed. No change of position is alleged by plaintiff and the fact that plaintiff concedes no re-appointment occurred, destroys his estoppel theory.

The plaintiff next urges that 5 TTC Sec. 251 requires a hearing by the Trial Division of the High Court before he can be terminated. As stated above, the hearing provision is applicable during the specified term of appointment by the High Commissioner. Plaintiff has pled no reappointment, disavows a reappointment and nowhere in his complaint does he allege anything other than he was in effect a de facto judge after August 2, 1974.

Lastly, the court must consider the broad statement in paragraph 13 that the facts alleged violate due process,

equal protection, United Nations Trusteeship Agreement and Interior Departmental Order provisions.

Plaintiff's counsel has not provided the court with any authority, be it a statute, case law, or rule and regulation upon which the court can reasonably conceive that at the trial the plaintiff might establish a cause of action based on these statements in paragraph 13.

No provision has been found in the Trust Territory law, rules and regulations or case law indicating that an appointee judge who has served his term is entitled to 90 days notice or a hearing. A review of the equal protection provisions of the Trust Territory Code show they are inapplicable here. All District Court Judges are appointed by the High Commissioner. They accept that appointment for a specified term knowing full well that at the expiration of their term it is up to the discretion of the High Commissioner to reappoint or to not reappoint. There is no allegation that the plaintiff is treated any differently than any of the other District Court Judges or that 5 TTC Sec. 251 is applied differently to him.

How and in what way the Trusteeship Agreement applies to the case at bar is not discerned by the court and the plaintiff has provided no enlightenment.

The Departmental Order 2918, Part IV, establishes the Judicial Branch of the Trust Territory Government. The one sentence therein which plaintiff claims is applicable here is that: "The judicial authority shall be independent of the executive and legislative powers."

Plaintiff apparently argues that 5 TTC Sec. 251 is invalid as the High Commissioner appoints District Court Judges and controls the judiciary because he reserves the right to not reappoint after the expiration of the specified term. Once again counsel for plaintiff has cited no authorities for this proposition or in what way it provides plain-

tiff with a claim for relief. The court has found none and in fact it appears that the appointment power of the High Commissioner does not violate any separation of powers theory. See Public Officers and Employees, 63 Am.Jur.2d 684 to 685; Constitutional Law, 16 Am.Jur.2d 459.

[10, 11] In the final analysis and construing plaintiff's complaint in the most favorable light possible, it alleges that his specified term expired and he was not reappointed. That from August 2, 1974 to November 7, 1974 he was a holdover judge or a de facto judge. 46 Am.Jur.2d, pages 105-106. This status was terminated on November 7, 1974. 5 TTC Sec. 251 provides no other conclusion than the High Commissioner had the complete authority and discretion to not reappoint. The claim for relief by injunction fails for this reason and those further reasons specified in this court's order dated December 2, 1974. Plaintiff's claim for damages likewise fails for failure to allege any facts upon which to base such a claim.

It is therefore ordered that plaintiff's complaint be dismissed and plaintiff take nothing by way of his action. Defendants shall be entitled to any court costs incurred.