Micronesian Yachts Co. v. Foreign Investment Board, 5 ROP Intrm. 305 (Tr. Div. 1995)

MICRONESIAN YACHTS CO., Ltd., DOUGLAS F. CUSHNIE,
Plaintiffs,

v.

FOREIGN INVESTMENT BOARD, ERMAS NGIRAELBAED,
its Chairman, and the REPUBLIC OF PALAU,
Defendants.

CIVIL ACTION NO. 116-94

Supreme Court, Trial Division
Republic of Palau

Decision and order
Decided: April 28, 1995

LARRY W. MILLER, Justice:

Plaintiffs Micronesian Yachts Co., Ltd. ["MYC"] and Douglas F. Cushnie brought this action challenging certain actions taken by the Foreign Investment Board ["FIB"]. According to their complaint, MYC is a business incorporated in the Commonwealth of the Northern Marianas Islands and Mr. Cushnie, a United States citizen, is its majority shareholder. In 1986, MYC received a Foreign business permit authorizing it to engage in the yacht chartering business. The permit had a term of five years with an option to renew for another five years. In 1992, following enactment of the Foreign Investment Act, 28 PNC § 101 et seq., MYC received a Foreign Investment Approval Certificate for five additional years. That certificate was subject to certain conditions not present in the original permit, two of which are at issue here. First, the certificate required that MYC deposit and maintain $10,000 in a bank in Palau as long it did business pursuant to the certificate. Second, the certificate provided that it would be subject to revocation

> "[i]f a non-Palauan shareholder transfer[red] shares in [MYC] to another non-Palauan . . . unless [MYC] notified the Foreign Investment Board of the proposed transfer at least thirty (30) days in advance of the proposed transfer date and ... received a written statement of non-objection from the Foreign Investment Board."

⊥306 In July 1993, MYC and Cushnie sought a statement of non-objection to a prospective transfer of Cushnie's shares in MYC to another non-Palauan. Following a hearing in December 1993, that request was denied by a letter from the FIB in January 1994. A request for reconsideration was also denied, without hearing, by letter in March 1994.

Plaintiffs' complaint sets forth three claims challenging the FIB's imposition of the new conditions and its refusal to issue a statement of non-objection and seeking damages. The Court now has before it defendants' motion to dismiss each of plaintiffs' claims for various reasons.

Micronesian Yachts Co. v. Foreign Investment Board, 5 ROP Intrm. 305 (Tr. Div. 1995)

I.

Plaintiffs' first cause of action challenges the FIB's authority to add new conditions to its renewal certificate. Defendants challenge both plaintiffs' right to assert this claim and its merits.

A.

Defendants first rely on the principle, enunciated by the United States Supreme Court, that

> "one may not retain the benefits of [an] Act while attacking the constitutionality of one of its important conditions." *Fahey v. Mallonee* , 67 S.Ct. 1552, 1557 (1947) (internal quotation omitted).

Defendants argue that plaintiffs' acceptance of a foreign investment approval certificate estops it from now challenging the constitutionality of the FIB's actions.

The Court does not believe that this principle bars plaintiffs' challenge here. In *Fahey*, a bank which had been chartered under a federal act sought to challenge another section of the same act which empowered regulators to place it under receivership. In refusing to consider the challenge, the Supreme Court stated that "one who utilizes an Act *to gain advantages of corporate existence* is estopped from questioning the validity of its vital conditions." *Id.* (emphasis added).

In its most recent comment on this principle, the Supreme Court emphasized just this language in allowing the parents of schoolchildren -- who were "obviously . . . not creatures of any statute" -- to challenge to a school busing scheme from which they had arguably benefitted. *Kadrmas v. Dickinson Public Schools* , 108 S. ⊥307 Ct. 2481, 2486 (1988). Notwithstanding the broad language used in *Fahey*, the Court stated: "we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." *Id.*

The Court believes that plaintiffs fall on the *Kadrmas* side of this principle. Neither MYC nor its shareholders owe their existence to the Foreign Investment Act, and neither should be barred from arguing either that the FIB misapplied the Act or that its application is unconstitutional as to them. Notably, the most recent case cited by defendants stresses this aspect of the doctrine in concluding that it remains viable after *Kadrmas*: "[B]y distinguishing *Fahey* the Court indicated that the doctrine of estoppel still applied where a plaintiff wasn't gaining simply any benefit from the statute, but instead owed its very existence to the statute". *Medical Wastes Associates v. Mayor and City Council of Baltimore* , 966 F.2d 148, 153 (4th Cir. 1992)(emphasis in original).

This limitation on the principle is quite sensible if it is viewed as a type of severability analysis. The court in *Fahey* was essentially saying that Congress would not have passed the act under which the plaintiff bank was created without also passing the termination provision under

Micronesian Yachts Co. v. Foreign Investment Board, 5 ROP Intrm. 305 (Tr. Div. 1995) challenge. *See Fahey*, 67 S.Ct. at 1557 (noting that the bank was asking that "the Act under which it has its existence be struck down in important particulars hardly severable from those provisions which grant its right to exist"). Thus, the bank could not make its challenge without paradoxically challenging its own existence. Where plaintiffs do not owe their existence to the statute under challenge, as is the case here, no similar paradox is created.

B.

Defendants also attack this claim on its merits, asserting that the FIB was fully within its authority in imposing additional conditions in its renewal certificate. Plaintiffs' challenge to the FIB's authority, as elucidated in their brief and at oral argument, has essentially three aspects. Plaintiffs assert that the FIB has no statutory authority to impose such conditions whatsoever, that it has no authority to impose them in renewal certificates, and that, even if it has been given the authority as a statutory matter, the exercise of that authority is in violation of the Constitution.

Each of these questions is subject to reasonable debate. First, while the FIB's authority to impose a minimum deposit ⊥308 condition is clear, [1] its authority to impose restrictions on the transfer of shares in a corporation granted a foreign investment approval certificate is less so, depending implicitly on its authority to restrict the transfer of the certificate itself. Second, the FIB's statutory authority to impose such conditions in renewal certificates depends on a proper interpretation of the proviso contained in 28 PNC § 105(1), [2] which is obviously less than pellucid. Finally, even if defendants are right on the first two issues, there is still a question whether, statutory authority notwithstanding, the imposition of new conditions in a renewal certificate (where, as here, the right of renewal had been contained in the original permit) in any way deprived MYC of a property right protected by the Due Process Clause or impaired some contractual right in violation of the Contract Clause. *See* Palau Const. Art. IV, Sec. 6.[3]

The Court has determined to leave these questions to another day. While the first two

---

[1] 28 PNC § 108(11)(h) explicitly authorizes the FIB to stipulate

> "as a condition of a foreign investment approval certificate that the grantee shall, throughout the period of its validity, maintain a stipulated minimum amount of money in a bank account with a bank located in the Republic . . ."

[2] Section 105(1) limits certain business activities to businesses in which Palauans have ownership interests, but then provides that it "shall apply only prospectively" and that

> "non-citizens currently holding business permits . . . shall be permitted to continue [restricted] business activities only for the current term of their business permits, with no renewal thereof except in accordance with the provisions of this chapter that do not conflict with any terms regarding extension or renewal included in such permits."

[3] Plaintiffs have also contended that they had an enforceable option contract with the government. Although the Court is somewhat doubtful of plaintiffs' reliance on contract law as such, the existence of the option language in the permit may bear on the constitutional issue.

Micronesian Yachts Co. v. Foreign Investment Board, 5 ROP Intrm. 305 (Tr. Div. 1995)
statutory issues have been adequately ⊥309 argued, and while the Court is inclined at this stage to accept defendants' contentions with respect to them, the Court does not believe that it has been presented with sufficient legal authority (and perhaps certain facts) to undertake a proper analysis of the constitutional issue. Although some of the cases cited in plaintiffs' supplement recognize that there is a constitutional dimension to plaintiffs' claim, [4] none squarely addresses the constitutional issue.[5] At the same time, however, none of the cases cited by plaintiffs foreclose their claim either. Since this is defendants' motion to dismiss, the better course, in the Court's view, is to deny the motion and ask for a fuller presentation on summary judgment.

The Court is most interested in being presented with an analytical framework for addressing the constitutional issue and a discussion of the appropriate remedy if a violation is found. The Court also believes that consideration of the following issues might be useful: Are there circumstances in which the transfer of shares in a corporation holding a foreign investment approval certificate is tantamount to the transfer of the certificate itself? Other than in such circumstances, does the FIB have authority to regulate the transfer of shares? If not, does the non-objection condition restrict MYC any more than the prohibition against transfer contained in both the original permit (§ 4.f) and the renewal certificate (§ 5.c)?

II.

Plaintiffs' second cause of action complains that the FIB failed to accord them a hearing on their request for reconsideration of the decision to deny a statement of non- objection. The Court believes that this claim is moot and dismisses it without prejudice on that basis.

⊥310 The relief sought by this claim is a direction that the FIB reconsider the request for non-objection after affording plaintiffs a hearing. However, plaintiffs' counsel was candid to admit at oral argument that the proposed sale of MYC shares that the FIB would be called upon to reconsider has now fallen through. Given that circumstance, the Court views both the request for reconsideration itself and the claim asserted here as moot. Should the proposed transaction (or a new one) materialize, plaintiffs may seek appropriate action from the FIB and, if necessary, this Court.

III.

Plaintiffs' third cause of action seeks an award of damages arising from the FIB's failure to approve the proposed stock transfer. Defendants assert that this claim is barred as a matter of sovereign immunity. The Court agrees.[6]

---

[4] *E.g., Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226, 229 (1988) (noting cases which "hold that a licensee has a constitutionally protected interest in obtaining the renewal of a liquor license").

[5] As defendants point out, the cases ruling in favor of licensees rely on favorable statutory language and thereby avoid the constitutional question. This is also true of the one case from which defendants try to discern implicit support for their position. Moreover, none of the cases deal with circumstances in which a renewal was granted but on different terms.

[6] In addition to the Republic of Palau, plaintiffs' complaint names the FIB and its

Although 14 PNC § 501 is a waiver of sovereign immunity, that waiver is limited by the exceptions set forth by 14 PNC § 502, one of which bars claims "arising out of ... interference with contract rights." 14 PNC § 502(e). Since the current statute is derived from its Trust Territory predecessor which in turn was based on the U.S. Federal Tort Claims Act, it is appropriate to look to U.S. cases for guidance. As defendants point out, the overwhelming majority of courts have read this language to bar not only claims for interference with existing contracts, but also claims for interference with prospective economic advantage. *Art Metal U.S.A., Inc. v. United States* , 753 F.2d 1151, 1155 n.5 (D.C. Cir. 1985) (citing cases). The Court agrees that this is the better ⊥311 reading of the statute, [7] and therefore agrees that plaintiffs' claim is barred to the extent that it rests on such a theory.

Citing *Block v. Neal* , 103 S.Ct. 1089 (1983), plaintiffs argue that they may still assert a claim that arises out of a duty distinct from the duty forming the basis for a claim barred under § 502(e). However, the only alternative theory suggested by plaintiffs for holding defendants liable for damages is their asserted failure to comply with regulations. But it is equally well-established that "the violation of a ... statute or regulation by government officials does not of itself create a cause of action under the FTCA". *Art Metal* , 753 F.2d at 1157. This principle derives from the requirement, under the U.S. statute and here, that the government may be held liable only "under circumstances where ..., if [it were a] private person, [it] would be liable to the claimant . . ." 14 PNC § 501(a)(3). Thus, plaintiffs can state a claim only if they can show that the government's failure to follow a regulation constitutes behavior that would be considered tortious if committed by a private person. But the alleged violation here -- unlike, for example, the negligent failure of a government boat operator to follow safety regulations -- is purely governmental activity that cannot be analogized to any private tort.

Plaintiffs' counsel urged at oral argument that a litigant can sue the government without resorting to the tort claims statute. That is undoubtedly true in many instances where all that is sought is declaratory or even injunctive relief. But in seeking damages, plaintiffs are limited by the doctrine of sovereign immunity: "the government is immune from lawsuits except to the extent it consents to be sued, and the terms of that consent defines a court's jurisdiction to entertain the suit." *Tell v. Rengiil* , 4 ROP Intrm. 224, 227 (1994). Since, so far as the Court is aware, 14 PNC § 501, as limited by 14 PNC § 502, defines the limits of Palau's consent to be

---

Chairman, Ermas Ngirachelbaed, as defendants. Because the FIB is an agency of the Republic, and because plaintiffs' counsel represented at oral argument that he was suing Mr. Ngirachelbaed in his official capacity, the sovereign immunity analysis applies to all defendants. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) ("Because an action against a federal agency or federal officers in their official capacities is essentially a suit against the Untied States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived.").

[7] "To hold that interference with prospective advantage does not arise out of interference with contracts under section 2680(h) would subject the government to liability if its employees interfered with the plaintiff's mere expectation of entering a contract, but not if they interfered with a contract already in existence. Such a result would be illogical . . . ." *Art Metal*, 751 F.2d at 1155.

Micronesian Yachts Co. v. Foreign Investment Board, 5 ROP Intrm. 305 (Tr. Div. 1995) sued, plaintiffs' failure to assert a claim in accordance with those limits leaves them with no other avenue to proceed with their third cause of action.

⊥312 IV.

In their brief opposing the government's motion to dismiss, plaintiffs raised the argument that the Compact of Free Association served to invalidate the Foreign Investment Act insofar as it restricted the activities of United States citizens like Mr. Cushnie. As the Court intimated at oral argument, this is a significant and novel matter that it does not believe should be addressed in the abstract. Since plaintiffs' complaint, drafted before the Compact was implemented, makes no mention of the Compact, the Court believes it prudent to decline to address this argument now. If plaintiffs continue to seek to raise this issue, they may file an amendment to their complaint -- specifying the relief they seek -- within the next 30 days.

CONCLUSION

For all of the reasons stated above, defendants' motion to dismiss the complaint herein is granted as to Counts Two and Three and denied as to Count One. Plaintiffs may file an amended complaint as stated above within 30 days, after which any party may move for summary judgment as it sees fit.

SO ORDERED.