

Baules v. Nakamura, 6 ROP Intrm. 317 (1996)
HOKKONS BAULES,
Plaintiff,

v.

KUNIWO NAKAMURA, et al.,
Defendants.

CIVIL ACTION NO. 409-95

Supreme Court, Trial Division
Republic of Palau

Memorandum decision and order dismissing complaint

Decided: May 17, 1996

Counsel for Plaintiff: Martin Wolff

Counsel for Defendants: Jeffrey A. Tomasevich

JEFFREY L. BEATTIE, Associate Justice:

Before the Court is the Motion to Dismiss filed by the defendants pursuant to ROP R. Civ. P. 12(b)(1) and 12(b)(6). As grounds for the Motion, defendants contend that this Court lacks subject matter jurisdiction and that the Complaint fails to state a claim upon which relief can be granted.

The Court first addresses the defendants' contention that, under Rule 12(b)(6), the Complaint should be dismissed for failure to state a claim upon which relief can be granted. In determining a motion to dismiss under Rule 12(b)(6), all allegations in the complaint are accepted as true, and the Court's inquiry is limited to whether the allegations are sufficient to make out the elements of a right to relief. *Letica Corp. v. Sweetheart Cup Co., Inc.*, 790 F. Supp. 702, 704 (E.D. Mich. 1992).

Plaintiff filed this action against 37 defendants, alleging that each is an employee of the executive branch of the government of the Republic of Palau. The Complaint alleges that the defendants made various expenditures from the National Treasury, ranging in amount from \$327 to \$309,954, which exceeded their budget authority as set forth in the 1995 fiscal year budget. It further alleges that the expenditures were made in violation of **L318** Article XII, Sec. 1 of the Palau Constitution and that each defendant made the expenditures "by failing to adopt and implement proper accounting procedures and controls."

Article XII, Sec. 1 of the Palau Constitution provides that:

There shall be a National Treasury and a state treasury for each of the states. All revenues derived from taxes or other sources shall

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be deposited in the appropriate treasury. No funds shall be
withdrawn from any treasury except by law.

Plaintiff's Complaint, fairly read, alleges that defendants violated the last sentence of Article XII, Sec. 1 by making expenditures in excess of their budgetary authority.

Defendants contend that Article XII by its terms imposes no personal liability on them, even if excess expenditures were made. They further argue that there is no basis for implying liability especially where, as here, the legislature has enacted legislation expressly imposing personal liability for unauthorized expenditures under certain circumstances. Defendants refer to 40 PNC § 401, which provides in pertinent part that:

(a) No person shall obligate or expend any funds made available or appropriated by the [OEK] until he receives written certification from the National Director of Program, Budget and Management...that funds are available and that obligations may be incurred.

(c) Any persons obligating or expending funds of the National Treasury without written authorization as specified in this section, shall be personally liable for the payment of such obligations or expenditures. . . .

Defendants claim that personal liability for unauthorized expenditures may be imposed only where the expenditures are made in violation of § 401 and that, because the Complaint does not allege that the expenditures were made without the requisite written certification, it fails to state a claim upon which any relief can be granted.

In response, plaintiff contends that Article XII is self-executing, apparently contending that the defendants are personally **§ 401** liable for the expenditures even if defendants fully complied with their duties under § 401 by obtaining a written certification that the necessary funds were available and the obligations could be incurred.

Assuming, without deciding, that there is implied liability for violating Article XII in addition to the express, statutory liability set forth in § 401, ¹ the Court will examine the Complaint to see if it alleges sufficient facts to state such a claim. Plaintiff cites this Court's decision in *Sixth Kelulu A Kiuluul v. Ngirameketii*, Civ. No. 58-95 (June 27, 1995) ("*Sixth KAK*") in support of his contention that defendants are personally liable if they negligently violated Article XII. In *Sixth KAK*, this Court held that where a state constitution provided that only appropriated funds could be spent by the governor the governor was personally liable for unauthorized expenditures only if he made them without due diligence, prudence and good faith².

¹ Plaintiff argues that *ROP v. Akiwo* (Civ. No. 350-95, January 3, 1996) adopts the principle that plaintiff contends for. However, *Akiwo* did not impose any personal liability on the individuals who made the expenditures in that case. Instead, it imposed liability on the persons who received the expenditures, holding that they were liable for restitution of the unlawful expenditures they received under settled principles of restitution.

² It is important to note that *Sixth KAK* involved a situation where the legislature had not

Strict liability for unauthorized expenditures was rejected.

Here, the Complaint does not allege that defendants acted negligently, or without due diligence, prudence or good faith in making the alleged unauthorized expenditures. The Complaint simply states that the defendants made the expenditures "by failing to adopt and implement proper accounting procedures and controls". To allow the Complaint to stand on this bare allegation without any allegation of negligence or lack of diligence would be to impose a standard of strict liability for violation of Article XII. Defendants would be personally liable, for example, even if each of them hired the world's foremost accountants to design and implement an accounting system to ensure that no expenditures were made in violation of Article XII, but the system proved to fall short in **¶320** some way. This Court rejected such a strict liability standard in *Sixth KAK* and does so here as well.

Even assuming that defendants could somehow be held to have negligently made the expenditures notwithstanding certification of the National Budget Director that they were authorized,³ the Complaint is wholly lacking in any allegation of negligence or lack of due diligence on the part of defendants, either with respect to accounting procedures or otherwise. Therefore, even accepting the allegations of the Complaint as true, plaintiff has failed to state a claim upon which relief may be granted. *See* 97 Am. Jur. 2d *Pleading* §§ 99-100. The Court, then, need not decide whether there can be personal liability for making expenditures in violation of Article XII apart from the liability imposed by § 401, for plaintiff has not alleged facts sufficient to support such a claim in any event.

In his Memorandum in Opposition to the Motion to Dismiss, plaintiff also argues that defendants are personally liable for the expenditures under RPPL 4-40, § 37. That statute, however, was not enacted until November 29, 1995, and was therefore not in effect at the time defendants made the expenditures plaintiff is attacking. Thus, the statute is only relevant to defendants' expenditures if it can be applied retroactively. It is well settled that retroactive application of statutes is disfavored: "a statute will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application." C. Dallas Sands, 2 Sutherland Statutory Construction § 41.04 (4th Ed. 1973). It follows that RPPL 4-40 cannot serve as a basis for plaintiffs claims.

In his Memorandum, plaintiff further contends that 40 PNC § 401 is "the very enabling legislation, if any be required" to establish personal liability for a violation of Article XII. Although that may indeed be true, defendants are not liable under § 401 unless they made the expenditures without the written certification and authorization referred to in that statute. The Compliant does not allege that defendants made the expenditures without the requisite **¶321**

addressed the issue of personal liability for unauthorized expenditures. Because funds of a state treasury were involved, § 401 did not apply. Thus, absent implied liability, there would be no liability for even intentional unauthorized expenditures.

³ It is perhaps noteworthy that in *Sixth KAK* this Court found the governor did not exercise due diligence because he took no steps to ensure that his expenditures were authorized before making them. The Court noted that he could have simply asked the treasurer for a certification that budgeted funds were available before making each expenditure. That is essentially what § 401 appears to require.

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written certification or authorization. The Complaint therefore fails to state a claim under § 401.

In view of the foregoing, taking the allegations of the Complaint as admitted and construing them liberally in favor of the plaintiff, the Complaint fails to state a claim upon which relief can be granted.

It is therefore ORDERED, that pursuant to Rule 12(b)(6), the Complaint be, and it hereby is, DISMISSED; and it is FURTHER ORDERED, that plaintiff is granted leave to file an amended complaint within ten days.