

Masang v. Dengokl, 9 ROP 243 (Tr. Div. 2001)

**SAM Y. MASANG and
GHANJIENA N. MASANG,
d/b/a Belau Cellular Co.,
Plaintiffs,**

v.

**KENJIRO DENGOKL, ALONSO JOSEPH, MOSES NGIRASWEI, NICK NGUAL, IVAN
RUDIMCH, GEORGE SUGIYAMA, PALAU NATIONAL CELLULAR, INC., PALAU
NATIONAL COMMUNICATIONS CORP.,
Defendants.**

CIVIL ACTION NO. 00-122

Supreme Court, Trial Division
Republic of Palau

Decided: February 16, 2001

[1] **Civil Procedure:** Summary Judgment

Summary judgment is appropriate when 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 judgment as a matter of law.

[2] **Constitutional Law:** Standing; **Foreign Investment Act**

Standing to contest violations of the Foreign Investment Act is basically conferred on anyone living in Palau.

[3] **Civil Procedure:** Private Attorneys General

The legislature confers standing to sue as a private attorney general when instead of designating the Attorney General, or some other public officer, to bring proceedings to enforce a statute, it enacts a statute conferring on a non-official person authority to bring suit to prevent action by an officer in violation of his statutory powers.

[4] **Civil Procedure:** Private Attorneys General; **Constitutional Law:** Standing

There is nothing constitutionally prohibiting the legislature from empowering any person to institute a proceeding even if the sole purpose is to vindicate the public interest.

[5] **Civil Procedure:** Private Attorneys General

One threatened with financial loss through increased competition resulting from a commission's

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order is aggrieved and properly has standing to sue under a private attorney general statute.

[6] **Foreign Investment Act**

The Foreign Investment Act is designed to protect Palauan citizens engaging in the type of business activity sought to be approved by the Foreign Investment Board.

[7] **Foreign Investment Act**

In permitted areas of foreign investment, 28 PNC § 107 provides mandatory criteria for evaluating the application including the extent of the activity's availability in the Republic, the likely impact on same or similar activities currently being carried on by citizens, and whether the capital investment and technical and managerial skills for the activity are within the capacity of citizens.

[8] **Foreign Investment Act**

It is an abuse of discretion for the Foreign **1244** Investment Board to base its decision on whether the foreign investor could provide better service than the local business, on reliance on personal anecdotal evidence of Board members, and on a refusal to grant a hearing to plaintiffs who were citizens carrying on the same activity as applicants.

[9] **Foreign Investment Act**

Foreign Investment Board members may not be witnesses for or against an application that is before them for evaluation.

Counsel for Plaintiff: Mark Doran

Counsel for FIB Members: Michael Fineman

Counsel for National Cellular: William Ridpath

Counsel for PNCC: Kevin Kirk

R. BARRIE MICHELSEN, Associate Justice:

Cross summary judgment motions have been filed in this case. The central issue raised by the motions concerns the scope of the discretion granted the Foreign Investment Board [the Board], when evaluating the likely impact of a foreign investment on citizen businesses engaged in similar activities, as well as considering the extent to which the service to be provided by a proposed foreign investment is currently available.

1. LEGAL STANDARDS REGARDING SUMMARY JUDGMENT

[1] Summary judgment is appropriate when

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.” ROP R. Civ. P. 56; *Rechelulk v. Tmilchol*, 2 ROP Intrm. 277, 281-82 (1991). In reviewing a motion for summary judgment, all doubts must be resolved against the movant, and the motion must be denied if the non-movant identifies some evidence in the record demonstrating a genuine factual dispute on a material issue. *Estate of Olkeriil v. Ulechong*, 4 ROP Intrm. 43, 51 (1993).

Dilubech Clan v. Ngeremlengui State Gov't, 8 ROP Intrm. 106, 108 (2000).

2. UNDISPUTED FACTS

Plaintiffs are citizens of Palau, who are the owners of “Belau Cellular Company” [Belau Cellular]. Plaintiff Sam Masang has been doing business as the exclusive retail sales agent for the Motorola Corporation in Palau since 1989, and has been and is affiliated with Motorola in the mainland United States, in the Philippines, and in Singapore since that time. Beginning in 1989, Plaintiffs provided a wireless communications system to their customers by which they can use a two-way radio to obtain a dial tone to make telephone calls. Over the years, Plaintiffs provided wireless radio transmission services in Palau to a number of private enterprises and public agencies. Clients included the Bureau of Public Safety, Belau National Hospital, the P.I.T.I. fishing company, Palau Transportation Company, 1245 Mobil Oil Corporation, and Shell Oil Corporation.

In 1995, Plaintiffs expanded the business to include wireless cellular telephones, a business by which its customers can own and operate wireless cellular telephones, purchase wireless cellular telephone equipment, and have wireless cellular telephone equipment repaired and serviced.

Family Telephone Co., Ltd. [Family Telephone], a Japanese corporation, decided to enter the cellular phone market in Palau, and to that end Palau National Cellular Inc. [National Cellular] was chartered in March 2000. The two shareholders who own all the authorized stock are Palau National Communications Corporation [PNCC], a government-owned corporation, and Family Telephone. National Cellular applied for a foreign investment certificate on April 7, 2000.¹ The application requested approval to engage in the business of providing wireless cellular telecommunications services in Palau.

Even before the formal application of National Cellular, Plaintiffs were aware of the plans of Family Telephone to establish a business in Palau, because of an earlier foreign

¹Technically, it is Family Telephone that needs the foreign investment permit, since Family Telephone is the foreign investor entering the Palau market as an owner. 23 PNC § 103(a) and 28 PNC § 102(d). The National Cellular format is merely the corporate structure formed in Palau for Family Telephone to carry on business here.

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investment application. However, Family Telephone's original Palau partner had to withdraw, apparently because of conflict of interest, and that earlier application was withdrawn. Nonetheless, in a letter dated March 22, 2000, Plaintiffs submitted written comments to the Board regarding the first application, objecting to Family Telephone entering the market here, asserting that Belau Cellular had the technical, managerial, and financial capacity to operate a cellular telephone system, including the ability to expand up to eight sites (towers) to provide nationwide coverage. It also alleged a host of deficiencies in the original application, and asked for an opportunity "to solicit opinions from Belau Cellular Company directly as set forth in section 4(a) of the regulations, and request at least fifteen days from the date of notification by the FIB to respond to the request for an opinion."

There was no response from the Board. Later, when the National Cellular application was filed, Belau Cellular followed up with another letter of objection on April 25, 2000, once again asserting that Plaintiffs had the capacity to operate a wireless cellular telephone business, which was capable of providing nationwide services with up to eight cell sites. Once again, there was no response from the Board. On April 27, 2000, at a weekly Board meeting attended by five members of the Board, there was a unanimous vote to grant the permit to National Cellular.

Ivan Rudimch was a member of the Foreign Investment Board at the time the Board granted the permit, and had been a Belau Cellular customer for approximately three years. He voted to approve the application of National Cellular for a foreign investment approval certificate at the Board meeting on April 27, 2000, based upon his personal experience and the discussion of the Board at the meeting. He said the members "decided that Belau Cellular could not provide service to Palau as well as National Cellular and that National Cellular was good for Palau."

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Kenjiro Dengokl was also a member of the Foreign Investment Board at the time the Board granted the permit. He has never been a Belau Cellular customer. However, he listened to Nick Ngwal and George Sugiyama and their complaints about the poor coverage area of Belau Cellular and the problems they had had with billing and how they never knew how much time was left in their account. At that same meeting, he determined that granting a permit to National Cellular was in the best interest of Palau and that, based on the letter from Mark Doran and the history of the company, Belau Cellular was unlikely to improve its service any time soon.

Nick Ngwal, at the time of the Board meeting in April 2000, had subscribed to Belau Cellular's wireless service for three months prior to the Board meeting. He told other Board members that on several occasions, he attempted to make calls and found that the phone will not work because he exceeded his allotment of prepaid airtime. His personal opinion, shared with other Board members, was that Belau Cellular's service was unsatisfactory in that the coverage area is extremely limited and the quality of the connection is often extremely poor, and that during those three months as a subscriber, he had not been informed of any intent, on the part of Belau Cellular, to upgrade the equipment or services provided by the company.

The vote was unanimous to grant National Cellular the permit, and it was formally issued May 11, 2000.

3. CONCLUSIONS OF LAW

[2] The Defendants do not question the standing of the Plaintiffs in this motion, and it is not an issue. However, some discussion of standing is appropriate to identify the interests of the Plaintiff in the proceedings before the Board. By a 1998 amendment to the Foreign Investment Act, standing to contest violations of the Act is basically conferred on anyone living in Palau. Title 28, PNC § 120 provides: “Any citizen or resident of the Republic of Palau, any political subdivision of the Republic of Palau, or any incorporated or unincorporated association shall have standing and capacity to bring suit to enforce the provisions of this chapter as a private Attorney General.”²

[3-5] It is the legislature that normally confers standing to sue as a private attorney general:

Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a 1247 proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot* 64 S. Ct. 74 (1943). More specifically, “one threatened with financial loss through increased competition resulting from a commission’s order is ‘aggrieved’” and properly has standing to sue under such a statute. *Nat’l Coal Ass’n v. Fed. Power Comm’n*, 191 F.2d 462, 464 (D.C. Cir. 1951). Therefore, because Plaintiffs are citizens of Palau and are threatened with financial loss through increased competition, they have standing as private attorneys general under 28 PNC § 120.

[6] The parties are also in agreement on the standard of review of Board decisions: abuse of discretion. In order to apply that standard, the general purposes of the statute must be considered. As stated by Plaintiffs, the statute “is designed to protect Palauan citizens engaging in the type of business activity sought to be approved by the [Board].”

[7] Indeed, there are specific areas where no foreign ownership is permitted. 28 PNC § 105. In permitted areas of foreign investment, 28 PNC § 107 provides the criteria for evaluating the application. The criteria are mandatory. “An application . . . shall be evaluated by the Board, according to the following criteria” 28 PNC § 107(a).

²“The legislative history of that enactment states the OEK’s concern [was] that the government was not enforcing the Act; the OEK’s solution was to enable private citizens to bring suit to enforce the Act. *House of Delegates Standing Committee Report No. 9 regarding House Bill No 3-15-1 (April 11, 1989)* .” *Tulmau v. R.P. Calma & Co.*, 3 ROP Intrm. 205, 208 (1992).

Of particular interest here are:

- (2) the extent of its current availability in the Republic;
 - (3) the likely impact on same or similar activities currently being carried on by citizens; [and]
- (b) Where the Board is of the view that the capital investment and technical and managerial skills required for a business activity are such to be within the capacity of citizens, it shall not grant a foreign investment certificate.

[8] In this case, the Board abused its discretion in a number of ways. First, the standard is not whether the foreign investor can provide *better* service than the local business. If that was the test, there would be no need for a Foreign Investment Board, because any foreign investor who was not providing better service than the local business would not be much competition. Instead, the act is protectionist and seeks to prevent outside investors and their money from overwhelming local businesses and, as a result of their economic punch, providing better service and competitive prices at least long enough to drive local competition out of business.

[9] Second, it was an abuse of discretion to rely upon the personal anecdotal evidence of Board members to decide the merits of an application. Both the applicant and any opponents deserve a determination made by the Board upon the record presented. Neither applicants nor opponents can be expected to refute anecdotal stories disclosed for the first time when the Board meets. In summary, Board members may evaluate the record before them, or they may be witnesses for or against an application, but they cannot do both.

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Third, it was an abuse of discretion not to have granted a hearing to the plaintiffs in this case. The plaintiffs are not peripheral to this application. They appear to be the very type of persons sought to be protected by the Act. Family Telephone, a Japanese corporation now in league with a government-owned corporation, imported \$1.5 million worth of equipment to take over a market Belau Cellular has been trying to develop in recent years. The Board cannot evaluate the criteria set forth in the statute and determine the “extent of [the business’] current availability,” “the likely impact on same or similar activities currently being carried on by citizens,” and whether “the capital investment and technical and managerial skills required for a business activity are such as to be within the capacity of citizens” based upon recitations of personal experience by Board members. On these facts, nothing less than a full opportunity for the local business to present its case can pass muster under the statute. It was an abuse of discretion not to allow the Plaintiffs a hearing. The fact that the Board “considered” the letters written by Plaintiff’s lawyer is inadequate. The letters of the lawyer put the Board on notice that the plaintiffs were serious in their opposition to the application. They were requesting an opportunity to be heard on the very criteria the Board was required to assess. The letters of the lawyer could not address technical issues peculiar to the business, nor could they address anecdotal concerns expressed for the first time at the Board’s meeting.

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Hence, summary judgment is granted to the plaintiffs. The judgment will be that Plaintiffs are entitled to a hearing before the Board, that the Board must consider all of the criteria set forth in 28 PNC § 107, and that the decision must rest upon the evidence of record before the Board, rather than the personal experiences and impressions of the Board members.

Costs and attorney's fees will be awarded to Plaintiffs.