

FSM SUPREME COURT APPELLATE DIVISION

FEDERATED STATES OF MICRONESIA)
 DEVELOPMENT BANK,)
)
 Petitioner,)
)
 vs.)
)
 HON. LOURDES MATERNE and FSM SUPREME)
 COURT TRIAL DIVISION, Pohnpei Venue,)
)
 Respondents,)
)
 MARIANNE B. SETIK, THE ESTATE OF MANNY)
 SETIK, ATANASIO SETIK, VICKY SETIK IRONS,)
 IRENE SETIK WALTER, MARLEEN SETIK,)
 JUNIOR SETIK, ELEANOR SETIK SOS, JOANITA)
 SETIK PANGELINAN, MERIAM SETIK,)
 CHRISTOPHER JAMES SETIK, JERMINA SETIK,)
 and AREEN SETIK,)
)
 Respondents/Real Parties)
 in Interest.)
)

APPEAL CASE NO. P10-2019
 (Civil Action Nos. 2007-008
 & 2010-006)

ORDER GRANTING WRIT OF MANDAMUS; AND WRIT OF MANDAMUS

Decided: August 5, 2020

BEFORE:

Hon. Larry Wentworth, Associate Justice, FSM Supreme Court
 Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
 Hon. Mayceleen J.D. Anson, Specially Assigned Justice, FSM Supreme Court**

*Chief Justice, Yap State Court, Colonia, Yap
 **Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

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HEADNOTES

Mandamus and Prohibition – Procedure

If the judge named as the respondent or the FSM Supreme Court trial division does not wish to appear in the proceeding, the judge may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. FSM Dev. Bank v. Materne, 23 FSM R. 1, 5 (App. 2020).

Mandamus and Prohibition – Procedure

When there is only one Supreme Court article XI, section 3 justice who is not disqualified, that justice has the authority to consider and make a final decision on a petition for a writ of mandamus without the participation of any other justices, but, in an exercise of the discretion conferred by Appellate Rule 21(b), that justice may seek the appointment of a full panel. FSM Dev. Bank v. Materne, 23 FSM R. 1, 5 (App. 2020).

Mandamus and Prohibition – When May Issue

The five elements that must be present in order for the FSM Supreme Court to exercise its discretion to issue a writ of mandamus are: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to perform the act; and 5) there must be no other adequate legal remedy available. FSM Dev. Bank v. Materne, 23 FSM R. 1, 5 (App. 2020).

Mandamus and Prohibition – Nature and Scope; Mandamus and Prohibition – When May Issue

A writ of mandamus is an extraordinary remedy, the object of which is to require an official to carry out a clear non-discretionary duty, and the writ issues only to force a ministerial act and only when there is no other adequate remedy available. FSM Dev. Bank v. Materne, 23 FSM R. 1, 5 (App. 2020).

Mandamus and Prohibition – Procedure

A respondents' motion to dismiss a petition for a writ of mandamus is deemed their answer to the petition because a filing is what it is regardless of what someone chooses to call it. FSM Dev. Bank v. Materne, 23 FSM R. 1, 5 (App. 2020).

Courts – Recusal; Mandamus and Prohibition – Procedure

No article XI, section 3 justice can sit when that justice is forbidden to do so by the judicial disqualification statute, 4 F.S.M.C. 124, the judicial ethics statute, 4 F.S.M.C. 122, or the Constitution. FSM Dev. Bank v. Materne, 23 FSM R. 1, 5-6 (App. 2020).

Mandamus and Prohibition – Authority and Jurisdiction

The FSM Supreme Court appellate division may issue a writ of mandamus directed to any inferior judicial officer or to a court lower in rank, and a temporary trial division justice is a judicial officer lower in rank or inferior to the FSM Supreme Court appellate division. FSM Dev. Bank v. Materne, 23 FSM R. 1, 6 (App. 2020).

Courts – Judges – Temporary Judges

Contentions that a temporary judge's appointment was improper and that a temporary justice's service is limited to three months are groundless when the FSM Supreme Court appellate division has previously ruled that the judge's appointment was not improper and that the statute was inapplicable and did not limit the judge's time served. FSM Dev. Bank v. Materne, 23 FSM R. 1, 6 (App. 2020).

Mandamus and Prohibition – Authority and Jurisdiction; Mandamus and Prohibition – Nature and Scope

A writ of mandamus, although directed to a particular judicial officer, applies to that judicial officer's successor(s) in office and the court itself. The named judicial officer is considered a nominal party. FSM Dev. Bank v. Materne, 23 FSM R. 1, 6 (App. 2020).

Appellate Review – Standard – Civil Cases; Debtors’ and Creditors’ Rights – Orders in Aid of Judgment; Mandamus and Prohibition

Contentions and arguments that the appellate division has previously rejected that challenged an order in aid of judgment have no effect on a petition for a writ of mandamus to enforce that order in aid of judgment. FSM Dev. Bank v. Materne, 23 FSM R. 1, 6 (App. 2020).

Courts – Judges

If an article XI, section 3 justice resigns, then that justice becomes either a resigned justice or a retired justice, depending on the justice’s age on the resignation’s effective date. FSM Dev. Bank v. Materne, 23 FSM R. 1, 7 (App. 2020).

Courts – Judges – Temporary Judges; Mandamus and Prohibition – Nature and Scope

If a temporary justice resigns from that justice’s temporary judicial office, the case, on which the temporary justice sat, would then need to be assigned to another judicial officer, but that does not alter the case’s posture. If the resigned temporary justice had presided over a trial division case, whichever judge is next assigned that case is equally subject to whatever instruction the appellate division has given the new justice’s predecessor(s). FSM Dev. Bank v. Materne, 23 FSM R. 1, 7 (App. 2020).

Mandamus and Prohibition – Authority and Jurisdiction; Mandamus and Prohibition – Nature and Scope

The appellate division can direct a writ of mandamus to a particular trial division justice, or to that particular trial division justice and that justice’s successors in office, or to the trial division in general. Regardless, the writ will apply to the trial justice’s successor(s) in office. Thus, whether a particular respondent justice is still presiding over the case in question is immaterial because any writ of mandamus directed to her is equally directed toward any successor in office. FSM Dev. Bank v. Materne, 23 FSM R. 1, 7 (App. 2020).

Mandamus and Prohibition – Nature and Scope

In a proper case, a ministerial order can involve land. FSM Dev. Bank v. Materne, 23 FSM R. 1, 7 (App. 2020).

Mandamus and Prohibition – Procedure

Even though the respondents’ failure to oppose the petitioner’s motions in the trial division is considered the respondents’ consent to those motions, the petitioner must still meet the requirements for the issuance of an extraordinary writ of mandamus before the appellate division can issue the writ that the petitioner requests concerning those motions. FSM Dev. Bank v. Materne, 23 FSM R. 1, 7 (App. 2020).

Mandamus and Prohibition – When May Issue

When the respondent is a judicial officer, having been validly appointed as a temporary justice presiding over the case; when the land was sold to a buyer pursuant to a valid order in aid of judgment and the buyer is legally eligible to own land and the auction process’s integrity has not been questioned; and when that sale satisfied and discharged the bank’s mortgage, which the order in aid of judgment had ordered foreclosed, and the buyer is thus entitled to an order to transfer the land’s title to it, the requested order is ministerial and the temporary trial court justice had a clear legal duty to issue an order to transfer the land’s title to the buyer. Since that trial court justice failed to act and the bank has no other adequate legal remedy available to obtain such an order, the bank is entitled to a writ of mandamus to compel the trial court issue an order to transfer the land’s title to the buyer. FSM Dev. Bank v. Materne, 23 FSM R. 1, 7-8 (App. 2020).

COURT'S OPINION

PER CURIAM:

For the reasons that follow, we hereby grant the FSM Development Bank's petition and issue the requested writ of mandamus.

I. PROCEDURAL BACKGROUND

On December 3, 2019, the FSM Development Bank filed a petition for a writ of mandamus, in which it asks the FSM Supreme Court appellate division to order FSM Supreme Court Temporary Justice Lourdes Materne to issue an order transferring title to Parcel No. 023-A-70 to Pacific Realtors Inc., the successful bidder on that property in an auction held pursuant to the trial court's order in aid of judgment in Civil Actions No. 2007-008 and 2010-006. The bank's petition recites that all the appeals from orders in Civil Actions No. 2007-008 and 2010-006 have been resolved in the bank's favor, see Setik v. Mendiola, 21 FSM R. 537, *reh'g denied*, 21 FSM R. 624 (App. 2018); Setik v. FSM Dev. Bank, 21 FSM R. 505, *reh'g denied*, 21 FSM R. 604 (App. 2018); Walter v. FSM Dev. Bank, 21 FSM R. 1 (App. 2016), as was a related case that was initiated in the Pohnpei Supreme Court and removed to the FSM Supreme Court and then appealed, see Setik v. Perman, 22 FSM R. 105 (App. 2018).

These appellate decisions also affirmed the December 24, 2013 order in aid of judgment in Civil Actions No. 2007-008 and 2010-006, as amended by FSM Dev. Bank v. Setik, 20 FSM R. 85, 90 (Pon. 2015) (appointing new land sales agent), *aff'd*, 21 FSM R. 505 (App. 2018). That order in aid of judgment allowed the bank to sell certain mortgaged property (Parcel Nos. 023-A-06 and 035-A-158 known as C-Star Apartelle¹), and if that sale did not satisfy the judgment, then to sell a second mortgaged property, Parcel No. 023-A-70. The first sale did not satisfy the Civil Actions No. 2007-008 and 2010-006 judgment. The bank then on January 7, 2019, took the formal steps necessary in order to auction off Parcel No. 023-A-70 as well. The auction was held in April 2019. Pacific Realtors Inc., a Pohnpei corporation with only FSM citizen shareholders, was the successful bidder. It paid the bid price on April 15, 2019.

On April 17, 2019, the bank filed and served a motion in Civil Actions No. 2007-008 and 2010-006 asking the trial court to order the transfer of the title to Parcel 023-A-070 to Pacific Realtors Inc. The trial court did not act. On May 16, 2019, the bank filed and served a request for an expedited hearing on its motion. The bank filed and served renewed requests for expedited handling and renewed motions to transfer title on July 11, 2019, and again on September 16, 2019. The trial court still did not act.

The last judge assigned to preside over Civil Actions No. 2007-008 and 2010-006 was Republic of Palau Supreme Court Associate Justice Lourdes F. Materne, who had been designated on June 18, 2015, by Acting Chief Justice Ready E. Johnny, as the specially assigned justice for that consolidated case. Setik, 21 FSM R. at 513.

II. SINGLE ARTICLE XI, SECTION 3 JUSTICE AND APPELLATE FILINGS

The bank, on December 3, 2019, filed this petition for a writ of mandamus to compel Justice Materne, or the trial division in general, to issue the requested order to transfer title.

In early April 2020, the presiding justice learned that he was the only FSM Supreme Court article XI, section 3 justice who was not disqualified from this case. The single justice, in an April 16, 2020 order, then

¹ See Setik v. FSM Dev. Bank, 21 FSM R. 505, 512 & n.1 (App. 2018).

directed that an answer to the petition be filed no later than May 6, 2020, since the justice was not of the opinion that it was clear the writ should be denied. FSM App. R. 21(b). That order further noted that if the judge named as the respondent or the FSM Supreme Court trial division "does not desire to appear in the proceeding, the judge or justice may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted." *Id.*

The single justice soon realized he had overlooked the Chief Justice's April 3, 2020 Emergency Court Order No. 1, that extended all court-ordered or rule-set filing deadlines to May 22, 2020, and reset the filing deadline to May 25, 2020. The respondents-real parties in interest ("the Setiks") filed, on May 8, 2020, a Motion to Dismiss Petition. On May 28, 2020, the bank filed Petitioner FSMDB's Opposition to Respondent Setiks' Motion to Dismiss Petition.

III. WRITS OF MANDAMUS – REQUIREMENTS AND PROCEDURE

Appellate Procedure Rule 21, which governs petitions for extraordinary writs, provides that:

The remaining article XI, section 3 justices of the Supreme Court to whom the petition is submitted may sit as the appellate division hearing the case or, if there are fewer than three, may, at their discretion, seek appointment of a temporary justice pursuant to the special assignment powers of the chief justice under article XI, section 9 of the Constitution.

FSM App. R. 21(b). Thus, as the only Supreme Court article XI, section 3 justice who was not disqualified, the presiding justice has the authority to consider and make a final decision on this petition without the participation of any other justices. However, in an exercise of the discretion conferred by Appellate Rule 21(b), the presiding justice sought the appointment of a full panel, which now presides over this petition.

The five elements that must be present in order for the FSM Supreme Court to exercise its discretion to issue a writ of mandamus are: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to perform the act; and 5) there must be no other adequate legal remedy available. Etscheit v. Amaraich, 14 FSM R. 597, 600 (App. 2007). Each of these must be satisfied. *Id.* A writ of mandamus is an extraordinary remedy, the object of which is to require an official to carry out a clear non-discretionary duty, and the writ issues only to force a ministerial act and only when there is no other adequate remedy available. FSM Dev. Bank v. Yinug, 11 FSM R. 437, 441 (App. 2003).

IV. OPPOSITION OF RESPONDENTS-REAL PARTIES IN INTEREST

The Setiks' Motion to Dismiss Petition is deemed their answer to the petition. That is because a filing "is what it is regardless of what someone chooses to call it." McIlrath v. Amaraich, 11 FSM R. 502, 505 (App. 2003). The Setiks' answer was timely filed. Their reasons not to grant the writ will be addressed in turn.

A. Article XI, Section 3 Justices

The Setiks first argue that this appellate panel must consist of all the FSM Supreme Court article XI, section 3 justices who were not the judge in the trial division case for which the writ is sought – in other words, all three current article XI, section 3 justices must sit. This is plainly false. No article XI, section 3 justice can sit when that justice is forbidden to do so by the judicial disqualification statute, 4 F.S.M.C. 124,

the judicial ethics statute, 4 F.S.M.C. 122, or the Constitution.²

The Setiks next argue that a writ of mandamus from the appellate division can only be directed against an FSM Supreme Court article XI, section 3 justice and not against Justice Materne because she is not an article XI, section 3 justice. This is also plainly false. The appellate division may issue a writ of mandamus directed to any inferior judicial officer or to a court lower in rank. See Chuuk v. Chuuk State Supreme Court App. Div., 21 FSM R. 583, 586 (App. 2018); GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 288 (App. 2014); Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM R. 116, 120 (Pon. 2001); see also 4 F.S.M.C. 117. A temporary trial division justice is a judicial officer lower in rank or inferior to the FSM Supreme Court appellate division.

B. Respondent Justice Materne's Appointment

Next, the Setiks contend that Justice Materne was not properly appointed to sit on Civil Actions No. 2007-008 and 2010-006, and, that if she was properly appointed, she has served as a temporary justice for too long and her service as a temporary justice to preside over Civil Actions No. 2007-008 and 2010-006 was limited to three months by 4 F.S.M.C. 104(2). They also question whether a Palau Supreme Court justice should ever be a judge in an FSM case and how it was she became an FSM temporary justice and how she could still be a temporary justice after so long.

These contentions are without any merit. The appellate division has previously ruled that Justice Materne's appointment was not improper. Setik, 21 FSM R. at 517; see also Mendiola, 21 FSM R. at 547. Section 104(2) of Title 4 does not limit a temporary justice's service to three months. It only allowed Congress to remove a temporary justice after three months' service, but Section 104(2) was ruled unconstitutional in 2004. Urusemal v. Capelle, 12 FSM R. 577, 586-87 (App. 2004). The statute is thus irrelevant. The Setiks' arguments about Justice Materne's appointment and continued service are thus groundless.

C. Validity of Order in Aid of Judgment

The Setiks further contend that the December 24, 2013 order in aid of judgment was, or is now, invalid, and thus presumably, it could not have been used to effect the sale of Parcel No. 023-A-70. They argue that the bank's failure until 2014 to apply credit life insurance proceeds to their delinquent loan "immobilized" the December 24, 2013 order in aid of judgment. They further argue that later rental payments also "immobilized" the December 24, 2013 order in aid of judgment.

The appellate division has previously rejected these same arguments challenging that order in aid of judgment. Setik, 21 FSM R. at 516; see also Mendiola, 21 FSM R. at 556. Furthermore, the Setiks abandoned their direct appeal from the December 24, 2013 order in aid of judgment. Walter v. FSM Dev. Bank, 21 FSM R. 1, 4 (App. 2016). These contentions thus have no effect on this petition.

D. Justice Materne as Respondent and Her "Recusal"

The Setiks also contend that the writ cannot issue because Justice Materne has "recused" herself from the matter. The court is unaware of this alleged "recusal." But even if that were so, that would have no bearing on whether the writ should issue. The bank named as respondents Justice Lourdes Materne and

² Chief Justice Yamase is disqualified because of his spouse's relationship to the real parties in interest and Justice Carl-Worswick is disqualified because the FSM Development Bank is the petitioner. That left one remaining article XI, section 3 justice.

the FSM Supreme Court trial division. A writ of mandamus, although directed to a particular judicial officer, applies to that judicial officer's successor(s) in office and the court itself. The named judicial officer is considered a nominal party.

Moreover, a temporary judicial officer, such as Justice Materne in Civil Actions No. 2007-008 and 2010-006, can always resign from that temporary office; just as any justice can resign from judicial office. If an article XI, section 3 justice resigns, then that justice becomes either a resigned justice or a retired justice, depending on the justice's age on the resignation's effective date. Hartman v. FSM, 6 FSM R. 293, 297-98 (App. 1993). If a temporary justice resigns from that justice's temporary judicial office, the case, on which the temporary justice sat, would then need to be assigned to another judicial officer, but that does not alter the case's posture. If the resigned temporary justice had presided over a trial division case, whichever judge is next assigned that case is equally subject to whatever instruction the appellate division has given the new justice's predecessor(s).

The appellate division can direct a writ of mandamus to a particular trial division justice, or to that particular trial division justice and that justice's successors in office, or to the trial division in general. Regardless, the writ will apply to the trial justice's successor(s) in office. Thus, whether Justice Materne is still presiding over Civil Actions No. 2007-008 and 2010-006 is immaterial. Any writ of mandamus directed to her is equally directed toward any successor in office.

E. *Sanctity of Land*

And lastly, the Setiks argue that since the order the bank seeks involves land, the issuance of that order cannot possibly be ministerial because of the sanctity of Micronesian land. But no reason was ever shown why, in a proper case, there could not be a ministerial order involving land. We must reject this argument.

F. *Setiks' Consent to the Requested Order to Transfer Title*

The bank contends that the Setiks have consented to the trial court's issuance of an order to transfer title because the Setiks never filed any opposition to the bank's April 17, 2019 motion in Civil Actions No. 2007-008 and 2010-006 that asked the trial court to order the transfer of the title to Parcel 023-A-070 to Pacific Realtors Inc. and because the Setiks never opposed the bank's May 16, 2019, July 11, 2019, and September 16, 2019 motions for an expedited hearing and for an order to transfer title.

Even though the failure to oppose those motions is considered the Setiks' consent to those motions, FSM Civ. R. 6(d); Panuelo v. Sigrah, 22 FSM R. 341, 349 (Pon. 2019), the bank must still meet the requirements for the issuance of an extraordinary writ of mandamus before we can issue the writ that it requests.

V. WRIT'S ISSUANCE

The respondent, Justice Lourdes Materne, is a judicial officer, having been validly appointed as the temporary justice presiding over Civil Actions No. 2007-008 and 2010-006. Parcel No. 023-A-70 was sold to Pacific Realtors Inc. pursuant to a valid order in aid of judgment. It is undisputed that Pacific Realtors Inc. is legally eligible to own land. The integrity of the auction process has not been questioned. That sale satisfied and discharged the bank's mortgage on Parcel No. 023-A-70, which the order in aid of judgment had ordered foreclosed. Parcel No. 023-A-70's buyer is thus entitled to an order to transfer Parcel No. 023-A-70's title to it. That order will act as a notice to the Pohnpei Court of Land Tenure that the bank's mortgage on Parcel No. 023-A-70 has been satisfied and discharged and that because of that discharge, Parcel No. 023-A-70's new owner takes that parcel free of that mortgage.

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Under the circumstances, the requested order is ministerial, Setik, 21 FSM R. at 521-22, and the trial court justice had a clear legal duty to issue an order to transfer Parcel No. 023-A-70's title to Pacific Realtors Inc. The trial court justice failed to act. Since the bank has no other adequate legal remedy available to obtain such an order, the bank is entitled to a writ of mandamus to compel the trial court issue an order to transfer Parcel No. 023-A-70's title to Pacific Realtors Inc.

Accordingly, the writ's requirements have been met. The writ will issue herewith.

VI. WRIT OF MANDAMUS

The appellate division hereby directs the Honorable Lourdes Materne, or her successor, to issue, in Civil Actions No. 2007-008 and 2010-006, an order to transfer the title to Parcel No. 023-A-70 to Pacific Realtors Inc. free of all claims by that property's previous owners, mortgagors, or mortgagee.

* * * *