For Publication

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

TINIAN CASINO GAMBLING CONTROL COMMISSION *ex rel*. Esther Hofschneider-Barr, Executive Director, Petitioner, v. **JUAN NEKAI BABAUTA, Governor of the Commonwealth of the Northern Mariana Islands; and SENATOR JOSEPH M. MENDIOLA, SENATOR HENRY H. SAN NICHOLAS, SENATOR JOAQUIN G. ADRIANO, and CONGRESSMAN NORMAN S. PALACIOS, comprising the Tinian Legislative Delegation,** Respondents.	**CIVIL ACTION NO. 04-0326C** **ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS**

THIS MATTER came before the Court for a hearing on September 27, 2004, at 9:00 a.m. in courtroom 220A to consider Respondent Governor Juan Nekai Babauta's ("Governor") MOTION TO DISMISS as well as the Respondent Tinian Legislative Delegation's ("Tinian Delegation") MOTION TO DISMISS. Governor Babauta was represented by Assistant Attorney General James D. Livingstone, Esq.; Senator Joaquin G. Adriano appeared personally and, together with the Tinian Delegation, was represented by Senate Legal Counsel Michael L. Ernest, Esq.; and Petitioner Tinian

Casino Gaming Control Commission ("Gaming Commission") was represented by Elliot A. Sattler, Esq.

I. Introduction / Procedural History

The Gaming Commission initiated this action on August 5, 2004, by filing its PETITION FOR DECLARATORY RELIEF ("Petition"). In the Petition, the Gaming Commission essentially argues that Tinian Local Law 14-1 ("TLL 14-1"), introduced and passed by the Tinian Delegation as House Local Bill No. 14-12 and signed into law by the Governor, is unconstitutional and/or otherwise legally invalid, and that the Respondents went beyond the scope of their authority in enacting this local law.

TLL 14-1 was passed by the Respondent Tinian Delegation pursuant to its powers under Article II, Section 6 of the NMI Constitution, and the Local Law Act of 1983, 1 CMC §§ 1401, *et seq*. It purports to amend the Revised Tinian Casino Gaming Control Act of 1989, 10 CMC §§ 2511, *et seq., as modified by Commonwealth v. Tinian Casino Gaming Control Commission*, Civ. No. 91-0690 (N.M.I. Super. Ct. Aug. 18, 1993) (Order Approving and Adopting the Revised Tinian Casino Gaming Control Act of 1989), for the following purposes:

> to regulate the building and licensing of a hotel-casino in phases, to authorize and regulate the employment in the casino of persons over the age of 18 years; to reduce the casino license application fee, to reduce the penalities [sic] for fees and taxes, to authorize the Tinian Casino Gaming Control Commission to waive or defer payment of such penalities [sic], to permit and regulate credit wagers; and for other purposes.

TLL 14-1 at 1. The Tinian Casino Gaming Control Act of 1989 was originally enacted by the residents of Tinian pursuant to a local initiative, and was subsequently modified by the ruling of the Commonwealth Superior Court in *Commonwealth v. Tinian Casino Gaming Control Commission,* Civ. No. 91-0690 (N.M.I. Super. Ct. Aug. 18, 1993) (Order Approving and Adopting the Revised Tinian Casino Gaming Control Act of 1989) on remand from the Commonwealth Supreme Court, *Commonwealth v. Tinian Casino Gaming Control Commission*, 3 N.M.I. 134 (1992).

The Gaming Commission's Petition asserts five causes of action with respect to the enactment of TLL 14-1. Upon review, however, it appears that only four "causes of action" have been stated. The Gaming Commission contends: **(1)** that a local law cannot amend a local initiative, since a statutory enactment can only be modified or repealed by a later undertaking that involves a legislative enactment of "equal dignity"; **(2)** that TLL 14-1 violates a portion of the Local Law Act of 1983, 1 CMC §§ 1401, *et seq.* ("Local Law Act"), specifically 1 CMC § 14022(a)(8); **(3)** that Article XXI of the NMI Constitution preempts Section 1402(a)(8)[1] of the Local Law Act; and **(4)** that the enactment of TLL 14-1 is barred by res judicata and/or the legal doctrine of "law of the case" based on an earlier CNMI Supreme Court ruling in the case of *Tinian Casino Gaming Control Commission*, 3 N.M.I. 134.

The Governor's Motion to Dismiss raises multiple issues with respect to the substantive aspects of the Gaming Commission's Petition, and the Tinian Delegation has joined in those arguments. However, the Respondents' primary argument is that each and all of them enjoy legislative immunity from this action, and that for this reason, the Gaming Commission lacks standing to sue, this Court lacks jurisdiction, and this case must be dismissed. Because this issue is dispositive of the case, and because this Court finds that the Respondents *are* immune in this case, this Order will deal solely with the issue of legislative immunity. Jurisdiction is vested in this Court pursuant to N.M.I. Const. art. IV, § 2.

II. Legal Standard for a 12(b)(6) Motion to Dismiss

The Respondents move for dismissal on the basis of Com. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). Unlike a Motion for Summary Judgment, a

[1] For its "Fourth Cause of Action," the Gaming Commission contends that legislators of the Second Constitutional Convention of 1985 intentionally omitted an exception for "Local Laws" when drafting Article XXI of the NMI Constitution. The Court finds that this argument simply represents an alternative argument in support of the Third Cause of Action, described above.

12(b)(6) motion "confines analysis to the allegations and implications contained on the face of the complaint." *In re Estate of Roberto*, 2002 MP 23 ¶12 (*citing Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); *Hal Roach Studios, Inc. v. Richard Feiner & Co*., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989)). "Dismissal is improper unless it appears beyond doubt that the [non-moving party] can prove no set of facts in support of his claim which would entitle him to relief." *Govendo v. Micronesia Garment Mfg., Inc.*, 2 N.M.I. 270, 283 (1991). Where the complaint itself establishes an affirmative defense, such as legislative immunity, then the action should be dismissed under Com. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. *See Sablan v. Tenorio*, 4 N.M.I. 351, 355 (1996). The Court must accept all well-pled facts of the non-moving party as true, and must draw reasonable inferences from the non-moving party's allegations. *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990).

III. Issue

> Whether the Governor and/or the Tinian Delegation are entitled to legislative immunity pursuant to Article II, Section 12 of the Commonwealth Constitution,[2] and/or as provided at common law, in an action that seeks a declaratory judgment ruling that a local law created by the respondent officials is unconstitutional.

IV. Analysis

The Governor and the Tinian Delegation maintain that they are entitled to immunity, because the actions that the Gaming Commission complains of are entirely *legislative* in nature, and legislative immunity therefore bars the suit.

"Legislative immunity is an affirmative defense which provides absolute, comprehensive protection from suits challenging actions taken in the performance of official legislative functions."

[2] N.M.I. Const. art. II, § 12 provides:

> Immunity. A member of the legislature may not be questioned in any other place for any written or oral statement in the legislature and a member of the legislature may not be subject to arrest while going to or coming from a meeting of the legislature except for commission of treason, a felony or breach of the peace.

Sablan, 4 N.M.I. at 355. "The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79, 85 (1998).[3] The common law doctrine of legislative immunity has been held to prohibit lawsuits contesting not only the actions of state legislators, but also the actions of local or regional legislators that are taken in their official, legislative capacities.[4] *Id*. at 49, 118 S. Ct. at 970, 140 L. Ed. 2d at 85. "The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference," and to insure that "legislators engaged 'in the sphere of legitimate legislative activity' [are] protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Consumers Union of United States*, 446 U.S. at 731-32, 100 S. Ct. at 1974, 64 L. Ed. 2d at 653 (citations omitted). Apart from its basis in the common law, the doctrine of legislative immunity is also founded in the Commonwealth Constitution, which provides at Article II, Section 12 that ***"[a] member of the legislature may not be questioned in any other place for any written or oral statement in the legislature*** . . . ." N.M.I. const. art. II, § 12 (emphasis added). The Commonwealth Constitution's legislative immunity provision applies to local delegations by virtue of Article II, Section 6, which provides: **"[l]aws that relate exclusively to local matters within one senatorial district *may be enacted by the legislature or by the***

[3] Contrary to the argument of the Gaming Commission in the hearing on this matter, although many of the cases referenced in the parties' briefs on the topic concerned actions initiated under 42 U.S.C. § 1983, legislative immunity is neither contingent upon nor limited by that statute. S*ee, e.g., Supreme Court of Virginia v. Consumers Union of United States*, 446 U.S. 719, 732, 100 S. Ct. 1967, 1974, 64 L. Ed. 2d 641, 653 (1980) (stating that "[i]n *Tenney [v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. ed. 1019 (1951)] we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of legislators").

[4] The Gaming Commission argues that in enacting TLL 14-1, the Tinian Delegation and the Governor acted solely on behalf of the Municipality of Tinian, "a political entity that can sue and be sued," and that TLL 14-1 is therefore the equivalent of a local municipal ordinance, since it applies only to the Second Senatorial District. On this basis, the Gaming Commission argues that legislative immunity should not bar this action. As the Tinian Delegation correctly noted at the hearing on this matter, however, the fact that legislative immunity extends to local officials acting in a legislative capacity would render any decision on this point moot.

***affirmative vote of a majority of the members representing that district.*"** N.M.I. Const. art. II, § 6 (emphasis added).

Whether legislative immunity will apply depends on whether the activity at issue is legislative in nature, and "[t]o determine whether a particular task is legislative, executive or judicial for purposes of extending immunity, the *function* performed by the defendant officer, and not his or her title, is determinative." *Sablan*, 4 N.M.I. at 359 (emphasis added, *citing Forrester v. White*, 484 U.S. 219, 227, 108 S. Ct. 538, 544, 98 L. Ed. 2d 555, 565 (1988); *Terry v. Bobb*, 827 F. Supp. 366, 368-69 (E.D.Va. 1993)). The U.S. Supreme Court has recognized that a governor's signing or vetoing of a bill is an act that is part of the legislative process and therefore absolutely immune from suit. *See Smiley v. Holm*, 285 U.S. 355, 373-73, 52 S. Ct. 397, 401, 76 L. Ed. 795, 803 (1932).

In this case, the Gaming Commission filed this lawsuit against the Tinian Delegation solely because the Tinian Delegation proposed and voted in favor of House Local Bill 14-12, which purported to amend the Revised Tinian Casino Gaming Control Act of 1989. The Gaming Commission included the Governor in this lawsuit because he signed House Local Bill 14-12 into law, making it Tinian Local Law 14-1. The Gaming Commission contends that the law enacted by the Respondents is *unconstitutional*, and that by enacting it, the Respondents have acted outside the bounds of their constitutionally permissible authority. However, this Court finds that the action complained of, *i.e.*, the enactment of a law, is *per se* legislative in nature, and that their conduct is therefore impervious to suit. Accordingly, this Court concludes that the Tinian Delegation is entitled to absolute legislative immunity under Article II, Sections 12 and 6 of the Commonwealth Constitution. Furthermore, this Court concludes that legislative immunity in this case extends to Governor Babauta and that he is, therefore, entitled to absolute immunity as well.

The Gaming Commission cites to several CNMI cases to support its contention that legislative immunity does not bar actions for declaratory judgment against public officials. However, it is telling that none of those cases involved challenges to *legislative* actions taken by a public official.[5]

In *Pangelinan v. Commonwealth*, 2 CR 1148 (Dist. Ct. App. Div. 1987), a taxpayer successfully sued the Commonwealth Legislature to enjoin it from *expending sums* for the legislators' individual salaries in excess of the ceiling amount specified by a constitutional amendment. In *Lizama v. Rios*, 2 CR 568 (Dist. Ct. 1986), the Mayor of Saipan was sued for conduct regarding the unlawful *expenditure of public funds*. In *Mafnas v. Commonwealth*, 2 N.M.I. 248 (1991), a petitioner sought to enjoin a judge of the Superior Court, *alleging that he did not legally hold the office* of Presiding Judge. In *United States ex rel. Richards v. De Leon Guerrero*, Misc. No. 92-00001, 1992 U.S. Dist. LEXIS 12936 (D.C. N.M.I. July 24, 1992), the Governor was sued to compel or enjoin *the enforcement of CNMI laws*. All of the cases cited by the Gaming Commission on this point represent instances in which an official was enjoined to prohibit or enforce an *executive act* that was *not* protected by legislative immunity. The enactment of Tinian Local Law 14-1, by the Tinian Delegation and the Governor, on the other hand, falls squarely within the

[5] As for the non-CNMI cases cited by the Gaming Commission, only two involved challenges to a legislative act, and those cases are both factually and legally distinguished from this case. The District Court case of *Saffioti v. Wilson*, 392 F. Supp. 1335 (S.D.N.Y. 1975), concerned a governor's unchecked veto power of a "private" bill that might have deprived the plaintiff only of a right or privilege protected by the Fourteenth Amendment to the U.S. Constitution. In this case, the Gaming Commission has not claimed any such protected right or privilege. In fact, the *Saffioti* Court itself recognized the peculiar factual setting of the case, holding that "the qualified immunity traditionally accorded to executive officers, *as well as the doctrine of legislative immunity*, will serve to bar any recovery in almost all cases of this sort." *Id*. at 1343, n.10 (emphasis added).

In the case of *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992), the Kentucky Supreme Court considered whether it could hear a case against members of the Kentucky state Senate seeking a declaration that a Senate rule was unconstitutional. Although the *Philpot* Court ultimately dismissed the case as moot, it determined that legislative actions could be reviewed by the courts to determine whether they met a constitutional "minimum." *Id*. at 494. Based on the precedent of *Sablan v. Tenorio*, 4 N.M.I. 351 (19916), as well as the host of U.S. Supreme Court precedents addressed above, this Court disagrees with the *Philpot* and *Saffioti* decisions, to the extent that they conflict with the absolute nature of legislative immunity as it is recognized in those cases.

ordinary function of *legislating*, which the Respondents are constitutionally empowered to do.

V. Conclusion

The Tinian Delegation and the Governor enacted Tinian Local Law 14-1 pursuant to their specific constitutional authority to enact laws. Were the Court to permit a case that solely contested the *act of legislating* to go forward, it would infringe upon the constitutionally-mandated powers of the legislative branch, hindering the legislative process as a whole, and interfering with the democratic process itself. Such a precedent would also likely result in a flood of litigation with each legislative session, straining the resources of our judiciary. If such a legislative act was an abuse of the Respondents' legislative powers, then, as the United States Supreme Court observed, "the ultimate check on legislative abuse [is] the electoral process . . . ." [1] The applicable case precedent, as well as sound policy considerations, dictate that the Tinian Delegation and the Governor be immunized from suit for their legislative acts. For the foregoing reasons, the Motions to Dismiss of Respondents, Governor Juan Nekai Babauta and the Tinian Legislative Delegation are GRANTED, and this case is dismissed with prejudice. The parties shall each bear their own attorney fees and costs.

SO ORDERED this 18th day of October 2004.

/s/_____
RAMONA V. MANGLONA, Associate Judge

[6] *Bogan v. Scott-Harris*, 523 U.S. 44, 53, 118 S. Ct. 966, 972, 140 L. Ed. 2d 79, 88 (1998).