



By Order of the Court, Associate Judge JOSEPH N. CAMACHO

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FOR PUBLICATION



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

LAWRENCE M. FLEMING,)	CIVIL CASE NO. 14-0147
)	
Plaintiff,)	
)	ORDER DENYING THE
v.)	COMMONWEALTH’S MOTION TO
)	DISMISS AND GRANTING THE
OFFICE OF THE MAYOR OF SAIPAN,)	MAYOR’S OFFICE’S MOTION TO
and COMMONWEALTH OF THE)	DISMISS RE: GOVERNMENT
NORTHERN MARIANA ISLANDS,)	LIABILITY ACT (7 CMC §§ 2201-10)
)	
Defendants.)	
)	
)	

I. INTRODUCTION

These matters were heard on December 16, 2014 at 1:30 p.m. in Courtroom 220A. Plaintiff Lawrence M. Fleming was represented by Joseph E. Horey. Defendant Office of the Mayor of Saipan (the “Mayor’s Office”) was represented by Samuel I. Mok. The Commonwealth of the Northern Mariana Islands, which has also substituted in for the Estate of Donald G. Flores (the “Estate”), was represented by Assistant Attorney General David Lochabay.

Two motions were at issue: (1) The Commonwealth’s motion to dismiss for lack of jurisdiction and failure to state a claim; and (2) The Mayors Office’s motion to dismiss for lack of jurisdiction. Both motions concern the legal nature of the Mayor’s Office, including its relationship to the Commonwealth, and whether or how the Government Liability Act of 1983, 7 CMC §§ 2201-10, (“the Act”) applies to it.

1 Based on the filings, oral arguments and applicable law, the Court finds that employees of
2 the Mayor's Office are employees of the Commonwealth for the purposes of the Government
3 Liability Act. Thus, the Court denies the Commonwealth's motion to dismiss, grants the Mayor's
4 Office's motion to dismiss, and dismisses the Mayor's Office as a defendant to this action.

5 **II. BACKGROUND AND PROCEDURAL HISTORY**

6 The Commonwealth filed its motion on August 13, 2014, requesting dismissal for two
7 reasons. The Commonwealth's first argument is that the claims should be dismissed because
8 7 CMC § 2202(b) requires that any negligence claim against the Commonwealth or an employee of
9 the Commonwealth acting in the scope of his duties must be presented to the Attorney General
10 before being filed. The Commonwealth argues that when Plaintiff presented his claim to the
11 Commonwealth, he stated that the claim was against the "Mayor's Office," and thus, no claim
12 against the Commonwealth was ever presented. This argument depends on a finding that employees
13 of the Mayor's Office are not employees of the Commonwealth under the Government Liability
14 Act, so the Commonwealth sets forth a legal history of the Mayor's Office as an entity to support
15 that contention. The Commonwealth argues that because the presentment requirement is
16 jurisdictional, this Court does not have jurisdiction to now hear Plaintiff's claim against the
17 Commonwealth.

18 The Commonwealth's second argument is that Plaintiff failed to state a claim against the
19 Commonwealth. The Commonwealth argues that Plaintiff's use of the term "Defendant" to refer to
20 all listed defendants collectively is fatal to his claim against the Commonwealth.

21 The Commonwealth's motion to dismiss was opposed by Plaintiff and the Estate, who filed
22 oppositions on September 12, 2014 and September 15, 2014 respectively. The Plaintiff argues that
23 the Commonwealth is the only proper defendant in this case. Plaintiff argues that the employees
24

1 covered under the Act include elected officials and employees of any “public entity,”¹ and that the
2 Mayor’s Office is a public entity pursuant to 1 CMC § 5101.² The Plaintiff argues that the Act
3 would apply to the Mayor’s Office employees, whether or not Saipan is a chartered municipality.
4 The Estate argued that the Mayor’s Office is not a chartered municipality, thus can only sue or be
5 sued through lawsuits against the Commonwealth.

6 On September 22, 2014, the Commonwealth filed a reply agreeing that elected officials and
7 employees of public entities are employees of the Commonwealth under the Act. Still, the
8 Commonwealth argued that because, based on its municipal history, Saipan should be considered a
9 municipality, the Mayor’s Office, the Mayor and the Mayor’s staff are not employees under the
10 Act.

11 However, on October 17, 2014, the Commonwealth filed a Notice of Substitution and
12 Motion for Order, reversing position on the Act’s applicability to the Mayor of Saipan. The
13 Commonwealth requested to substitute in for the Estate, conceding that “the late mayor was an
14 elected official of a public entity” pursuant to 7 CMC § 2201(b)(4), and that a suit against the
15 Commonwealth is the “‘exclusive remedy’ for persons seeking money damages by reason of
16 actions of employees of public entities acting within the scope of their employment” under 7 CMC
17 § 2208(b)(1). Commonwealth’s Notice and Motion at 2-3.

18 On October 28, 2014, the Court held a hearing concerning the Commonwealth’s motion to
19 substitute itself for the Estate and dismiss the claim against the Estate. The Court granted this
20 motion and dismissed all claims against the Estate. Nov. 20, 2014 Order at 1. Also on October 28,
21 2014, the Mayor’s Office filed a motion to dismiss based on lack of subject matter jurisdiction. The

23 ¹ 7 CMC § 2201(b)(4) states: “‘Employee’ means an officer, elected or appointed official . . . or servant of a public
entity.”

24 ² 1 CMC § 5101 states: “There are in the Commonwealth government agencies of local government the offices of the
mayors, composed of the duly-elected mayors of Saipan, Rota, Tinian and Aguiguan, and the islands north of Saipan.”

1 Mayor's Office argues that it is covered by the Act, and as such, a claim against the Commonwealth
2 is the exclusive remedy for Plaintiff.

3 On November 20, 2014, Plaintiff and the Commonwealth responded to the Mayor's Office's
4 motion. Plaintiff reiterates its earlier arguments that the Commonwealth is the proper defendant.
5 Plaintiff argues, in the alternative, that if the Court cannot resolve these motions as a matter of
6 statutory construction, the Court should consider evidence of the type reviewed in *Atalig v. Rota*
7 *Municipal Council*, Civ. No. 04-0012 (NMI Super. Ct. May 9, 2005) (Findings of Fact and
8 Conclusions of Law at 4), concerning how the employees' personnel actions were processed and
9 how they were paid. The Commonwealth opposed the Mayor's Office Motion, arguing that it was
10 untimely and reiterating its arguments that the Mayor's Office is a municipality and not part of the
11 Commonwealth for the purposes of the Act.³ The Commonwealth also argues that the Mayor's
12 Office should be judicially estopped from arguing that it is not a chartered municipality because the
13 "Municipality of Saipan" was allowed to intervene in a 1994 civil action concerning competing
14 bingo licenses, and because the Mayor's Office hangs a sign on its building that includes the words
15 "Municipality of Saipan." *See Island Amusement Corp. v. Western Investors, Inc.* Civ. No. 94-0166
16 (NMI Super. Ct. Dec. 15, 1994) (Decision and Order).

17 The Mayor's Office filed a reply on December 4, 2014, arguing that issues of subject matter
18 jurisdiction may be raised at any time, pointing out inconsistencies in the Commonwealth's position
19 that the Act applies to the Mayor, but not the agency of the Mayor's Office, and noting that the
20 applicability of the Act does not depend on whether an agency can sue or be sued. *See 7 CMC*
21 *§ 2208(a)*.

22 _____
23 ³ During oral arguments, the Commonwealth clarified that it has given up the position that employees of the Mayor's
24 Office are not covered under the Government Liability Act, even though that position was articulated in the
Commonwealth's November 20, 2014 "Opposition to Mayor's Cross-motion to dismiss and Reply to Opposition to
CNMI Motion to Dismiss."

1 The parties presented their arguments again during the hearing on December 16, 2014.
2 Additionally, the Commonwealth asked the Court to treat the pending motions as motions for
3 summary judgment, given the attachment of exhibits by the Plaintiff, and also requested leave to
4 file additional evidence. The Court denied both requests, noting that the Plaintiff's exhibits only
5 supports an alternative argument, and that the Court would proceed to determine the issues raised in
6 the pending motions as matters of law.

7 **III. COMMONWEALTH'S MOTION TO DISMISS**

8 The Commonwealth moves to dismiss Plaintiff's claims against it arguing that the Court
9 lacks subject matter jurisdiction because, naming only the "Office of the Mayor" as the entity by
10 which the negligent employees were employed, the claim was not properly presented to the
11 Attorney General before being filed. The Commonwealth also argues that Plaintiff failed to state a
12 claim against the Commonwealth because the Complaint referred to all named defendants
13 collectively as "Defendant." However, because the Commonwealth cites no legal authority to
14 support this second argument, it is deemed waived, and will not be considered by the Court. *Atalig*
15 *v. Mobil*, 2013 MP 11, ¶ 32.

16 **A. Legal Standard: Government Liability Act**

17 The statute at issue in this case is the Government Liability Act of 1983, 7 CMC §§ 2201-
18 10, (the "Act), last amended in 2006 by the Commonwealth Employees' Liability Reform and Tort
19 Compensation Act. The Act is modeled on the Federal Tort Claims Act, the purpose of which is to
20 "protect [government] employees from personal liability for common law torts committed within
21 the scope of their employment." 102 Stat. 4563, § 2(b) (1988); *see also* PL 15-22, § 2. Under the
22 Act, "[t]he Commonwealth government shall be liable in tort for damages arising from the
23 negligent acts of employees of the Commonwealth acting within the scope of their office or
24 employment." 7 CMC § 2202(a). To facilitate the efficient settlement of claims and to avoid the

1 expense of litigation, all claims against the Commonwealth must first be presented to the Attorney
2 General before they are filed. 7 CMC § 2202(b); PL 15-22, § 2. This presentment requirement is
3 jurisdictional. *Jerves v. United States*, 966 F2d. 517, 519 (9th Cir. 1992).

4 The Act does not define the term “Commonwealth,” but uses the term “public entity” in
5 defining the employees whose negligence is covered by the Act: “‘Employee’ means an officer,
6 elected or appointed official, exempted service, excepted service, classified or unclassified
7 employee, or servant of a public entity, whether or not compensated, but does not include an
8 independent contractor of the Commonwealth.” 7 CMC § 2201(b)(4). And while there is no specific
9 definition for the term “public entity,” the Act, applies broadly to governmental agencies:

10 The authority of any Commonwealth agency to sue or be sued in its own name shall
11 not be construed to authorize suits against such agency or its employees on claims
12 which are cognizable under this Title and the remedies provided by this Title in such
cases shall be exclusive for claims against all branches of the Commonwealth
government.

13 7 CMC § 2208(a). The Act’s limitation on liability also extends to “public corporations, boards,
14 and commissions organized and existing under and pursuant to the laws of the Commonwealth.”

15 7 CMC § 2211(a).

16 B. Legal Standard: Status of the Mayor’s Office

17 Before the Commonwealth was established, Saipan was a chartered municipality under the
18 Trust Territory of the Pacific Islands, but that status was dissolved under the original
19 Commonwealth Constitution.⁴ The original Commonwealth Constitution still provided for the
20 election of mayors for Rota, Saipan, Tinian and Aguiuan, and the islands north of Saipan, and set
21 forth mayoral duties such as serving on the governor’s council, reviewing services and
22 appropriations, investigating complaints and conducting hearings on local matters, recommending a

23 _____
24 ⁴ Article VI, Section 6(a) of the original Commonwealth Constitution, ratified in 1977 and enacted in 1978, stated: “The chartered municipality form of local government shall cease to exist on the effective date of this Constitution.”

1 budget, promulgating regulations, and appointing and supervising employees.⁵ In 1986, following
2 the second constitutional convention in 1985, the voters approved Amendment 25, which re-
3 chartered Rota and Tinian and Aguiguan as municipalities, and planned to abolish the position of
4 the mayor of Saipan, replacing that position with precinct commissioners.⁶ The abolition of the
5 office of mayor of Saipan was to take effect in 1990, but in 1987 the voters passed Legislative
6 Initiative 1, which retained the elected office of mayor of Saipan, but did not charter Saipan as a
7 municipality.⁷

8 The current state of the law is that Article VI, Section 2 of the Commonwealth Constitution
9 provides for the election of four mayors, one each for: (1) Rota, (2) Tinian and Aguiguan, (3)
10 Saipan, and (4) the islands north of Saipan. Article VI, Section 3 sets forth the responsibilities and
11 duties of the mayors, and gives the Legislature the power to add to the responsibilities of the mayor.
12 Even though there are four mayors, Article VI, Section 8 establishes only two chartered
13 municipalities: (1) Rota, and (2) Tinian and Aguiguan. Section 8 reads in full:

14 (a) The chartered municipality form of local government on Rota, and, Tinian and
15 Aguiguan, is hereby established. Local taxes paid to the chartered municipal
16 governments of Rota, and, Tinian and Aguiguan, and Saipan may be expended for
17 local public purposes on the island or islands producing those revenues. New
 agencies of local government may not be established without the affirmative vote of
 two-thirds of the persons qualified to vote from the island or islands to be served by
 the proposed agency of local government.

19 ⁵ Article VI, Section 2 of the original Commonwealth Constitution, ratified in 1977 and enacted in 1978, stated: “The
20 qualified voters from Rota, Saipan, Tinian and Aguiguan, and the islands north of Saipan shall elect a mayor for each
island or group of islands.” The duties of the mayor were set forth in Article VI, subsections 2(a)-(h).

21 ⁶ Under Amendment 25, Article VI, Section 2(c) of the Commonwealth Constitution stated: “The office of the mayor
22 for Saipan shall remain as provided in this Constitution prior to the effective date of this provision until the second
Monday of January, 1990, at which time, it shall cease to exist and the offices of precinct commissioners shall be
established as provided in this article.” Under Amendment 25, Article VI, Section 8 of the Commonwealth
Constitution stated: “The chartered municipality form of local government on Rota, and Tinian and Aguiguan, is hereby
established.”

23 ⁷ The amendments made by Legislative Initiative 1 are found in the current version of Article VI of the Commonwealth
24 Constitution. The following language accompanied the text of the proposed constitutional amendment: “The Fifth
Northern Marianas Commonwealth Legislature does hereby approve the following Initiative be placed on the ballot on
the November, 1987 General Election so that the people are given an opportunity to express their true feelings
concerning the abolition of the Saipan Mayor’s Office[.]” PL 5-49, § 3.

1 NMI Const. art. VI, § 8.

2 The Commonwealth Supreme Court has not addressed the issue of whether Saipan is a
3 chartered municipality, able to sue and be sued. However, in 2003, the Commonwealth Supreme
4 Court considered the following certified question from the U.S. District Court for the Northern
5 Mariana Islands: “Is the ‘Municipality of Tinian and Aguiguan’ a chartered municipality such that
6 it can sue and be sued?” *United States v. Borja*, 2003 MP 8 ¶ 2. In *Borja*, the municipality argued
7 that it was never chartered by legislative enactment, thus could not be sued. *Id.* ¶ 5. The Supreme
8 Court disagreed, finding that Article VI, Section 8 of the Constitution is self-executing. *Id.* ¶ 9. In
9 making this decision the Supreme Court looked to (1) the plain language of Section 8 (“is hereby
10 established”); (2) the fact that no further charter was enacted by the legislature; and (3) the other
11 provisions of Article VI which define the powers of the chartered municipality of Tinian and
12 Aguiguan. *Id.* ¶¶ 9, 12, 15.

13 Additionally, the Commonwealth Legislature has enacted the Mayors Organization Act of
14 1978, 1 CMC §§ 5101-10. 1 CMC § 5101 states, “There are in the Commonwealth government as
15 agencies of local government the offices of the mayors, composed of the duly-elected mayors of
16 Saipan, Rota, Tinian and Aguiguan, and the islands north of Saipan.” This statute was enacted in
17 1978, before Rota and Tinian and Aguiguan were chartered as municipalities.

18 C. Discussion

19 The Court begins its analysis by noting that all parties agree that the Mayor of Saipan is an
20 employee of the Commonwealth under the Government Liability Act. The remaining issue before
21 the Court is whether other employees of the Mayor’s Office are also employees of the
22 Commonwealth, or if they are employees of a separate entity, a chartered municipality.

1 First, the Court considers whether judicial estoppel prevents the Mayor's Office from taking
2 the position that there is no chartered municipality of Saipan. The Commonwealth argues that the
3 Court should bar the Mayor's Office from taking this position because the "Municipality of Saipan"
4 was allowed to intervene in a 1994 civil action before the Superior Court of the Northern Mariana
5 Islands. *See Island Amusement Corp. v. Western Investors, Inc.* Civ. No. 94-0166 (NMI Super. Ct.
6 Dec. 15, 1994) (Decision and Order at 3).

7 The doctrine of judicial estoppel allows the Court to bar a party from intentionally taking
8 inconsistent positions to obtain an unfair litigation advantage. *Saipan Lau Lau Dev., Inc. v.*
9 *Superior Court*, 2000 MP 16 ¶¶ 18-20. In *Island Amusement*, the court considered whether the term
10 "Commonwealth law" in Article XXI of the Commonwealth Constitution included local gambling
11 ordinances adopted during the Trust Territory period. *Id.* at 5-8. This issue arose because bingo
12 licenses were being issued by both the Saipan Mayor and the Department of Commerce and Labor,
13 and the Court had to determine whether the Mayor still had control over licensing the bingo
14 industry. *Id.* at 2.

15 It is not clear that the position taken by the Saipan Mayor in the *Island Amusement* case
16 conflicts with the position taken in the case at hand. The *Island Amusement* court allowed the
17 Mayor to enter the litigation, but that ruling is not discussed in the Decision and Order cited by the
18 Commonwealth. *Id.* at 3. The most that can be gathered from the Decision and Order in the *Island*
19 *Amusement* case about the Mayor's position is that the Mayor wanted to be a party to the action.
20 There is no indication that the court ruled on, or the parties addressed, the legal status of the
21 Mayor's Office as an entity. And the *Island Amusement* case certainly did not address the
22 applicability of the Government Liability Act to negligence of employees of the Mayor. Further, it
23 is not inconsistent for the Mayor's Office to take both the position that it can sue and be sued in
24 certain situations, and also the position that employees of the Mayor's Office should be considered

1 employees under the Government Liability Act, because an agency’s ability to sue or be sued is not
2 dispositive to the applicability of the Act. 7 CMC § 2208(a).

3 Because the position taken in the *Island Amusement* case is not clearly inconsistent with the
4 position of the Mayor’s Office in the current case, the Court finds that an application of the doctrine
5 of judicial estoppel would be inappropriate.

6 Having determined that the position of the Mayor’s Office is not barred by judicial estoppel,
7 the Court considers the central issue of whether the allegedly negligent employees are employees of
8 the Commonwealth, or are employees of the chartered municipality of Saipan. The Court finds that,
9 under the plain language of the Constitution, there is no chartered municipality of Saipan. *See* NMI
10 Const. art. VI, § 8. While the Constitution provides for a mayor of Saipan, it does not establish a
11 chartered municipality of Saipan. NMI Const. art. VI, §§ 2, 3, 8.

12 This finding is consistent with the Supreme Court’s holding in *Borja*, that Tinian and
13 Aguiguan is a chartered municipality under the Commonwealth Constitution. *Borja*, 2003 MP 8
14 ¶ 22. In *Borja*, the Commonwealth Supreme Court “freely admit[ted]” that the constitutional
15 method of chartering municipalities employed in the Commonwealth is rare. *Id.* ¶ 13. Although the
16 analysis in *Borja* concerned the chartered municipality of Tinian and Aguiguan, the Supreme Court
17 made it clear that Rota was also a chartered municipality under the Constitution. *Id.* ¶¶ 9, 13-14.
18 Nothing in the Supreme Court’s analysis in *Borja* suggests that this Court should read the plain
19 language of Article VI as establishing a chartered municipality of Saipan, when the phrase that
20 made the charters for Rota and Tinian and Aguiguan self-executing only applies to those two
21 municipalities. *See* NMI Const. art. VI, § 8; *and Borja*, 2003 MP 8 ¶ 9.

22 The finding that there is no chartered municipality of Saipan is also consistent with the
23 history of the legal status of Saipan vis-à-vis the Commonwealth. Only during the Trust Territory
24 period was Saipan a chartered municipality. Since that time, there has consistently been a Mayor of

1 a procedural issue, arguing that the Mayor's Office's motion was untimely as it was filed well after
2 the Mayor's Office filed an Answer.

3 This Court clearly has subject matter jurisdiction, or the authority to adjudicate, claims
4 arising under the Government Liability Act so long as they are properly presented to the Attorney
5 General before being filed. 7 CMC § 2202(b); 1 CMC § 3202; *see also* Restatement (Second) of
6 Judgments, § 11 ("A judgment may properly be rendered against a party only if the court has
7 authority to adjudicate the type of controversy involved in the action.").

8 The question raised by the Mayor's Office is not whether the Court (rather than some other
9 adjudicatory body) has the authority to hear this claim, but whether a claim may be properly
10 brought against the Mayor's Office as a defendant. Even so, the Court does not find the timing of
11 the Mayor's Office's motion to be dispositive, because a motion to dismiss based on failure to state
12 a proper claim may also be made by motion for judgment on the pleadings. NMI R. Civ. P.
13 12(h)(2). And a motion for judgment on the pleadings may be made "within such time as not to
14 delay the trial." NMI R. Civ. P. 12(c). The Mayor's Office's motion was timely made because it
15 was made in time to be heard far before trial, and was heard at the same time as the
16 Commonwealth's motion to dismiss, so there was no resultant delay to the proceedings in this case.

17 The Court's above analysis concerning the legal status of the Mayor's Office also applies to
18 the issue of whether it is a proper defendant in this case. Having found that the Commonwealth is
19 the proper defendant in this case, it is clear that a claim may not also be brought against the
20 Mayor's Office stemming from the same subject matter. 7 CMC § 2208(b)(1); *see also* 7 CMC
21 § 2208(a) (indicating that agencies may not be sued separately from the Commonwealth).

22 Accordingly the Mayor's Office's motion to dismiss is granted.
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V. CONCLUSION

Because there is no chartered municipality of Saipan, employees of the Mayor’s Office are employees of the Commonwealth for the purposes of the Government Liability Act. This claim was presented to the Attorney General, and claims against the Commonwealth are the exclusive remedy for damages caused by the negligence of Commonwealth employees acting within the scope of their employment. 7 CMC §§ 2202, 2208. Thus, the Commonwealth is the only proper defendant in this case and the Court issues the following orders:

- 1. The Commonwealth’s motion to dismiss is DENIED;
- 2. The Mayor’s Office’s motion to dismiss is GRANTED; and
- 3. All claims against the “Office of the Mayor of Saipan” are DISMISSED and the “Office of the Mayor of Saipan” is DISMISSED as a Defendant to this action.

IT IS SO ORDERED this 22nd day of December, 2014.

/s/ _____
JOSEPH N. CAMACHO
Associate Judge