



By Order of the Court, DENIED *Judge Kenneth L. Govendo*

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

NORTHERN MARIANA ISLANDS
SETTLEMENT FUND

Plaintiff,

v.

COMMONWEALTH UTILITIES
CORPORATION,

Defendant,

COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Intervenor.

CIVIL ACTION NO.: 11-0114

ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

THIS MATTER came before the Court on March 26, 2018 at 1:30 p.m. in Multipurpose Room 2 on Plaintiff Northern Mariana Islands Settlement Fund's Motion for Summary Judgment. Attorney Nicole M. Torres-Ripple was present and represented the Plaintiff, Northern Mariana Islands Settlement Fund ("Plaintiff"). Joyce Tang, trustee for the Plaintiff, was also present. Attorney James S. Sirok was present and represented Defendant Commonwealth Utilities Corporation ["CUC"]. Matthew Pugh, Attorney for the Government, was not present and has subsequently sought removal from this case citing Intervenor's desire to no longer take a position in the instant case.

1 **II. BACKGROUND**

2 This case began May 5, 2011 when the Plaintiff, the Northern Mariana Islands Settlement
3 Fund (“Plaintiff” or “the Fund”), filed a Complaint against Defendant CUC for non-payment of
4 employer contributions. The Fund was established as a retirement fund to provide retirement
5 security and other benefits to CNMI Government employees, including a pension system.

6 Plaintiff alleges that CUC is delinquent in its employer contributions by a sum to be proven
7 at trial. Defendant CUC is required by law to provide employee and employer contributions to the
8 Fund for all CUC employees. 1 §§ CMC 8361 & 8362. Pursuant to Public Law 16-2 § 9, Defendant
9 is required to pay a statutory penalty on its delinquent contributions. Plaintiff claims Defendant
10 owes the Fund a large sum for deficient employer contributions. Additionally, Plaintiff claims the
11 resulting penalties and economic damages for lost opportunity caused by the deficient employer
12 contributions.

13 On December 28, 2011, Plaintiff filed a Motion for Partial Summary Judgment as to the
14 constitutionality of Public Law 16-2 and Defendant’s reduced employer contribution rate for fiscal
15 year 2008. The Fund asserts Defendant is severely delinquent in its employer contributions to the
16 Commonwealth’s Defined Benefit Plan. The Fund argues Defendant has incurred, but not paid,
17 statutory penalties and interest, and is liable to the Fund for lost opportunity costs because of the
18 Fund’s inability to invest the unremitted employer contributions. The ultimate determination of the
19 amount due in this case rests on the constitutionality of Public Law 16-2.

20 In its Motion for Summary Judgment filed December 28, 2011, Plaintiff argues that PL 16-2
21 is unconstitutional because it unlawfully diminishes and impairs the accrued benefits of the Fund in
22 violation of Article II, Section 20(a) of the Commonwealth Constitution. The Constitution of the
23 Commonwealth of the Northern Mariana Islands provides that accrued pension benefits shall be
24 neither diminished nor impaired.

1 Plaintiff argues PL 16-2 is unconstitutional because essentially, there is a statutorily created
2 contract between CUC and the Fund, which provides that the government “shall make contributions
3 to the fund each year on an actuarially funded basis.” 1 CMC § 8362(a) . By rendering services and
4 making contributions, an employee acquires a limited vested right to pension benefits which may
5 not be eliminated or substantially changed by unilateral action of the governmental employer to the
6 detriment of the member. *Pub. Employees’ Retirement Bd. v. Washoe Co.*, 615 P.2d 972, 974
7 (1980). Thus, Plaintiff argues, Fund members’ accrued and vested benefits include the right to have
8 the pension funded on a current and actuarially sound basis. Accordingly, the enactment of a law
9 reducing employer contributions to an amount less than that determined by the Fund’s Board upon
10 the recommendation of an actuary, is *per se* unconstitutional, according to Plaintiff. Plaintiff asserts
11 that PL 16-2 thus violates the contracts clause of the U.S. and Commonwealth Constitutions. ¹

12 Plaintiff argues there is a contractual right to an actuarially sound pension; the contractual
13 right to an actuarially sound retirement fund has been impaired; the impairment is substantial, and;
14 neither the Government nor CUC can show the impairment is both reasonable and necessary.²

15 On February 20, 2012, Defendant CUC filed its Opposition to Plaintiff’s Motion for
16 Summary Judgment. Defendant CUC denies that it owes Plaintiff the money it seeks and asserts
17 that CUC was justified in relying on PL 16-2. CUC alleges that PL 16-2 was the CNMI

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19 ¹ Article I, section 10 of the United States Constitution provides that: “[n]o state shall . . . pass any . . . law impairing the
20 obligation of contracts.” The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political
21 Union with the United States Section 501 makes the United States Contracts Clause applicable to the Commonwealth.
22 See *Matsunaga v. Matsunaga*, 2006 MP 25 ¶21. Similarly, the Commonwealth Constitution sets forth in Article I,
23 section 1 that: “no law shall be made that is a bill of attainder, an ex post facto law, a law impairing the obligation of
24 contracts, or a law prohibiting the traditional art of healing.”

² In a contracts clause analysis, the threshold inquiry is whether the state law has caused a substantial impairment of a
contractual relationship. Within this threshold inquiry three components must be considered: (i) whether there is a
contractual relationship; (ii) whether a change in law impairs that contractual relationship; and (iii) whether the
impairment is substantial.” *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 117 L. Ed. 328, 112 S. Ct. 1105 (1992)
quoting *Allied Structural Steel Co. v. Spannaus*, 438, U.S. 234, 244 (1978). An impairment is substantial if it deprives
a party of an important right, thwarts performance of an essential term, defeats the expectations of the parties, or alters a
financial term. *Id.*

1 Government's response to address a CNMI wide emergency that was necessary to ensure that CUC
2 would be able to avert an economic, health, and welfare disaster. Any harm created by this law,
3 CUC claims, should be addressed to its creator, the CNMI Government. CUC requests, in the
4 alternative, that if the Court were to find PL 16-2 unconstitutional, that such finding be held non-
5 retroactive based on CUC's justified reliance on the law and the Plaintiff's delay in the filing of this
6 action and its subsequent motion.

7 Additionally, CUC complains there is nothing in the complaint that could have given
8 CUC's prior counsel notice that PL 16-2 would be attacked as unconstitutional. Defendant CUC
9 argues that the claims brought in Plaintiff's Summary Judgment Motion cannot be raised for the
10 first time via a summary judgment motion; they should have been raised in the complaint. *See*
11 *Caribbean Healthways, Inc. v. James*, 2011 WL 3903390, at 4 (V.I. 2011). This is especially true in
12 a constitutional challenge—it must be set out in a separate cause of action. *See Aguiar v. Russo*,
13 2009 WL 1137916, at 3 (C. Miss. 2009).

14 The Contract Clause, Defendant CUC argues, is not meant as an absolute bar to state
15 regulations that impair contractual relationships. "Its prohibition must be accommodated to the
16 inherent police power of the State to safeguard the vital interests of its people," which is exactly
17 what CUC claims occurred in this case. There are five factors in determining the validity of
18 contractual limitations. The factors include whether: the State declared an emergency need; the law
19 was enacted to protect a basic societal interest; the relief was appropriately tailored to the
20 emergency, the conditions were unreasonable; and the legislature was limited in its duration.

21 CUC submitted for the Court's review the declaration of Antonio S. Muna, who attests to
22 the great need for the law in question. CUC does not contest that a contract is involved here, that it
23 was impaired, or that the impairment was substantial. CUC's focus is that PL 16-2, as it pertained to
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1 CUC, was “reasonable and necessary to serve an important public purpose.” *U.S. Trust Co. of N.Y.*
2 *v. New Jersey*, 431 U.S. 1 (1977).

3 Finally, CUC argues that the doctrine of non-retroactivity applies to this case. CUC
4 suggests, if this Court does not find PL 16-2 unconstitutional, that it order Plaintiff to amend his
5 complaint and include the CNMI Government and the Attorney General as defendants. CUC points
6 out that although CUC’s contributions under PL 16-2 were reduced to 11% for one year, the
7 remaining 26% obligation does not go away since the Central Government is still on the hook as the
8 guarantor.³ CUC argues that the court is missing a “crucial player” to the lawsuit, because the
9 legislature created the law in question and must be the one to defend the law. In other words, the
10 CNMI Government is a necessary party. On May 10, 2012, the CNMI Government entered the case
11 as an Intervenor, but on March 26, 2018, the Government expressed its desire to pull out of the
12 case.

13 CNMI, as Intervenor with a claimed interest in the constitutionality of PL 16-2, provides the
14 Court a lengthy discussion of how it and CUC struggled for funding to provide basic human health
15 and safety amenities to the public—such things as water and power. CNMI discusses the many
16 ways the government tried, and failed to raise enough money. Thus, CNMI was forced to enact PL
17 16-2, but it did so within the required parameters of the law, with reasonable limitations, and only
18 for public health in a state of emergency. CNMI argues that summary judgment is not appropriate
19 because Plaintiff has failed to meet its initial burden. Where CUC conceded that a contract is
20 involved here, that it was impaired, and that the impairment was substantial, Defendant CNMI
21 briefly contests each of these points. CNMI states that contractual limitations are sometimes

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24 ³ See 1 CMC § 8385. (“It is the intention of this part that the payment of required contributions by any government
entity shall be an obligation of the government.”)

1 necessary—and legal—when there is an emergency and parameters are in place to ensure fairness,
2 time restrictions, and that the measure is almost one of last resort.

3 III. LEGAL STANDARD

4 Rule 56(a) of the Federal Rules of Civil Procedure, states that “[t]he court shall grant
5 summary judgment if the movant shows that there is no genuine dispute as to any material fact and
6 the movant is entitled to judgment as a matter of law.” *See Com. R. Civ. Pro. 56(c)*; *see also*
7 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In bringing a summary judgment motion, the
8 “moving party bears the ‘initial and ultimate’ burden of establishing its entitlement to summary
9 judgment.” *Santos v. Santos*, 4 N.M.I. 206, 210 (1995) (citation omitted). The moving party must
10 identify the pleadings, depositions, affidavits, or other evidence that it “believes demonstrates the
11 absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see*
12 *also Furuoka v. Dai-Ichi Hotel*, 2002 MP 5 ¶ 23 (discussing the application of *Celotex* in the
13 Commonwealth). “The burden of establishing the nonexistence of a ‘genuine issue’ is on the party
14 moving for summary judgment.” *Celotex*, 477 U.S. at 330 (citations omitted).

15 The moving party has the burden of demonstrating the absence of a genuine issue of material
16 fact for trial. *Id.* At 257. “If the party moving for summary judgment meets its initial burden of
17 identifying for the court those portions of the material on file that it believes demonstrates the absence
18 of any genuine issues of material fact,” the burden of production shifts and “the non moving party
19 must set forth, by affidavit or as otherwise provided in Rule 56, ‘specific facts showing that there is a
20 genuine issue [of material facts] for trial.’” *T.W. Electric Service, Inc. v. Pacific Elec. Contractors*
21 *Ass’n.*, 809 F. 2d 626, 630 (9th Cir. 1987) (quoting *Fed. R. Civ. P. 56(e)*). Genuine factual issues are
22 those for which the evidence is such that “a reasonable jury could return a verdict for the non-moving
23 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). That is, material facts are those
24 which might affect the outcome of the suit under governing law. *See id.* In ruling on summary

1 judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s]
2 whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994)
3 (*internal citations omitted*).

4 When considering a motion for summary judgment, “the trial court must review the
5 evidence and inferences [drawn therefrom] in the light most favorable to the nonmoving party.”
6 *Estate of Mendiola v. Mendiola*, 2 N.M.I. 233, 240 (1991). In judging evidence at the summary
7 judgment stage, the Court does not make credibility determinations or weigh conflicting evidence.
8 The evidence presented by the parties must be admissible. Conclusory or speculative testimony in
9 affidavits and moving papers, however, are insufficient to raise genuine issues of fact and defeat
10 summary judgment. *See Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49 (2d
11 Cir.1985); *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979).

12 Moreover, inferences are not drawn out of the air, and it is the opposing party's obligation to
13 produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen*
14 *Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987).
15 Finally, to demonstrate a genuine issue, the opposing party “must do more than simply show that
16 there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could
17 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’”
18 *Matsushita*, 475 U.S. at 587.

19 IV. DISCUSSION

20 The Plaintiff wants this Court to find Summary Judgment in its favor. Plaintiff wishes this
21 court find that PL 16-2 is unconstitutional, and to apply this ruling retroactively to CUC. In doing
22 so, Plaintiff asks this Court to find that Defendant CUC unlawfully relied on PL 16-2, and therefore
23 hold that CUC must pay the Fund a large sum for deficient employer contributions, penalties, and,
24 additionally, for economic damages for lost opportunity.

1 This case is not ripe for Summary Judgment. First, the Court notes that Plaintiff's original
2 complaint alleged that as of April 29, 2011, Defendant owed \$4,443,433 for deficient employer
3 contributions, penalties, and economic damages. However, at the March 26, 2018 hearing,
4 Plaintiff's counsel did not recognize this amount and instead referred to various charts detailing
5 CUC's delinquent fees. This Court understands that coming up with a number for damages is a
6 complicated process that must be decided at a trial. Second, the Complaint and the Motion for
7 Summary Judgment in this case were both filed in 2011. As the Court made clear in the March 26,
8 2018 hearing, the information contained in the pleadings are out-of-date and must be updated. This
9 case has changed hands many different times, and it has become clear that each new counsel is
10 choosing a new method of arguing this case. Third, Matthew Pugh, Attorney for the Government,
11 was not present at the hearing on the Motion for Summary Judgment and subsequently sought
12 removal from this case citing Intervenor's desire to no longer take a position in the instant case.
13 This Court finds that the Government is a necessary party to the case, and HEREBY DENIES
14 Intervenor Matthew Pugh's Motion for Leave to Withdraw as Counsel.

15 Plaintiff argues that an application of the "undisputed facts" to the law dictates that PL16-2
16 be held unconstitutional, and draws parallels to PL 15-15, which the Court set aside. As its final
17 point, this Court cannot grant summary judgment in Plaintiff's favor because, based on the facts
18 that the Court has in front of it, this Court finds that PL 16-2 differs from PL 15-15 in one
19 imperative way—the more recent law restricting CUC's financial contribution to the Settlement
20 Fund was only for a *limited time period* as authorized by law. PL 16-2—crucially—only limited the
21 reduction in CUC's payments to the Fund for a *period of one year*, and was in response to a state of
22 emergency where residents of Saipan had no or limited access to basic utilities such as power and
23 water. PL 15-15 was for an indefinite period of time.

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1 The Court does not find one way or the other that PL 16-2 is constitutional. It is not required
2 to for purposes of this Motion for Summary Judgment. However, the Court cannot at this time rule
3 that the law was unconstitutional. Defendant CUC and Intervenor CNMI Government have put
4 forth enough facts to defend PL 16-2. The burden of proof is on the moving party—the Plaintiff.
5 Plaintiff’s vague allegation that neither the Government nor CUC can show the impairment is
6 reasonable and necessary is not adequate to warrant summary judgment in its favor.

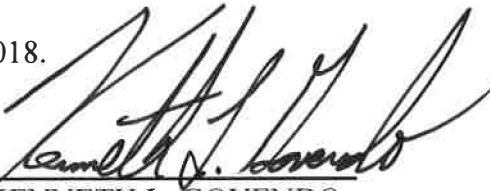
7 Based on all the above, this Court ORDERS that the pleadings be amended to include the
8 updated information, arguments, and complaints in this case. Additionally, the Court advises that
9 the government be listed as a named Defendant in the new pleadings, as the Court considers the
10 government a necessary party in this proceeding.

11 **V. CONCLUSION**

12 It is not appropriate to grant summary judgment in this case. The Plaintiff, as the moving
13 party, has the burden of establishing its entitlement to summary judgment. This Court finds that
14 there are genuine disputes as to material facts, and the Plaintiff has failed to identify the pleadings,
15 depositions, affidavits, or other evidence it believes demonstrates the absence of a genuine issue of
16 material fact. There is simply not enough proof in this case to meet the high standard required for
17 summary judgment.

18 Based on the foregoing, Plaintiff’s Motion for Summary Judgment is hereby **DENIED**.

19
20 **SO ORDERED** this 11th day of April, 2018.

21 
22 KENNETH L. GOVENDO
23 Associate Judge
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