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

PACIFIC MANAGEMENT LIMITED, Plaintiff, v. HONG KONG ENTERTAINMENT (OVERSEAS) INVESTMENTS LTD., Defendant.	)	Civil Action No. 98-907-E **ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO STRIKE AND MOTION FOR RULE 11 SANCTIONS**

On December 2, 1998, this matter came before the Court on Defendant Hong Kong Entertainment LTD.'s (hereinafter "HKE") motion to dismiss or alternatively for summary judgment, Pacific Management Limited's (hereinafter "PML") motion for Rule 11 sanctions, PML's motion to strike HKE's reply to PML's opposition to the motion to dismiss or alternatively for summary judgment and to strike HKE's opposition to PML's Rule 11 motion. The Court having reviewed the pleadings and heard arguments of counsel, now renders its decision.

I. BACKGROUND

In May 1996, PML, a Vanuatu corporation, entered into a management contract ("Management Agreement") with HKE to provide casino management services for the Tinian Casino Hotel. The Tinian Casino Gaming Control Commission approved the Management Agreement and PML as the casino management company. Subsequently, HKE requested that PML create a local corporation to **[p. 2]** perform the casino management services and assign the Management Agreement responsibilities to the new NMI corporation.

In the early part of 1997, PML and HKE requested HKE's attorney, Mr. G. Anthony Long, to form an NMI corporation that could take over PML's management responsibilities under the Management Agreement. As such, Mr. Long incorporated International Casino Management Ltd.

("ICM") pursuant to the NMI laws. ICM obtained a business license and a taxpayer identification number.

PML and HKE learned after ICM's incorporation that neither the casino license held by HKE nor the Management Agreement could be transferred or assigned. Accordingly, PML and HKE canceled their attempt to have ICM perform pursuant to the Management Agreement. PML then assigned the right to receive income from its management services to ICM.

On August 28, 1998, PML filed the instant action against HKE. On September 17, 1998, HKE served and filed a motion to dismiss claiming that PML, as a foreign corporation, could not maintain a proceeding in any Commonwealth court without a Certificate of Authority. At the time HKE filed its motion to dismiss, PML did not have a Certificate of Authority to transact business as a foreign corporation in the CNMI. On October 16, 1998, PML filed its opposition to HKE's motion to dismiss. On November 20, 1998, HKE filed its reply memorandum supporting its motion to dismiss or alternatively for summary judgment.

On October 22, 1998, PML obtained a Certificate of Authority from the Registrar of Corporations and faxed a copy of PML's Certificate of Authority to HKE's counsel. *Declaration of [PML's] Counsel*, para. 5, Dec. 2, 1998. On the same day, PML's counsel made an oral and written request that HKE withdraw its motion to dismiss because PML had obtained a Certificate of Authority. HKE's counsel refused to withdraw the motion.

On November 3, 1998, HKE filed a motion for Rule 11 sanctions after PML's counsel refused to withdraw its motion to dismiss. On November 20, 1998, HKE filed its opposition to PML's motion for Rule 11 sanctions.

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II. ISSUES

1. Whether HKE's reply to PML's opposition to HKE's motion to dismiss and HKE's opposition to PML's Rule 11 motion should be stricken pursuant to Rule 6(d)(1).

2. Whether PML's complaint should be dismissed since PML, as a foreign corporation, did not possess a Certificate of Authority when it instituted the present action, pursuant to 4 CMC § 4642(a).

3. Whether HKE is entitled to summary judgment.

4. Whether the Court should impose Rule 11 sanctions against HKE's counsel for refusing to withdraw HKE's motion to dismiss after he had notice that PML had obtained its Certificate of Authority.

III. ANALYSIS

A. Motion to Strike.

Rule 6(b)(1) provides, in pertinent part, that "[a]ny opposition to the motion shall be filed and served not later than nine calendar days after service of the motion. Any reply to the opposition shall be filed and served not later than six calendar days after service of the opposition."

Here, HKE filed and served its motion to dismiss on September 17, 1998. PML's opposition to HKE's motion to dismiss was filed on October 16, 1998, twenty-nine calendar days after service of HKE's motion and eleven calendar days after receiving a one-week extension from HKE on October 5, 1998. Therefore, PML's opposition was four days late under Rule 6(d)(1).

HKE filed and served its reply to PML's opposition to HKE's motion to dismiss on November 20, 1998. HKE's reply was filed on November 20, 1998, which was twenty-nine days late under Rule 6(d)(1).

PML's motion for Rule 11 sanctions was filed and served on November 3, 1998. HKE filed and served its opposition to PML's motion for Rule 11 sanctions on November 20, 1998, which was eight days late under Rule 6(d)(1).

[p. 4] It appears that both PML and HKE have failed to strictly adhere to Rule 6(d)(1) of the Commonwealth Code of Civil Procedure. If, as urged by PML's counsel, the Court were to adopt the position that strict compliance with Rule 6(d)(1) is mandated by Lucky Development, Co., Ltd. v. Tokai U.S.A., Inc., 2 N.M.I. 82 (1991), and that all oppositions or replies not complying with Rule 6(d)(1) should be stricken, then the Court would be required to strike PML's opposition to HKE's motion to dismiss as it was filed four days late under Rule 6(d)(1).

In Lucky Development, the Court enforced Com. R. App. Proc. 27(b), striking the plaintiff's opposition to defendant's motion because it was one day late. PML's counsel argues that Lucky Development mandates strict compliance with all timing requirements in the Rules of Procedure and demands that all noncomplying oppositions and replies must be stricken. The Court disagrees. First, Lucky Development deals with Com. R. App. 27(b), not with Com. R. Proc. 6(d)(1). Secondly, Lucky Development did not hold that strict compliance is mandated in all cases nor that all noncomplying oppositions or replies must be stricken. The plaintiff's opposition was stricken because plaintiff's counsel could not adequately explain his reason for the late filing and because plaintiff's counsel was previously warned about complying with the filing rules. Lucky Development, at 84-85.

Here, as to the motion to strike HKE's reply to PML's opposition to HKE's motion to dismiss, HKE's reply was filed on November 20, 1998, twenty-nine days late under Rule 6(d)(1). HKE's counsel, however, issued an off-island notice from October 23, 1998 to November 4, 1998 and due to medical reasons did not return to Saipan until November 15, 1998. HKE's counsel, therefore, had reasons for his delay in filing the reply to PML's opposition. Further, HKE's counsel has not been warned by the Court about lack of compliance with the filing rules.

As to the motion to strike HKE's opposition to PML's motion for Rule 11 sanctions, HKE's opposition was filed on November 20, 1998, eight days late under Rule 6(d)(1). HKE, as stated, had reasons for the delay in filing the opposition and HKE's counsel has not been warned by the Court about lack of compliance with the filing rules.

For the foregoing reasons the Court finds that PML's motion to strike HKE's reply to PML's opposition to HKE's motion to dismiss or alternatively for summary judgment, and **[p. 5]** PML's motion to strike HKE's opposition to PML's motion for Rule 11 sanctions, are denied.

B. Motion to Dismiss.

Under 4 CMC § 4642(a), "[a] foreign corporation transacting business in the Commonwealth without a certificate of authority may not maintain a proceeding in any court in the Commonwealth until it obtains a certificate of authority."

HKE relies on the Commonwealth Superior Court decision in National Pacific Ins., Inc. v. Pacific Basin Ins., Inc., Civil Action No. 94-748 (N.M.I. Super. Ct. March 14, 1995) (Decision and Order Granting Defendants' Motion to Dismiss) to support its contention that PML's action should be dismissed or alternatively that summary judgment should be rendered in favor of HKE because PML lacked a certificate of authority to do business as a foreign corporation in the CNMI. National Pacific involved a foreign insurer which was transacting business in the CNMI through its agent on Saipan without a certificate of authority to do so. The foreign insurer did not obtain a certificate of authority to "transact insurance" as required by 4 CMC §73801(a), therefore the Court applied 4 CMC §7305(f) and dismissed the foreign insurer's complaint. 4 CMC §7305(f) states:

> No unauthorized insurer shall **institute or file, or cause to be instituted or filed**, any suit, action or proceeding in the Commonwealth to enforce any right, claim, or demand arising out of the transaction of business in the Commonwealth, until the insurer has obtained a certificate of authority to transact insurance business in the Commonwealth. (emphasis added)

National Pacific is not persuasive. National Pacific dealt with a plaintiff foreign corporation that never obtained a certificate of authority, whereas here PML obtained a certificate of authority on October 22, 1998. National Pacific dealt with 4 CMC §7305(f) which states that "no unauthorized insurer shall institute or file, or cause to be instituted or file, any suit, action or proceeding in the Commonwealth...". PML, however, is governed by 4 CMC §4642(a) which contains different language. Unlike 4 CMC §7305(f), the language of 4 CMC §4642(a) does not expressly prohibit a foreign corporation without a certificate of authority from instituting or filing a cause of action in the **[p. 6]** CNMI. This difference in statutory language is crucial to the disposition of HKE's motion to dismiss. 4 CMC §4642(a) states:

> A foreign corporation transacting business in the Commonwealth without a certificate of authority may not **maintain** a proceeding in any court in the Commonwealth until it obtains a certificate of authority. (emphasis added)

Courts interpreting statutes similar to 4 CMC §4642(a) have held that the use of the word "maintain" implies the continuation of an action that has already been filed. These Courts held that a foreign corporation which lacks a certificate of authority may commence an action in that state and then later "maintain" that action by obtaining the certificate of authority it once lacked. *See* Roldan Corp. v. D. CT., City & City of Denver, 716 P.2d 120, 122-123 (Colo. 1986); Cost of Wisconsin, Inc., v. Shaw., 357 S.E.2d, 20, 21 (S.C. 1987); Rigid Component Systems v. Nebraska Component Systems, 276 N.W.2d 659, 661 (Neb. 1979).

In Roldan Corp., the Court interpreted a state statute which provides that "[n]o foreign corporation transacting business in this state without a certificate of authority nor anyone in its behalf shall be permitted to maintain any action, suit, or proceeding in any court of this state until such corporation has obtained a certificate of authority." The Court noted that the purpose of the statute is fully accomplished by an actual compliance with its requirements subsequent to the commencement of the action. Roldan Corp., *supra* at 122-123, *citing* International Trust Co. v. A. Leschen & Sons Rope Co., 92 P 727, 731 (Colo. 1907). In Roldan Corp., plaintiff was a foreign corporation which instituted an action in state court without first obtaining a "certificate of authority." Defendant moved for summary judgment and for dismissal of plaintiff's action on the grounds that plaintiff was barred from instituting the action because it did not have a "certificate of authority." The trial court granted the motion for summary judgment and dismissed the complaint with prejudice. Plaintiff did not receive notice of the dismissal and filed a motion to alter or amend judgment because it had obtained a "certificate of authority" within sixty days of defendant's motion to dismiss. Roldan Corp., at 121. The Supreme Court of Colorado directed the district court to vacate its summary judgment of dismissal **[p. 7]** and to reinstate plaintiff's complaint, holding that a foreign corporation not properly qualified in Colorado can remove the statutory prohibition against maintaining a civil action by taking the steps necessary for qualification at any time. Id., at 123.

The resolution of the issue of whether to grant HKE's motion to dismiss rests on the interpretation of the word "maintain" in 4 CMC §4642(a). The Court finds that Roldan Corp., Cost of Wisconsin, Inc., and Rigid Component Systems contain the correct interpretation of the word

"maintain" in 4 CMC §4642(a). The Court finds that the word "maintain" in 4 CMC §4642(a) means "to continue, to carry on, to support what has already been brought into existence, as contradistinguished from 'to institute' the action that has already been brought." Rigid Component Systems, at 661, *citing* 54 C.J.S. Maintain 902. Therefore, 4 CMC §4642(a) does not require that PML's action be dismissed on the grounds that PML did not possess a certificate of authority to transact business in the CNMI when it instituted this action on August 28, 1998. PML was only prohibited from continuing or "maintaining" its action until it obtained the requisite certificate of authority from the Registrar of Corporations. PML obtained the certificate of authority October 22, 1998 and may now "maintain" the present action against HKE.

For the foregoing reasons, the Court finds that defendant HKE's motion to dismiss is denied.

C. Motion for Summary Judgment.

HKE alternatively moves for summary judgment. The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil Procedure. Rule 56(a) provides:

> A party seeking to recover upon a claim...may...move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Com. R. Civ. P. 56(a). Rule 56(c) continues:

> The judgment sought will be rendered forthwith if 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.

[p. 8] Com. R. Civ. P. 56(c). In a motion for summary judgment, the trial court must review the evidence and inferences in the light most favorable to the nonmoving party. Cabrera v. Heirs of De Castro., 1 N.M.I. 172 (1990).

HKE claims that National Pacific, *supra*, stands for the proposition that a contract entered into by a foreign corporation which fails to obtain a certificate of authority is unenforceable and therefore if a contract did exist, PML could not enforce it as a matter of law and HKE is entitled to summary judgment. National Pacific does not support HKE's contentions. National Pacific dealt with 4 CMC §7305(f), which states "no unauthorized insurer shall **institute or file**...any suit, action or proceeding in the Commonwealth...". (emphasis added) The Court in National Pacific noted that

while the statute does not render contracts voidable or void ab initio, it effectively renders them unenforceable because a party without a certificate of authority cannot sue to enforce a contract if 4 CMC §7305(f) applies to them. National Pacific, *supra* at 9. As previously stated, PML is not govemed by 4 CMC §7305(f). PML is governed by 4 CMC §4642(a) which does not bar the institution or filing of a lawsuit by a foreign corporation lacking a certificate of authority in the CNMI. PML, as a foreign corporation, can enforce its contracts in the CNMI, it was merely prevented from continuing or maintaining its actions until it received a certificate of authority, which it has done. Therefore, HKE has failed to show, pursuant to Rule 56(c), that there is no genuine issue as to any material fact and that HKE is entitled to judgment as a matter of law.

For the foregoing reasons, HKE's motion for summary judgment is denied.

D. Motion for Rule 11 Sanctions.

Commonwealth Rule of Civil Procedure 11(b) states in pertinent part:

> By presenting to the court ... a pleading, written motion, or other paper, an attorney...is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law...

[p. 9] PML claims HKE's motion to dismiss became moot and without merit on October 22, 1998 when PML served HKE with notice that it had obtained a certificate of authority. However, 4 CMC §4642(a) had not been interpreted by the Courts of the Commonwealth and the issue of whether or not a corporation may file or institute an action without having a certificate of authority was thus unsettled. There is no evidence that HKE's counsel had an improper purpose for refusing to withdraw its motion to dismiss and the motion presented a non-frivolous argument for the extension or modification of existing law. For the foregoing reasons, the Court finds that PML's motion for Rule 11 sanctions is denied.

IV. CONCLUSION

For the foregoing reasons, the Court finds that: (1) PML's motion to strike HKE's reply to PML's opposition to HKE's motion to dismiss or alternatively for summary judgment and HKE's opposition to PML's Ruling 11 motion, are denied; (2) HKE's motion to dismiss is denied; (3) HKE's motion for summary judgment is denied; (4) PML's motion for Rule 11 sanctions against HKE is denied.

So ORDERED this 26 day of January, 1999.

/s/ Juan T. Lizama
JUAN T. LIZAMA, Associate Judge