For Pub

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

JOAQUIN M. MANGLONA, Plaintiff, v. GOVERNMENT OF THE COMMONWEALTH OF THE -NORTHERN MARIANA ISLANDS Defendant. ROBERT C. NARAJA, et. al, Third-Party Defendants.	)	Civil Action No. 97-486 **ORDER GRANTING THIRD-PARTY DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came on for a hearing on November 24, 1998, on the motion of Third-Party Defendant's David M. Apatang and Robert C. Naraja for partial summary judgment. This motion is premised upon the Public Employee Legal Defense and Indemnification Act of 1986, P.L. 5- 12, and seeks a ruling on the issue of whether Third-Party Defendants, as former employees of the Government of the Commonwealth of the Northern Mariana Islands, are entitled to have the Government pay for their legal defense in the present case. For the reasons stated herein, this Court GRANTS the Motion for Partial Summary Judgment.

I. Factual Background

This case arises out of a lease agreement between Plaintiff Manglona, as Lessor, and the Immigration and Naturalization Office ["IN,"] and CNMI Office of the Attorney General, as

Lessee, executed on December 14- *15, 1992.* *See Complaint,* ¶ 3 (May 6, 1997) and Exhibit A attached thereto. Under the terms of the Lease Agreement, Mr. Manglona agreed to lease certain office space to the Lessee for a term of ten years for consideration.

During the period in question, Mr. Apatang served as the Chief of Procurement and Supply for the CNMI and discovered, through written and verbal communications with Attorney General Robert Naraja, that the Immigration and Naturalization Office needed additional space. *Declaration of Apatang,* ¶ 4. By letter, Attorney General Naraja stated that Mr. Manglona "is the only one that can provide us with our need" (sic) and requested immediate and favorable action on the Lease Agreement. *Id.* and Exhibit A. Based upon this and other verbal statements, Mr. Apatang understood Attorney General Naraja to be making a statement of sole source. Mr. Apatang then went one step further by meeting with Assistant Attorney General Tom Sheldon concerning this matter. Mr. Sheldon not only informed Mr. Apatang that a search by the Attorney General's Office for appropriate office space revealed that Mr. Manglona's building was the only premises available for INO, but also advised Mr. Apatang that there was sole source justification to lease space in Mr. Manglona's building. *Apatang Decl.* at ¶¶ 6 and 7. Mr. Apatang thus signed the Lease Agreement and certified that it complied with the CNMI Procurement Regulations, was for a public purpose, and did not waste or abuse public funds. Shortly thereafter, Mr. Apatang again signed the Lease Agreement, certifying that all necessary signatures had been obtained.

Attorney General Naraja was similarly advised as to the legality of the Lease Agreement by Assistant Attorney General (AAG) Dick Weil and Assistant Attorney General Sheldon. *Declaration of Robert C. Naraja,* ¶ 6. AAG Sheldon was responsible for handling all legal

matters pertaining to the termination of the existing contract with the Nauru Building, the execution of the Lease Agreement and all required and related "legal matters." ***Id.*** at ¶ 8. AAG Weil assisted in the performance of these responsibilities. ***Id.*** On December 7, 1992, Attorney General Naraja signed the Lease Agreement as to form and legal capacity, and on December 14, 1992, he again signed as the contracting officer.

After the Lease Agreement was executed, the Department of Labor and Immigration (DOLI), INO's successor, moved its operations to Lessor's premises and remained there until October 1996, at which time DOLI vacated the premises. ***See Complaint,*** Exhibit C attached thereto (Letter from the Secretary of Finance Antonio R. Cabrera to Joaquin Manglona) (Jan. 23, 1997).

On May 5, 1997, Mr. Manglona sued the Government for breach of contract and for damage to his business reputation. The CNMI Government, in turn, filed a Third-Party Complaint naming Mr. Naraja, David Apatang and other government officials as Third-Party Defendants.

More than five days before their answers were filed, both Mr. Naraja and Mr. Apatang made written requests to the Acting Attorney General demanding legal representation or provision for their legal defenses in this matter. ***Apatang Decl.*** at page 3, ¶ ¶ 8, 10, 9, and 10 (sic); *Naraja Decl.* at ¶ 1 l-12. Both requests were denied.

On October 14, 1998, Mr. Apatang filed the instant Motion for Partial Summary Judgment. Mr. Naraja joined in this motion.

II. Issue

The only issue before this Court with respect to Third-Party Defendant's Motion is

whether the Public Employee Legal Defense and Indemnification Act of 1986 permits the Government of the Commonwealth of the Northern Mariana Islands to refuse to defend a former government employee or refuse to pay for his defense by a private attorney retained by the employee, where the government has sued the employee for indemnification and where the merits of the government's claim has yet been adjudicated.

III. Analysis

A. Summary Judgment Standard

In *Castro v. Hotel Nikko Saipan,* Inc., 4 N.M.I. 268, 272 (1995), the Commonwealth Supreme Court set forth the following standard for summary judgment:

> When a party moves for summary judgment under Corn. R. Civ. P. 56, it is incumbent upon that party to show that there are no genuine issues of material fact. See *Riley,* 4 N.M.I. at 89. Once this has been shown, "the burden shifts to the opponent to show that such an issue does not exist." *Id.* "[T]he opponent, by affidavit or otherwise, 'must set forth specific facts showing. . . a genuine issue for trial."' *Id.* (quoting Corn. R. Civ. P. 56(e). For purposes of opposing a summary judgment motion, "[g]eneral denials or conclusory statements are insufficient." *Id.*

Third-party defendants submit that the issue raised in this motion for summary judgment is one of law, not of fact.

B. The Public Employee Legal Defense and Indemnification Act of 1986

1. Scone of the Act

Mr. Apatang argues that he is entitled to have the CNMI Government pay for his legal defense pursuant to the Public Employee Legal Defense and Indemnification Act because he was sued for actions taken in his capacity as the Chief of Procurement and Supply. He argues that the Act gives the Government the right to recover the payment of such fees "if, at the end of a trial, the Court finds that the employee has not acted within the scope of his employment or that the

employee has acted because of actual fraud, actual malice, or willful criminal misconduct." *Reply to Third-Party Plaintiff's Opposition to Motion for Partial Summary Judgment,* at 7 (Nov. 12, 1998).

The Government contends that the Act does not apply to its claims for indemnification against an employee or former employee for acts the Government opines were ultra vires. It further argues that the Third-Party Defendants' interpretation of the Act would prevent meaningful recovery by the Government should it prevail on its claim for indemnification.*[1]

The Public Employee Legal Defense and Indemnification Act of 1 986[2] is codified at 7 CMC $2301, *et seq.* Section 2304(a) sets for the rule governing the public defense of an action and states:

> (a) *General Rule for Public Defense of an Action.* At the public entity's discretion, either a public entity shall pay for an employee's defense by an attorney accepted by the employee and the Attorney General or his designee, or the public entity shall defend the employee, and the public entity shall pay any settlement (to which the public entity has agreed) or any judgment, if:

1/ The Government also claims that the Third-Party Defendants' interpretation of this Act "would wholly frustrate the legislative enactments . . . that clearly impose personal liability upon government employees who engage in unauthorized obligation of funds or procurement actions violative of regulations. The Public Employee Defense and Indemnity Act provides no indication that it is intended to repeal the several statutory provisions . . . that mandate personal liability of government employees for the specified unauthorized acts." *Third-Party Plaintiff's Opposition to Motion for Partial Summary Judgment,* at 8 (Nov. 5, 1998). In support of this argument, the Government cites 1 CMC §§ 2553 (j), 2557,7401,7404(a), 7701-7702, 7705, and CNMI Procurement Regulation § 1-108. Such provisions, however, do not govern the provision of funds for an employee's defense or the public entity's defense of the employee. Rather, the cited provisions speak to the issue of who has the ultimate liability for unauthorized acts or other matters. *Estate of Faisao v. Tenorio,* 4 N.M.I. 260, 265 (1995) (two statutory provisions are "irreconcilable only where "there is a positive repugnancy between them or . . . they cannot mutually coexist."); 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.12 (5th ed.). Given that the Government is entitled to recovery of any defense fees it pays on behalf of an employee for acts which did not arise out of his employee, Third-Party defendants' interpretation of section 2304 does not, in the words of the Government, present a "clear conflict" with such provisions.

2/ The parties have not directed the Court's attention to any CNMI case law interpreting the Act. Nor has the Court's research revealed any such law.

(1) The employee requests the public entity to pay for his defense or to defend him against any claim against him for an injury arising out of an act that he reasonably and in good faith believes has occurred within the scope of his employment as an employee of the public entity (whether or not the employee is sued in an official or private capacity);

(2) The employee has not acted because of actual fraud, actual malice, or willful criminal misconduct;

(3) The employee reasonably cooperates in good faith in the defense of the claim; and

(4) The employee makes his request in writing to the public entity not less than five days before an answer must be filed; . . .

The acceptance of an attorney under this subsection (a) of.this section shall not be unreasonably withheld by the Attorney General or his designee.

7 CMC $2304(a). In its interpretation of this Act, the Court will follow well-accepted rules of statutory construction: it will construe the entire statutory scheme of the Act; it will avoid inconsistency, superfluity and nullities; it will "give language its ordinary meaning;" and it will "favor a more reasonable result." ***See In re Loretto Winery Ltd., 898*** F.2d 715, 722 (1990); ***accord*** Sutherland Statutory Construction §§ 45.12, 46.07 and 5 1 .01 .[3/] Finally, this Court will construe the Act "liberally to achieve its purposes." ***Loretto Winery Ltd., 898*** F.2d at 722.

The Act arose out of the Legislature's concern that "public employees of the Commonwealth government, . . . have been increasingly sued under federal and Commonwealth law for injuries arising out of acts that arise out of the scope of their employment." 7 CMC § 2302. The stated purpose of this statute is to '-provide protection to government employees

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3/ *Accord In re Estate of Rofag, 2* N.M.I. 18, 29 & n. 10 (199 1) (a basic tenet of statutory construction is that language must be given its plain meaning Where, however, the meaning of statutory language is ambiguous, a court must give the statute the "meaning that the legislature intended."). In this case, counsels' memoranda reveal the ambiguities of the Act, thus requiring this Court to give effect to the legislative intent behind the Act.

against the high cost of the legal defense and the judgments for injuries arising out of actions occurring within the scope of their employment." *Id.*

Acts such as this serve to "[preserve] ardor in the performance of public duties." *Johnson v. State, 447* P.2d 352, 358 (Cal. 1968) (interpreting the statutory framework of California's public indemnification and public defense); 7 CMC § 2302 ("This chapter is based upon statutes from the states of California and Washington."). As one court explained,

> [A] principal purpose of the indemnification scheme . . . , limiting the personal threat of suit or liability, is centered on assuring the zealous execution of official duties by public employees. To the extent that the ardor of public employees might be affected by the threat of personal liability, these fears will be allayed by the indemnification provisions.

Johnson, 447 P.2d at 359 (interpreting the substantially similar California statutory provisions after which the Act was patterned).

The real threat of personal liability for the execution of official duties can arise not only from a claim by a third party but also from a claim for indemnification by the Government.[4/] The Court cannot accept the Government's position that the Legislature intended a government employee to finance, on his own accord, his legal defense where the Government has opined, but

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4/ The Government argues that indemnification claims are excluded from coverage because, *inter alia,* "the claim of 'injury' against which the Commonwealth may be required to provide a defense, must by definition be one that would be actionable if inflicted by a private person." *Third-Party Plaintiffs Opposition to Motionfor Partial Summary Judgment,* at 3-4, citing 7 CMC § 2303(f). The term "'injury' means death, injury to a person, damage or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, or such nature that would be actionable if inflicted by a private person. . . ." Traditional tools of statutory construction elicit a clear legislative directive. Here, the Legislature used the disjunctive term "or" between the categories of "injuries," indicating that these categories are meant to be considered separately. *See, e.g., United States v. Behnezhad, 907* F.2d 896 (9"' Cir. 1990); *Knutzen v. Eben Ezer Lutheran Hous. Ctr., 8* 15 F.2d 1343, 1349 (19' Cir. 1987) (use of disjunctive in statute generally indicates alternatives were intended); *accord* 1A SUTHERLAND STATUTORY CONSTRUCTION, § 2 1.14. Moreover, qualifying phrases apply to the phrase or clause immediately preceding it. 2A SUTHERLAND STATUTORY CONSTRUCTION, § 47.33. This Court will, therefore, not read the phrase "if inflicted by a private person" to qualify all of the categories identified in this sentence. Here, Mr. Manglona complains of a loss of property, a breach of the Lease Agreement. As such, the Third-Party Defendants' written requests to the Government constitute requests for payment of their defenses or for representation against Mr. Manglona's claim for an "injury" for purposes of this Act.

not yet proven, that the employee acted outside the scope of their employment. To allow such interpretation, the Act would necessarily have to provide a mechanism for instances in which a government employee had successfully defended himself against the Government's indemnification claim so that the employee could obtain reimbursement for defense fees incurred in such defense. The Act, however, provides no such mechanism.

The Government's interpretation has no support in the statutory structure of the Act. Rather, subsection 2304(c) contemplates the reverse procedure by providing that:

> *(c) Public Entity's Right to Seek Indemnification Defined.* If a public entitv pays any defense fees or any claim or judgment either itself or against any employee, for an injury arising out of an act of an employee, the public entitv may recover from the employee the amount of its navment only if:
>
> > (1) The employee's liability did not arise out of his emnlovment as an employee of the public entity (whether or not the employee is sued in an official or private capacity);
> >
> > (2) The employee acted because of actual fraud, actual malice, or willful criminal misconduct; or
> >
> > (3) The employee willfully failed or refused to conduct the defense of the claim in good faith.
>
> . . . .

7 CMC § 2304 (emphasis added). Under this statutory scheme, if the Government prevails at trial on its claim for indemnification against the employee (ie: it proves that the employee's challenged acts did not arise out of his employment), then the Government may seek reimbursement for the legal fees incurred in defense of a government employee. 7 CMC § 2304(c). This interpretation comports with the purpose of the Act. By following this procedure, the Government would, in effect, only pay for those legal costs of government employees if the

"injuries [arose] out of actions occurring within the scope of their employment." 7 CMC $2302. Any other interpretation would result in the imposition of an onerous financial burden upon government employees who ultimately prevail at trial and are cleared of any charges of wrongdoing — a result that is contrary to the legislative intent behind the Act. See *In re Loretto Winery Ltd., 898* F.2d at 722 (1990); *Commissioner of Internal Revenue v. Brown, 380* US. 563, 571, 85 S. Ct. 1162, 1166 (1965), cited in *Third-Party Plaintiff's Opposition to Motion for Partial Summary Judgment,* at 8.[5/]

For the foregoing reasons, this Court concludes that the Public Employee Legal Defense and Indemnification Act applies to the requests for a public defense made by the Third-Party Defendants, Mr. Apatang and Mr. Naraja. If the facts of this case meet the requirements set forth in section 2304(a), Third-Party Defendants would in fact be entitled to payment of their attorneys' fees as requested.

2. **The Reauirements for a Public Defense of an Action.**

Section 2304(a) of the Act requires the Government to provide a public defense for current and former government employees if: (1) the employee requests such defense against a claim filed against him "for an injury arising out of an act that he reasonably and in good faith believes has occurred within the scope of his employment as an employee of the public entity; (2) the employee has not acted because of actual fraud, actual malice or willful criminal misconduct; (3) the employee reasonably cooperates in good faith in the defense of the claim; and (4) the employee makes his request in writing to the public entity not less than five days before the

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5/ The Court notes that it is not absurd to interpret the statute as requiring a public defense when the ultimate issue of liability has yet to be determined.

answer must be filed." 7 CMC § 2304(a). The scope of employment requirement is the only source of a genuine debate for purposes of determining whether the Third-Party Defendants are entitled to have their legal defenses funded.[6/]

The California Supreme *Court* in *Johnson v. State* analyzed the statutory scheme after which the Act was patterned. 447 P.2d at 359. There, the statute similarly mandated a public defense where the employee or former employer requests the public entity to "defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of employment as an employee of the public entity . . . ." *Id.* In view of this provision, the court concluded that the employee does not face *any requirement* that he assume the financial and mental burden of defending his official conduct in a personal suit against him." *Id.* (emphasis added).

Like *the court* in *Johnson,* this Court finds that the Act is designed to shield former and current government employees from such financial burdens. Therefore, in determining whether an employee is entitled to a public defense under the Act, this Court is not required by the Act to rule upon the question of ultimate liability -- ie: whether the employee's liability arose out of his employment. This Court will, however, evaluate the reasonableness of his belief and whether he in good faith believed that he was acting in the scope of employment.

[6/] The Government briefly, challenged the Third-Party Defendants' right to a public defense on the grounds that they failed to "reasonably cooperate" in the defense of the claim. According to the Government, "[t]here can be no cooperation between the Commonwealth and the defendants in a case brought by the Commonwealth against those same defendants for injury to the Commonwealth." *Third-Party Plaintiff's Opposition to Motion for Partial Summary Judgment,* at 4. A plain reading of this provision suggests that the employee must engage in some conduct at the time of the preparation of the defense which demonstrates a lack of cooperation. See 7 CMC § 2304(a)(3). If, for instance, the government had already agreed to defend an employee, the employee's refusal to meet with or assist the Government with his defense would be indicia of a lack of cooperation. Here, the record is devoid of any evidence that the Third-Patty Defendants' engaged in any such conduct.

In the present case, Mr. Apatang's responsibilities as the Chief of Procurement and Supply included the review and approval of government lease agreements. *See Apatang Decl.*, at ¶ 3. Similarly, Mr. Naraja's responsibilities as the Attorney General included the review and approval of all contracts as to form and legal capacity. Naraja Decl., ¶ 2. The Government did not submit any evidence to the contrary.

The Government argues that the Third-Party Defendants do not meet the standard for good faith and reasonable belief required by section 2304(a)(l) because "the belief must not conflict with clearly established law of which the person is or reasonably should be aware." *Third Party Plaintiff's Opposition to Motion for Partial Summary Judgment,* at 11, citing *Hill v. CNMI*, 1 CR 905 (D. N.M.I. 1985); *Pangelinan v. Castro,* 2 CR 429 (D.N.M.I. 1986); *Employment Consultants, Inc. v. O'Connor, 2* CR 535 (Corn. Tr. Ct. 1986). It asserts that stated beliefs of Mr. Apatang and Mr. Naraja cannot be reasonable as a matter of law because they, as government officials are charged with knowledge of the law and are presumed to know the law. Mr. Apatang and Mr. Naraja, however, have signed declarations, alleging their beliefs that the signing of the Lease Agreement was an act that occurred within the scope of employment as employees of the CNMI Government and declared that they conferred with and relied upon advice from attorneys in the Attorney General's Office concerning the execution and legality of the Lease Agreement. *Apatang Decl.*, at page *2*, ¶¶ *6-8; Naraja Decl.*, at ¶¶ 2-9. The Government has failed to submit any declarations from such attorneys to rebut or address the statements contained in the declarations filed by Mr. Apatang and Mr. Naraja. For purposes of this motion, a government employee or official's acts meet the standards of reasonableness and good faith when he confers with and relies upon attorneys in the Attorney General's Office

concerning the execution of a contract which falls within the ambit of his duties as a government employee.

For the foregoing reasons, this Court therefore concludes that the Third-Party defendants are entitled to a public defense under the Act.

III. CONCLUSION

Mr. Apatang's Motion joined in by Mr Naraja for Partial Summary Judgment is hereby GRANTED.

IT IS SO ORDERED this 2 day of August, 1999.

David A. Wiseman
Special Judge

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errata to 8-3-99 order

Law Revision

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IN THE SUPERIOR COURT
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JOAQUIN M. MANGLONA,

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ROBERT C. NARAJA, ET. AL.,

Third-Party Defendants.

Civil Action No. 97-486

ERRATA ORDER

The court's decision of August 2, 1999, entitled "Order Granting Third-Party Defendant's Motion for Partial Summary Judgment," is hereby ordered to be published.

SO **ORDERED this** 21 day of October, 1999.

DAVID A. WISEMAN, Special Judge