

**SAIPAN SECRETARIAL/
EMPLOYMENT SERVICES,
INC., a Corporation
vs.
COMMONWEALTH OF THE
NORTHERN MARIANA
ISLANDS, et al.**

Appellate No. 86-9023
District Court NMI
Appellate Division

Decided October 13, 1987

Affirming 2 CR 700 (CTC 1986)

**1. Civil Procedure - Summary
Judgment - Standard**

Summary judgment is appropriate only if it is demonstrated that there exists no genuine dispute as to any material fact and that movant is entitled to judgment as a matter of law. Com.R.Civ.P. 56(c).

**2. Civil Procedure - Summary
Judgment - Burden of Proof**

On a motion for summary judgment the Court must construe the pleadings, other record evidence, and its attendant inferences most favorably to the party opposing the motion. Com.R.Civ.P. 56(c).

**3. Civil Procedure - Summary
Judgment - Standard**

On a motion for summary judgment, a predicate to a finding of a genuine factual issue which would entitle plaintiff to judgment if she proved her asserted version of the facts, is a viable legal theory. Com.R.Civ.P. 56(c).

**4. Appeal and Error - Standard of
Review - Findings of Fact**

The Appellate Division of the District Court reviews the Trial Court's findings of fact under a clearly erroneous standard

and conclusions of law are freely reviewable.

**5. Contracts - Employment -
Government**

An "acceptance" letter from the Director of Public Safety, who did not have authority to enter into a contract, did not constitute a contract under CNMI regulations, which require the signatures of other government officials, and plaintiff's action to enforce the terms of the letter was properly dismissed.

**6. Constitutional Law - Due
Process - Property Interests**

Where there is no valid contract, there was no protectible property interest under the civil rights statute. 42 U.S.C. §1983.

**7. Public Officers and Employees
- Attorney General - Authority**

The Attorney General, who is empowered by the CNMI Constitution to act as legal advisor to the Governor and the executive departments, has authority to determine if a contract is in the best interest of the Commonwealth.

**8. Public Officers and Employees
- Immunity - Absolute**

When the Attorney General reviews government contracts, he is shielded by absolute immunity.

9. Civil Rights - Attorneys' Fees

A prevailing government defendant in a civil rights action is entitled to attorney's fees if the government shows that it is more than just a prevailing party; it must also show that the lawsuit was frivolous, unreasonable, and without foundation, even though not brought in subjective bad faith. 42 U.S.C. §1988.

**10. Contracts - Damages -
Employment**

That plaintiff would have lost money if it had been awarded the contract and that no government contract could have come into existence absent compliance with

government regulations controlling government contracts renders its cause of action for damages for breach of contract groundless.

11. Attorneys Fees - Appeal and Error

The Appellate Division of the District Court reviews attorney's fees awards for abuse of discretion.

12. Civil Rights - Attorney's Fees

Where plaintiff's suit was frivolous, unreasonable, and without foundation, the defendant was entitled to an award of attorney's fees. 42 U.S.C. §1988.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS
APPELLATE DIVISION


SAIPAN SECRETARIAL/EMPLOYMENT)
SERVICES, INC., a Corporation)
Plaintiff/Appellant,)
vs.)
COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS, REXFORD C.)
KOSACK, INDIVIDUALLY AND AS)
ATTORNEY GENERAL FOR THE)
COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
Defendant/Appellee.)

DCA NO 86-9023
CIVIL ACTION NO. 85-105

OPINION

FILED
Clerk
District Court

OCT 13 1987

For The Northern Mariana Islands
By 
(Deputy Clerk)

ATTORNEY FOR PLAINTIFF/APELLANT:

Marcia R. Bell
P.O. Box 49
Saipan, CM 96950

ATTORNEY FOR DEFENDANT/APELLEES:

Keith Partlow
Assistant Attorney General
Office of the Attorney
General
5th Floor, Nauru Building
Saipan, CM 96950

BEFORE: LAURETA, DUENAS, and NIELSEN*, District Judges

* The Honorable Leland C. Nielsen, Senior Judge, Southern District of California, sitting by designation.

1 LAURETA, District Judge:

2 Plaintiff-appellant Saipan Secretarial/Employment
3 Services, Inc., (hereinafter Saipan Secretarial Services) sued
4 the Government of the Commonwealth of the Northern Mariana
5 Islands and the Attorney General, in both his official and
6 individual capacity, for breach of contract. The suit also
7 sought relief under 42 U.S.C. §1983 for alleged constitutional
8 violations. The case was dismissed by the Commonwealth Trial
9 Court on the Government's motion for summary judgment and, in a
10 subsequent order, the Government was awarded attorney's fees
11 under 42 U.S.C. §1988. Plaintiff appeals both decisions. For
12 reasons set out herein, we now affirm the decision of the
13 Commonwealth Trial Court.

14

15 FACTS

16 Plaintiff Saipan Secretarial Services is a CNMI
17 corporation run from the home of its president, Stacy Pounds.
18 Pounds was a part-time secretary for the CNMI personnel office in
19 the fall of 1984 when she became aware of a federal program for
20 the development of an automatic records system to compile
21 criminal records data. The program provided grant assistance
22 from the federal government to communities to facilitate the
23 implementation of an integrated criminal records system. Pounds
24 spearheaded the CNMI's efforts to acquire the funding for the
25 program and it was through these efforts that the CNMI obtained a
26 \$25,000 grant to develop the program.

27 The funding was forwarded to the CNMI and steps were
28 initiated to implement the program. Director of Public Safety

1 Felix B. Cabrera instructed Pounds to publish a "Request for
2 Proposals", in an effort to locate prospective contractors for
3 the project, which Pounds published once in a local newspaper.
4 The ad solicited proposals for the first phase of the project
5 which were due one week after the date of publication. Saipan
6 Secretarial Services with its bid of \$25,000 was the only entity
7 that responded to the solicitation . At Cabrera's behest, Pounds
8 drafted a letter stating that Saipan Secretarial Services
9 proposal was "selected" and that Pounds was invited to discuss
10 the project and set out priorities for its successful completion.

11 Subsequently, Pounds and Cabrera signed a standard CNMI
12 contract form governing the work for the project. Pounds then
13 circulated the contract to the other government officials
14 included on the contract form, soliciting their signatures as
15 well. These were the Governor, the Attorney General, the Public
16 Auditor, and the Director of Finance. Attorney General Rex
17 Kosack refused to sign the agreement because, according to
18 Pounds, he preferred that it be awarded to and performed by the
19 U.S. Justice Department. The contract was not signed by the
20 Governor, the Public Auditor, or the Director of Finance, either.

21 Unable to obtain contract approval, Saipan Secretarial
22 Services sued the CNMI and Kosack, in his individual and official
23 capacity, alleging breach of contract and infringement of
24 constitutional property rights. The Trial Court granted the
25 government's motion for summary judgment on all counts.
26 Additionally, the Trial Court allowed the Government and Kosack
27 \$15,047.80 attorney's fees pursuant to 42 U.S.C. §1988.
28 Plaintiff filed a timely notice of appeal.

1
2
3
4
5
6
7
8
9
10

ISSUES

1. Whether the Trial Court correctly ruled that there was no contract between plaintiff and defendant and, therefore, no deprivation of a property right compensable under 42 U.S.C. §1983.
2. Whether the Trial Court correctly concluded that Kosack was entitled to absolute immunity for his acts in reviewing the contract.
3. Whether the Trial Court correctly applied 42 U.S.C. §1988 when it awarded attorney's fees.

11
12
13
14
15
16
17
18
19
20
21
22

STANDARD OF REVIEW

[1-3] Summary judgment is appropriate only if it is demonstrated that there exists no genuine dispute as to any material fact and that movant is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). The Court must construe the pleadings, other record evidence, and its attendant inferences most favorably to the party opposing the motion. Harlow v. Fitzgerald, 457 U.S. 800, 816, n.26 (1982). A predicate to a finding of a genuine factual issue which would entitle plaintiff to judgment if she proved her asserted version of the facts is a viable legal theory. Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, 637 F.2d 1376, 1381 (9th Cir.), cert. denied, 454 U.S. 831 (1981).

[4] The Appellate Division reviews the Trial Court's findings of fact under a clearly erroneous standard. Schenk v. Government of Guam, 609 F.2d 387, 390 (9th Cir. 1979). Conclusions of law are freely reviewable. Official Creditor's Committee of Fox Markets, Inc. v. Ely, 337 F.2d 461 (9th Cir. 1964) cert. denied, 380 U.S. 978 (1965).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ANALYSIS

I. Whether Cabrera's letter accepting Plaintiff's proposal constituted a binding contract.

The trial division of this Court has held that in analyzing contracts to which the Government is a party the Government's applicable rules and regulations determine and define when a contract is enforceable. Hill v. CNMI, Civ. No. 82-0007, Decision, May 16, 1984, p.6 (citing National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981)).

On September 14, 1984, the Governor issued to all department heads a "Revised Executive Branch Delegation of Authority to Contracting Officers and Procurement Policy." This memorandum set out, inter alia, the procedures for contracting for government services, including independent contract work like that contemplated under the project which is the basis of this suit. Under these procedures, which are still in effect, contracts are prepared by a contracting officer and approved by the Personnel Officer, who then transmits the contract to the Attorney General, who reviews the contract and approves it as to "form and legal capacity." The Attorney General then forwards the contract to the Director of Finance for review and certification of available funds after which the contract is sent to the Governor, who signs the contract and returns it to the contracting officer. The independent contractor, plaintiff in this case, then signs the contract.

[5] Plaintiff alleges that a contract was formed when Cabrera signed the letter that Pounds had drafted selecting Saipan Secretarial Services proposal for the project. As the

1 Trial Court found, this position runs contrary to the procurement
2 regulations which, as Hill held, are controlling. Cabrera's
3 letter fell short of constituting a binding contract for two
4 reasons. First, Cabrera was the Director of Public Safety and
5 did not have authority to enter into contracts for services to be
6 performed for the Judiciary, which services the Trial Court
7 determined were included in the scope of the proposed agreement.
8 Second, the agreement anticipated expending \$25,000, which
9 necessitated the signature of the Governor, the Director of
10 Finance, the Attorney General, the Public Auditor, and the
11 Personnel Officer. In short, Cabrera's "acceptance" letter did
12 not constitute a contract under CNMI regulations and plaintiff's
13 action to enforce the terms of the letter was properly dismissed.

14 [6] This conclusion readily dismisses plaintiff's §1983
15 claim against the Government. Since there was no contract, there
16 was no protectible interest. See Board of Regents of State
17 Colleges v. Roth, 408 U.S. 564 (1972). (To be protectible there
18 must be an actual right and not merely an expectation of one).

19
20 II. Whether the Court properly applied "Mother Goose"
21 to Kosack.

22 Plaintiff's third cause of action is against former
23 Attorney General Kosack in his individual capacity. Plaintiff
24 alleged that Kosack's failure to sign the contract deprived
25 plaintiff of its constitutional right to contract, as well as its
26 property right in the contract, in contravention of due process.
27 Plaintiff sued Kosack individually claiming that he knew or
28 should have known that his acts were unconstitutional and,

1 therefore, outside the scope of his authority. Plaintiff
2 points out that under the Governor's memorandum, referred to
3 above, Kosack was required to review the contract for "form and
4 legal capacity" and obligated to sign the contract if those
5 requirements were satisfied. According to Plaintiff, the parties
6 had capacity to contract and the form of the contract, a CNMI
7 form, was proper. Given these two conditions, Kosack was
8 obligated to sign the agreement.

9 [7] The Attorney General is empowered by the CNMI
10 Constitution to act as legal advisor to the Governor and the
11 executive departments. His very function is to serve as legal
12 counsel to the Government. To handcuff the Attorney General, as
13 plaintiff has suggested, by restricting his authority when
14 reviewing contracts to a determination that the parties are "of
15 legal age and sober" (Appellee's Brief p.25), would negate the
16 purpose of having the Attorney General review contracts. The
17 Trial Court found that Kosack had authority to determine if the
18 contract was in the best interest of the Commonwealth and this
19 Court adopts the reasoning and the conclusion of the Trial Court.

20 Stemming from this, plaintiff's third cause of action,
21 is the question of the applicability of the doctrine of
22 immunity. Plaintiff argued below and argues on appeal that
23 Kosack does not have absolute or qualified immunity from suit in
24 this case because he was not acting as the prosecutor in a
25 judicial setting but rather was giving advice to the Government.
26 The Government cites Mother Goose Nursery Schools Inc. v. Sendak,
27 770 F.2d 668 (7th Cir. 1985), cert. denied, 106 S.Ct. 884 (1986)
28 for the proposition that immunity extends to these acts. In

1 Mother Goose, the Attorney General of Indiana had been delegated
2 the duty of reviewing the form and legal sufficiency of proposed
3 contracts. When the attorney general disapproved plaintiff's
4 contract because its president and director had criminal records,
5 plaintiff sued. The Seventh Circuit affirmed the district
6 court's holding that the attorney general was protected by
7 absolute immunity from suit for these acts. Though the CNMI
8 regulations (and 1 CMC §2153) provide that the Attorney General
9 reviews contracts as to form and legal capacity, the Trial Court
10 concluded that the Attorney General is accorded the same
11 protection as was the Attorney General of Indiana in Mother
12 Goose.

13 This conclusion is freely reviewable by this Court.
14 Schenk, 337 F.2d at 463. Though the statute and the procurement
15 regulations provide that the Attorney General is to review
16 contracts as to form and legal capacity, a narrow or restrictive
17 reading of this provision would lead to a incongruous result.
18 The Attorney General would be required to sign illegal contracts
19 provided they were in the proper form and the parties were not
20 incapacitated in any way. The Attorney General would have to
21 disregard the constitutional mandate that he provide legal advice
22 to the government in order to stay within the constrictions of
23 the regulations.

24 [8] Even plaintiff has difficulty keeping straight the
25 Attorney General's duties regarding contracts. It states in
26 paragraph 17 of its amended complaint that Kosack had a duty to
27 review the contract as to form and legal sufficiency. The
28 contract which Pounds signed and attached to the complaint

1 contains a line for Kosack's signature which states, "approved as
2 to form and legal sufficiency." Inaccurate drafting of 1 CMC
3 §2153 and the Governor's memorandum on procurement cannot control
4 the obvious purpose and intent of having the Attorney General
5 review contracts, and when acting in this regard, he is shielded
6 by absolute immunity.

7
8 III. Whether plaintiff's action was frivolous, unreasonable, and
9 without foundation.

10 [9,10] The final issue raised in this appeal is whether the
11 Trial Court properly awarded the Government attorney's fees
12 pursuant to 42 U.S.C. §1988. Section 1988 provides that the
13 Court may allow attorney's fees to the prevailing party in a suit
14 brought under §1983. In the normal course of events, the
15 plaintiff may be allowed fees if she proves that the Government
16 violated her constitutional rights. (Kerr v. Screen Extras Guild,
17 Inc., 526 F.2d 67 (9th Cir. 1975) cert. denied 425 U.S. 951
18 (1976)). But, in limited situations, the prevailing government
19 defendant is entitled to attorney's fees. Hughes v. Rowe, 449
20 U.S. 5 (1980). However, the prevailing government defendant must
21 show that it is more than just a prevailing party, it must also
22 show that the lawsuit was "frivolous, unreasonable, and without
23 foundation, even though not brought in subjective bad faith."
24 Hughes, 449 U.S. at 14 (quoting Christiansburg Garment Co. v.
25 EEOC, 434 U.S. 412, 421 (1978)). The Government successfully
26 argued below that this was the case. First, it argued that there
27 was never a contract between Saipan Secretarial Services, Inc.
28 and the Government. It argued that the procurement regulations

1 rendered the suit groundless.^{1/} Additionally, as was brought out
2 through discovery, though the contract price for the project was
3 \$25,000, Pounds estimated that the cost of implementing the
4 program would have been \$40,000, inclusive of a 10% profit; a net
5 loss of \$11,000.^{2/} The Trial Court pointed out that under the
6 Restatement of Contracts, §328, which the court is bound to
7 apply, the measure of damages in a breach of contract suit is
8 loss of profits. The fact that plaintiff would have lost money
9 if it had been awarded the contract renders its cause of action
10 in contract groundless, which causes the other claims to collapse
11 as well.

12 [] The Appellate Court reviews attorney's fees awards
13 for abuse of discretion. Jensen v. Stengel, 762 F.2d 815, 817
14 (9th Cir. 1985) (citing Parks v. Watson, 716 F.2d 646, 664 (9th
15 Cir. 1983)). Hill stands for the proposition that no government
16 contract comes into existence absent compliance with government
17 regulations controlling government contracts. The Restatement of
18 Contracts, §328, provides that contract damages are measured by
19 loss of profits. The combination of these two propositions
20 renders plaintiff's suit without foundation. There was no
21 contract and a cursory reading of Hill and the government
22 regulations would have counseled that no cause of action in
23 contract existed. Without a contract, there is no protectible
24

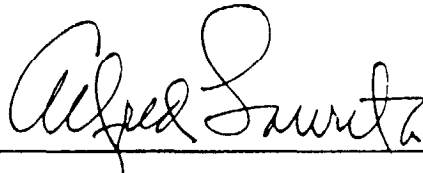
25 ^{1/} The issue of government immunity under the 11th Amendment
26 and/or common law immunity was also raised, but we do not
touch upon this in light of the absence of a contract.

27 ^{2/} Gleaning from the record, the cost of operating the program
28 would have been between \$36,000 and \$37,000 with an
additional \$3000 to \$4000 profit.

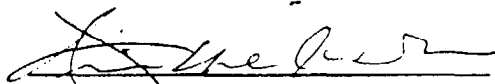
interest. And finally, Mother Goose clearly supports the Government's position that Kosack enjoyed absolute immunity from suit for actions stemming from his advice concerning government contracts.

[2] The Trial Courts's finding that plaintiff's suit was frivolous, unreasonable, and without foundation and that defendant was entitled to an award of attorney's fees is supported by the facts of this case.

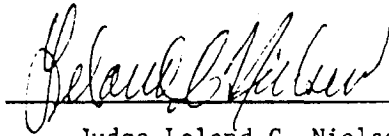
The Trial Court is AFFIRMED.



Judge Alfred Laureta



Judge Cristobal C. Duenas



Judge Leland C. Nielsen