

**PEOPLE OF MICRONESIA,  
INC., et al.  
vs.  
CONTINENTAL AIR LINES,  
INC., et al.**

**Civil Action No. 85-0002  
District Court NMI**

**Decided June 27, 1986**

**1. Civil Procedure - Motions**

Court will not address motions until motions have been properly noticed and heard.

**2. Jurisdiction - District Court - Bankruptcy**

The district court's jurisdiction is not altered by an improper attempt to remove a case from one division of the court to another; the district judge continues to sit as a district judge. U.S.C. §902(a); District Court Local Rule 700-1.

**3. Civil Procedure - Default - Relief From**

Where it appeared during the course of court proceedings that defendants' failure to respond to the complaint was the result of a tactical decision on their part to circumvent these proceedings by seeking another court's proposed injunctions, and where their reliance on the preliminary injunctions of that court was misplaced, and where defendants did not communicate to this Court their desire to proceed in this manner or seek a protective order from this Court, the defendants' default was the result of willful and culpable neglect.

**4. Civil Procedure - Default - Relief From**

A defendant moving to vacate the entry of a default must show that: (1) plaintiff

will not be prejudiced; (2) defendant has a meritorious defense; and (3) the default was not the result of defendant's culpable conduct. A finding that any one of these requirements is not met results in denial of the motion.

**5. Civil Procedure - Default - Relief From**

Argument that service of complaint was defective because defendant's secretary was not authorized to accept service will be rejected as ground to set aside a default where rule provides that a motion challenging service of process shall be made within twenty days of service of the summons and complaint and defendant failed to plead the defense.

**6. Civil Procedure - Service of Process - Waiver**

Defense of defective service is waived if not pleaded within the statutory time period. Fed. R. Civ. P.12.

FILED  
Clerk  
District Court

JUN 27 1986

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN MARIANA ISLANDS

For The Northern Mariana Islands  
By: *[Signature]*  
(Deputy Clerk)

4 PEOPLE OF MICRONESIA, INC., )  
5 et al., )

CIVIL ACTION NO. 85-0002

6 Plaintiffs, )

7 vs. )

DECISION

8 CONTINENTAL AIR LINES, INC. )  
9 et al., )

10 Defendants. )

11  
12 In September, 1983, Continental Airlines, Inc. filed a  
13 petition for reorganization in the Houston Bankruptcy Court. On  
14 January 18, 1985, People of Micronesia, Inc., Conrado L.G.  
15 Crisostomo, Russ Curtis, and Larry Hillblom (hereinafter  
16 collectively referred to as POM) filed Civil Action No. 85-0002  
17 in this Court seeking damages and declaratory and injunctive  
18 relief against Continental Airlines, Inc., Texas Air Corporation,  
19 Frank Lorenzo, Daniel Purse, Phillip Bates, Barry Simon, the  
20 Federated States of Micronesia, David Nevitt, Barry Israel,  
21 United Micronesia Development Association (UMDA), Andon T.  
22 Amaraich, Isidoro Rudimch, Arthur Ivons, J. Thomas Utley, Edward  
23 Cotter, Donald C. Williams, and Air Micronesia, Inc. The suit  
24 alleged that the defendants had violated the Securities Exchange  
25 Act, the Foreign Corrupt Practices Act, and the Racketeer  
26 Influenced Corrupt Organization Act.

1           On January 30, 1985, Continental obtained a preliminary  
2 injunction from the Houston Bankruptcy Court which purported to  
3 prohibit POM from prosecuting CV 85-0002. On February 1, 1985,  
4 POM filed a petition for removal of CV 85-0002 to the Bankruptcy  
5 Court of the Northern Mariana Islands. The case was docketed BK  
6 85-00002.

7           On June 17, 1985, POM moved for entry of default in BK  
8 85-00002 against Texas Air Corporation, Frank Lorenzo, Phillip  
9 Bates, Barry Simon, David Nevitt, Barry Israel, Donald C.  
10 Williams, and Air Micronesia, Inc. POM cited defendants' failure  
11 to plead as the ground for the default. The Clerk of Court  
12 entered a default against the defendants on June 18, 1985.

13           On February 10, 1986, counsel for defendants  
14 Continental Air Lines, Inc., Texas Air Corporation, Frank  
15 Lorenzo, Phillip Bates, Barry Simon and Donald C. Williams  
16 (hereinafter Continental), filed Motions to Set Aside Defaults,  
17 Vacate Judgments, Dismiss Adversary Proceedings, and Establish  
18 Time for Moving or Answering. These motions were accompanied by  
19 a Memorandum of Points and Authorities and several volumes of  
20 affidavits and exhibits. The memorandum specifically and  
21 comprehensively addressed the issue of setting aside the  
22 defaults. However, in the accompanying notice only the motion to  
23 stay the proceedings was set for hearing.

24           On March 4, 1986, the Attorney General of the Federated  
25 States of Micronesia (FSM), representing David Nevitt and Barry  
26 Israel, filed a Motion to Set Aside the Entry of Default and Stay

1 Further Proceedings. This motion was accompanied by a  
2 memorandum. A notice of the motion was also filed. This notice  
3 set these motions for hearing at the "same time as the motions of  
4 the 'Continental defendants'...".

5 [4] These matters were heard by the Court on March 26,  
6 1986. During the hearing, Continental informed the Court that it  
7 wished to be heard only on its motion to stay the proceedings.  
8 This position was based on its assertion that it had noticed only  
9 that motion. POM vehemently disagreed.

10 A careful reading of Continental's Notice of Motion  
11 filed February 10, 1986, shows that Continental is correct. Only  
12 the motion to stay proceedings was noticed for hearing. This  
13 Court's practice has been to hear only those motions which are  
14 properly noticed. The Court will not address Continental's  
15 motion to set aside defaults, dismiss adversary proceedings, and  
16 establish time for moving or answering until these motions have  
17 been properly noticed and heard.

18 The FSM properly noticed its motion to set aside the  
19 defaults and stay further proceedings. The Court will entertain  
20 this motion.

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I. The Attempted Removal

Preliminarily, there is an issue regarding the propriety of POM's removal petition. On February 1, 1985, POM attempted to remove CV 85-0002 to the Bankruptcy Court. The petition was filed pursuant to Title 28 U.S.C. §1478. This section had been repealed<sup>1/</sup> at the time of POM's petition. POM argues that this is of no import and that it does not affect proceedings subsequent to the petition. Continental argues that all proceedings following the petition are void.

[2] POM's attempt to remove CV 85-0002 to the Bankruptcy Court pursuant to Title 28 U.S.C. §1478 was without force and effect. This section was not operative when POM filed its petition. It was technically and legally impossible for POM to accomplish removal under this section at that time.

However, this did not affect the proceedings subsequent to this attempt. In 1984, Public Law No. 98-454, the "Omnibus Territorial Act for 1984," was signed into law. Title XI, §902(a) of this law states:

The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in Section 1332 of Title 28, United States Code, and that of a bankruptcy court of the United States. (emphasis added)

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<sup>1/</sup> 28 U.S.C. §1478 was implicitly repealed by Pub.L.No. 98-353 (1984).

1                   On September 15, 1985, Local Rule 700-1 took effect.  
2 This rule created the Bankruptcy Division of the District Court  
3 for the Northern Mariana Islands.

4                   This Court does not now, nor did it previously, view  
5 the Bankruptcy Division as a separate and distinct court. The  
6 Bankruptcy Division of the District Court is no different than  
7 the Criminal or Civil Divisions of the District Court. They are  
8 divisions of one court, administered by a single judge.

9                   When a petition is filed in the district court under  
10 11 U.S.C. §101 et seq. there is no referral to a bankruptcy  
11 judge. The case is docketed with a bankruptcy caption and filed  
12 in the bankruptcy division. But, the case is heard by the  
13 district court judge. District courts throughout the United  
14 States retain the option to exercise this same jurisdiction.  
15 They choose not to in most instances. The district court's  
16 jurisdiction is not altered by an improper attempt to remove a  
17 case from one division to another. The district judge continues  
18 to sit as a district judge. Therefore, POM's improper attempt to  
19 remove CV 85-0002 to the Bankruptcy Court does not alter the  
20 results that have transpired. The parties will henceforth file  
21 all moving papers under CV 85-0002. The files will be  
22 consolidated and BK 85-00002 will be dismissed.

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1           II. Continental's Motion to Stay Proceedings

2           At the time Continental filed this motion to stay  
3 proceedings Judge Bue had withdrawn his referral of Continental's  
4 bankruptcy case from the Houston Bankruptcy Court. Pending  
5 before the Houston District Court were temporary injunctions  
6 which prohibited Larry Hillblom, POM, and others from pursuing  
7 their claims before any court other than the Houston Bankruptcy  
8 Court. Continental argued that this Court should hold CV 85-0002  
9 in abeyance until Judge Bue decided the propriety of the Houston  
10 Bankruptcy Court order. On May 23, 1986, Judge Bue ruled on  
11 these matters. Continental's motion to stay these proceedings is  
12 moot.

13           III. The FSM's Motion to Set Aside the Defaults and  
14                 Stay Further Proceedings

15           The FSM's motion to stay proceedings is moot based on  
16 the reasons set forth in Section II.

17           The FSM contends that the defaults against Nevitt and  
18 Israel should be set aside. It argues that these defaults were  
19 obtained in violation of the Houston Bankruptcy Court's  
20 injunctions. Further, according to the FSM, its failure to honor  
21 the processes of the District Court of the Northern Marianas was  
22 not willful. Finally, the FSM argues that setting aside the  
23 defaults will not prejudice plaintiffs.

24           [3] The Court finds that Israel's and Nevitt's total  
25 disregard for the court's processes was the result of willful and  
26 culpable neglect. This finding is based in part on the

1 memorandum in support of the motion to set aside. In this  
2 memorandum the FSM states:

3 The parties<sup>[2]</sup> in this action were barred by  
4 the series of court orders issued by the  
5 Texas Bankruptcy Court from prosecuting this  
6 lawsuit. See Exhibits 3-5. The FSM  
7 defendants did not respond to the Hillblom  
8 complaint because of these orders.

9 Memorandum in Support of Motion to Set Aside the Entry of Default  
10 and to Stay Further Proceedings (FSM Memorandum), filed March 4,  
11 1986, at p. 5.

12 It has become increasingly apparent to the Court during  
13 the course of these proceedings that Israel's and Nevitt's  
14 failure to respond to the complaint filed in CV 85-0002 was the  
15 result of a tactical decision on their part to circumvent these  
16 proceedings by hiding under the umbrella of the Houston  
17 Bankruptcy Court's proposed injunctions. Their reliance on the  
18 preliminary injunctions of the Houston Bankruptcy Court was  
19 misplaced. Further, it was their duty to communicate to this  
20 Court their desires to proceed in this manner. Instead, they  
21 chose to ignore the complaint and failed to inform the Court of  
22 the reasons for their failure to respond to the complaint and  
23 seek any protective order from this Court.

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24 [2] Neither Nevitt nor Israel was a party in the Houston Bank-  
25 ruptcy Proceedings. The February 1, 1985, Temporary Restraining  
26 Order prohibits the "Hillblom parties" from prosecuting,  
financing, or otherwise promoting CV 85-0002 in the Northern  
Marianas. See, In Re Continental Air Lines, Inc., Case No.  
83-04020-E1-5, and Continental Airlines, Inc. v. Larry I.  
Hillblom, People of Micronesia, Inc., Conrado L.G. Crisostomo,  
Trustee, Conrado L.G. Crisostomo, and Russ Custis, Adversary No.  
85-0157-112, Temporary Restraining Order, February 1, 1985, (B.K.  
S.D. Houston).

Defendants' argument that they did not respond because POM was enjoined from pursuing this matter is perplexing. Why did Nevitt and Israel choose not to respond to a complaint that their adversary was enjoined from pursuing? The injunction did not prevent Nevitt and Israel from answering. Apparently, they were doing this to protect POM. See, Continental Memorandum<sup>3/</sup> at p. 87 (CV 85-0002 should be held in abeyance until the Houston District Court "permits plaintiffs to respond"). But POM, feeling it needed no protection, continued to pursue this matter.

[4] The Ninth Circuit has adopted a three-prong test to determine the propriety of vacating a default judgment. Falk v. Allen, 739 F.2d 461 (9th Cir. 1984). Under Falk, a defendant moving to vacate a default judgment must show that:

- (1) plaintiff will not be prejudiced;
- (2) defendant has a meritorious defense; and
- (3) the default was not the result of defendant's culpable conduct.

Falk, 739 F.2d at 463. A finding that any of these requirements is not met results in denial of the motion. Pena v. Seguros J. Commercial, S.A., 770 F.2d 811, 815 (9th Cir. 1985). The Court will address only the third requirement because that is sufficient to decide the merits of this motion.

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<sup>3/</sup> The FSM adopted the Continental Memorandum in its Memorandum. FSM Memorandum at p. 26.

1 [5,6] Defendant Israel was aware of the complaint filed in CV  
2 85-0002. FSM's Memorandum, Affidavit of Barry Israel. His  
3 secretary was served in January, 1985. Id. Israel argues that  
4 service was defective because his secretary was not authorized to  
5 accept service. Id. However, Israel was aware of these  
6 proceedings. He does not argue that his secretary failed to  
7 deliver the complaint to him. He merely asserts that the  
8 complaint was technically defective, presumably under Rule 5 of  
9 the Federal Rules of Civil Procedure (FRCP).

10 It is ironic that an attorney (an officer of this  
11 Court) could be so well-versed in FRCP Rule 5, and completely  
12 oblivious to FRCP Rule 12. Rule 12 provides that a motion  
13 challenging service of process should be made within twenty days  
14 of service of the summons and complaint. Rule 12(h) points out  
15 that this defense is waived if not pleaded within the statutory  
16 time period.

17 Israel knew this suit was pending. He chose not to  
18 respond because he felt the Houston Bankruptcy Court injunctions  
19 would shield him, a non-party to that proceeding, from adverse  
20 consequences in this Court. This error in judgment now results  
21 in a denial of his motion to vacate the default judgments.

22 Nevitt knew these proceedings were pending. He was  
23 personally served. FSM's Memorandum, p. 3 fn. 1. He argues that  
24 the summons was defective because it did not put him on notice  
25 concerning critical deadlines. Rule 12 is controlling here also.  
26 Mr. Nevitt is himself an attorney. There are technical, formal

1 processes to challenge a defective summons. Ignoring it is not  
2 one of them. Like Israel, Nevitt chose not to plead in CV 85-  
3 0002 because he felt the Houston Bankruptcy Court's injunctions  
4 would protect him. They did not. Neither will this Court.

5  
6 DATED this 27<sup>th</sup> day of June, 1986.

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11 JUDGE ALFRED LAURETA  
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