

**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.

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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. )

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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  
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Saipan, CM 96950

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

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



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.

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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.

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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).

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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).

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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.

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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.<sup>1/</sup> 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.<sup>2/</sup> 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  
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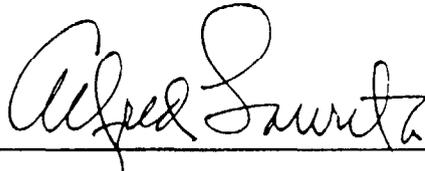
25 <sup>1/</sup> The issue of government immunity under the 11th Amendment  
26 and/or common law immunity was also raised, but we do not  
touch upon this in light of the absence of a contract.

27 <sup>2/</sup> 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.

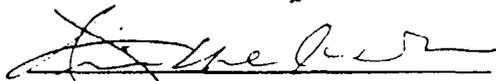
interest. And finally, Mother Goose clearly supports the Government's position that Kosack enjoyed absolute immunity from suit for actions stemming from his advice concerning government contracts.

[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.

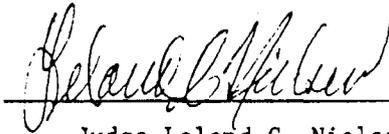
The Trial Court is AFFIRMED.



Judge Alfred Laureta



Judge Cristobal C. Duenas



Judge Leland C. Nielsen