

FILED
3/12/13

DATE: _____ TIME: _____ am/pm

By: CW
CLERK, FSM SUPREME COURT
KOSRAE
TRIAL DIVISION

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ATTORNEYS FOR DEFENDANT TROPICAL WATERS KOSRAE, INC., CLAUDE PHILLIP AND
RONALD BICKETT,

IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
KOSRAE STATE-TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2012-2003
)	
Plaintiff,)	
)	RENEWED
vs.)	MOTION TO WITHDRAW
)	AS COUNSEL OF RECORD
TROPICAL WATERS KOSRAE, INC.,)	
CLAUDE PHILLIP and RONALD BICKETT,)	
)	MOTION TO FILE BY FACSIMILE
Defendants.)	
_____)	

The undersigned counsel for defendants TROPICAL WATERS KOSRAE, INC., and RONALD BICKETT, hereby moves this Honorable court pursuant to Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct (b) (4), (5) and (6) for an order permitting counsel to withdraw as attorney of record in this matter. This motion is a renewed motion. This motion also contains a motion to enlarge time to allow defendants an opportunity to find new counsel and to respond to any pending discovery obligations. This motion is supported by the attached affidavit of Stephen V. Finnen, and the Memorandum of Points and Authorities.

The defendants, by and through counsel, hereby move for an order of the Court to allow filing by facsimile. Pursuant to General Court Order, 1990-1, plaintiffs move the Court to be allowed to file this Motion to Withdraw by facsimile, on the basis that the

Court might not receive a filing by mail in time. Filing by mail would not be received timely.

MEMORANDUM OF POINTS AND AUTHORITIES

The undersigned counsel originally filed a motion to withdraw on or about February 6, 2013. This motion was denied by the Court in its order of February 14, 2013, stating that the argument for plaintiff's motion for pre-judgment writ of attachment must go forward.

This counsel then attended the motion hearing in Kosrae on February 26, 2013, along with the depositions of Betty Phillip, the most knowledgeable representative of Tropical Waters Kosrae, Inc. and Steven George.

At this point in time the court on February 27, 2013, has ordered the deposition by telephone of Ronald Bickett within sixty days of the order and ordered production of records ten days prior to that deposition.

Defendants owe this office as of this date, the sum of \$6,083.86. Defendant, the Estate of Claude Phillip through Betty Phillip is now being represented by Canney Palsis at MLSC. The remaining two defendants have been unable to clear or even substantially pay the existing debt. These sums are only bound to increase, especially when including anticipated travel to Kosrae for further hearings or trial. It has been impossible to establish a reasonable payment plan with the remaining defendants. Additionally, without payment in full the debts owed could easily be discharged in bankruptcy.

Ronald Bickett is a lawyer, who was a former Attorney General of the State of Kosrae, and is familiar with the obligations he has a party to this matter. Tropical

Waters Kosrae, Inc. (TWKI) is a non-operating corporation, whose primary assets were subject to the plaintiff's motion for prejudgment writ of attachment. After that motion is decided TWKI may have little or no assets left.

The applicable rule provides in part as follows:

Rule 1.16 DECLINING OR TERMINATING REPRESENTATION

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effects on the interests of the client, or if:

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) any other good cause for withdrawal exists;

The attorney initially represented three clients, Ron Bickett, Claude Phillip and Tropical Waters Kosrae, Inc. Claude Phillip passed away in late 2012. His wife Betty Phillip has been appointed administrator of the estate, and now has separate counsel.

On or about March 22, 2012 a complaint was filed by the FSM Development Bank. This office then responded by initially filing a motion to dismiss then filing an answer.

The reason for seeking withdrawal is a failure of the clients to respond to numerous requests for payment of fees. Per the affidavit of Stephen V. Finnen, and after the last trip to Kosrae, \$8,083.86 in fees are owed.

Additionally, settlement may be completed with Betty Phillip. Settlement is unlikely at this point with the remaining defendants. The Development Bank is actively

pursuing this litigation, with the deposition of Ron Bickett to be scheduled within 60 days and to have him produce documents.

It would be a hardship on this office to continue representation in this case, without payment, along with making future trips to Kosrae without payment. This litigation will require further trips to Kosrae for trial and other court appearances.

The retainer agreement entered into required an initial retainer. When that retainer was exhausted, no new retainer was deposited. Some monthly payments were made but a significant amount is in arrears. This office cannot afford to pursue this case any longer, and must seek withdrawal.

Additionally, there are other interrelated matters that would require even more attorney time. The corporate defendant may need to file for bankruptcy in a separate proceeding, and other creditors may sue these same defendants. This counsel is unwilling to handle any of these matters, and so should withdraw from the current case.

Absence of Material Adverse Effect-Motion to Enlarge Time

Rule 1.16(b) provides that an attorney may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.

Currently discovery has been served on defendants. The responses are outstanding but an enlargement has been granted until ten days before the deposition of Ronald Bickett. Counsel has not received responses from the clients. This motion also includes a motion to enlarge time for the defendants Bickett and TWKI to seek new counsel and respond. The deposition of Bickett has not been set at this time but is due to be set in the near future.

No trial dates are set, and there are no other dates scheduled in this case. Betty Phillip and the Estate of Claude Phillip have separate representation. This office can leave the case at this time with minimal burden on the clients.

Unreasonable Financial Burden

Continuing the representation without payment will result in an unreasonable financial burden on the attorney. The outstanding amount is over \$6,000.00. For a small office, this burden is great. This attorney has salaries, rent, communications expenses, and utilities to pay in order to maintain and run a law office.

Travel to Kosrae is an additional expense. This office has to go to Kosrae solely for this matter, and cannot apportion costs. With the current flight schedule all trips to Kosrae must last either five or six days. This is a substantial time away from the office for one client, and without compensation it is an unreasonable burden.

Failure to Substantially Fulfill an Obligation Regarding Lawyer's Services.

There have been numerous communications both by email and on the telephone advising the clients of the necessity of payment. Some payments were made, but the billing remains unpaid after last month's trip to Kosrae in an amount of over \$6,000.00. Despite demand which has included email and telephonic communication, the back billing has not been paid and no retainer for future billing deposited.

TWKI is no longer operating and does not appear capable of paying these debts. This counsel cannot afford to continue representation, when the debts for fees and travel costs will increase substantially.

Other Good Cause.

Rule 1.16(b)(6) authorizes withdrawal when other good cause has been shown.

The circumstances of this case include other causes. This office cannot afford to represent clients without payment, but there is even additional cause, when the case is in Kosrae. It is expensive to travel to Kosrae with the current flight schedule necessitating five or six day stays. This requirement is a unique burden solely for cases set in Kosrae.

Additionally, the position of the corporate defendant is perilous. Other creditors may file collection actions against the corporation and the individual defendants. Additionally, the corporation's interests may be protected by a bankruptcy filing. However, this counsel has not accepted representation on these matters, and cannot undertake additional representation under the circumstances.

This counsel has contacted the defendants more than ten times by email regarding the fact that they must pay the incurred legal fees and costs, or else this counsel must withdraw. No meaningful agreements can be reached.

The attorney at this point has no choice but to seek to withdraw from this matter.

MOTION TO ENLARGE TIME

Rule 6(b) of the FSM Rules of Civil Procedure states:

"(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion (1) with or without notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 52(b), 59(b), (d) or (e), and 60(b), except to the extent and under the conditions stated in them."

Defense counsel seeks to enlarge the time to respond to discovery questions and to schedule the deposition of Bickett, to allow the defendants Bickett and TWKI to


retain new counsel. The enlargement should be adequate to allow time for the retention of new counsel.

CONCLUSION

The undersigned renews its motion to be allowed to withdraw from representation in this case. The court should allow this renewed motion since the scheduled hearing on pre judgment attachment went forward as scheduled. For the foregoing reasons it is requested that this motion to withdraw be granted.

Dated: 3-11-13

Respectfully submitted,



Stephen V. Finnen
A Law Corporation
Attorneys for Defendants

IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
KOSRAE STATE-TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2012-2003
)	
Plaintiff,)	
)	
vs.)	AFFIDAVIT OF
)	STEPHEN V. FINNEN
TROPICAL WATERS KOSRAE, INC.,)	
CLAUDE PHILLIP and RONALD BICKETT,)	
)	
Defendants.)	
)	

Stephen V. Finnen, being sworn, deposes and states:

1. I am the attorney of record and have factual knowledge about the events stated below. If called upon I could and would competently testify to the facts stated below.
2. I was retained by Tropical Waters Kosrae, Inc. (hereinafter TWKI) in approximately March, 2010. The initial scope of my services was to assist the company in re-writing its loan and negotiating with the FSM Development Bank (hereinafter FSM DB) to allow the company more time to pay its debts.
3. On or about March 22, 2012, the FSM DB filed the present lawsuit. This office represented all three defendants, two individuals and the corporation.
4. Numerous attempts were made to settle this matter on behalf of all parties, but such attempts have failed. I was representing Claude Phillip, when he passed away. Betty Phillip has been appointed administrator of his estate. She is now represented in this capacity and on behalf of the estate in this litigation, by Canney Palsis at MLSC. A substitution of attorney has been filed.

5. This counsel initially received a retainer from defendants. When that retainer was exhausted, counsel sought an additional retainer. No additional retainer was forthcoming, but the client's started to pay the monthly billing. Some payments have been made, but at the current time \$6,083.86 in fees and costs are owed to this office.

6. This counsel has made numerous demands on defendants, both individually and the corporation, to pay the outstanding fees. The arrearages have not been cleared. The outstanding balance is a significant amount of money, and is a hardship on this firm to carry. There is no present likelihood that the fees will be paid within any reasonable time period.

7. This counsel cannot afford to retain this case, without payment. The arrearages are substantial, and will increase greatly as the litigation intensifies.

8. This counsel will also incur substantial additional expenses to travel to Kosrae. To attend further hearings would require a six day trip to Kosrae. Counsel has already gone to Kosrae twice on this case. It is also a hardship on counsel to be gone from his office for an entire week without compensation.

9. The current flight schedule to Kosrae also causes additional hardship as the minimum stays for business are five or six days.

10. This counsel does not have many clients in Kosrae and cannot apportion these costs for travel.

11. Counsel could not handle this matter through trial without payment of past due billings and a substantial retainer. Despite demands, the clients have not paid.

This counsel has made at least ten demands through email to clear the unpaid

balance. No satisfactory responses have been made and the balance is over \$6,000.00. This firm is too small to absorb such large unpaid balances. Through trial, attorneys' fees and costs could exceed \$15,000.00.

12. TWKI would also have to determine if it should file for bankruptcy protection, and should have other counsel review this option and take this action if necessary. This counsel has informed the clients he cannot act on TWKI's behalf in this matter. This counsel will also not defend any claims by other creditors of TWKI or the individual defendants.

13. Claude Phillip passed away in late 2012, and his wife Betty Phillip has been appointed administrator of the estate. This counsel is not handling the estate of Claude Phillip. Canney Palsis substituted into this litigation representing Betty Phillip and the Estate of Claude Phillip in this litigation.

14. The withdrawal of counsel at this stage will not prejudice the defendants. This motion seeks to continue the outstanding discovery deadlines, and the deposition deadline. No trial dates are set and no further proceedings are scheduled. Per the previous order of the court regarding withdrawal, the motion regarding a prejudgment attachment of assets has been argued.

15. The lack of payment of the outstanding billing has caused a hardship on this firm, and the anticipated legal fees and travel costs in the future are anticipated to cause even greater hardship.

FURTHER AFFIANT SAYETH NAUGHT

^^

^^

Dated: 3-11-13

[Signature]
Stephen V. Finnen

Subscribed to and sworn before me this 11th date of November 2013.

[Signature]
Notary Public

UTA KRAUSE, NOTARY PUBLIC
POHNPEI STATE
FEDERATED STATES OF MICRONESIA
My Commission Expires on the
day of APRIL 2013



CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on this 11th day of March, 2013, I caused Defendant's Motion to Withdraw and to Enlarge Time to be served on the plaintiff's attorney of record by hand delivery and on the clients by certified mail.

Nora Sigrab, Esq. Hand Deliver
FSM Development Bank
Katonla, Pohnpei, FM 96941

Tropical Waters Kosrae, Inc. Certified Mail
P.O. Box 68
Kosrae, FM 96944

Ronald Bickett Certified Mail
11701 Palm Avenue
Bakersfield, CA
USA 93312

Canney Palsis
NLSC
P.O. Box 38
Kosrae, FM 96944

Dated: 3-11-2013