Koshiba v. KSPLA, 8 ROP Intrm. 356 (Tr. Div. 2000)

JOSHUA KOSHIBA,
Plaintiff,

v.

KOROR STATE PUBLIC LANDS AUTHORITY, HON. IBEDUL Y.M. GIBBONS, ALAN SEID, BASKASIO OITERONG, ERMAS NGIRACHELBAED, GILLIAN T. TELLAMES, VIVIANA UCHERBELAU, and BENJAMIN SANTOS, in their official capacity as members of the Board of Directors of the KOROR STATE PUBLIC LANDS AUTHORITY,
Defendants.

CIVIL ACTION NO. 98-378

Supreme Court, Trial Division
Republic of Palau

Decided: August 22, 2000

BEFORE: R. BARRIE MICHELSEN, Associate Justice.

This matter arises on Defendants' [1] motions for summary judgment and to dismiss on the pleadings. The motions for summary judgment are granted in part and denied in part. The motions to dismiss are granted.

⊥357 The original Plaintiffs [2] brought this action against Koror State Public Lands Authority ("KSPLA"), Ibedul Yutaka M. Gibbons, and Alan Seid, seeking to invalidate the lease giving Belau Industrial Development Corp. ("BIDC") the right to operate a rock quarry and build resort facilities at Toitmeduch, a parcel of public land in Koror off the road to Airai. Ibedul Gibbons and Alan Seid are shareholders in BIDC. Ibedul Gibbons is also the Chairman of the KSPLA Board of Trustees and is responsible for appointing three persons to the Board. Alan Seid is Koror's delegate to the Olbiil Era Kelulau ("O.E.K.") and was appointed to the Board by Ibedul Gibbons.

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[1] Plaintiffs have referred to their complaint as a "Petition" and to the parties as "Petitioners" and "Respondents." *But see* ROP R. Civ. Pro. 3: "A civil action is commenced by filing a complaint with the court." It may seem a trifling matter to complain about the substitution of the word, "petition" for "complaint," but Defendants have a reasonable objection to the terminology as an inference that this litigation is "some sort of special proceeding not subject to the Rules of Civil Procedure . . . ." Defendants Gibbons and Seid's Reply Memorandum filed June 18, 2000, at 2. This order adopts the correct nomenclature to reflect that this claim for relief follows the usual procedural rules.

[2] All plaintiffs but Mr. Koshiba have dismissed their claims.

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Defendants seek summary judgment on the validity of the lease and dismissal of related claims.

I. The Conflicts of Interest

Plaintiff's main contentions concern conflicts of interest of Ibedul Gibbons and Delegate Seid; conflicts Defendants acknowledge but maintain were properly handled in conformity with pertinent regulations. Plaintiff argues that Defendants violated the regulations of the Palau Public Lands Authority ("PPLA") by executing a lease of public land to a company in which Ibedul Gibbons and Delegate Seid have a financial interest. Plaintiff also asserts that Ibedul Gibbons and Delegate Seid used confidential information acquired by virtue of their membership on the KSPLA Board for their personal benefit, as indicated by the fact that BIDC entered into a joint venture agreement with Hawaii Belau Rock, Inc. to establish a quarry at Toitmeduch before the lease came up for consideration by KSPLA. Furthermore, Plaintiff adds that Defendants violated their fiduciary duties by entering a lease which advances their financial interest at the expense of the public interest. To support this contention, Plaintiff alleges that Koror State could have earned more revenue if KSPLA had cut a deal directly with Hawaii Belau Rock, Inc., rather than allow BIDC to reap a significant part of the bargain with the quarry operator.

Defendants are entitled to summary judgment on these claims. At common law, public officials are forbidden from acting on any matter in which they have a personal or financial interest. *See* discussion in *Airai State Public Lands Authority v. Tmetuchl,* Civ. Act. No. 255-97 at 2, 3 (Apr. 21 1999). [3] However, government agencies are not absolutely prohibited from entering into transactions which have the effect of advancing the financial interest of member officials. Such transactions are invalid only if the interested officials fail to disqualify themselves from the proceedings. *See, e.g., Anderson v. City of Parsons,* 496 P.2d 1333, 1337 (Kan. 1972); *Eways v. Reading Parking Auth.,* 124 A.2d 92, 97-98 (Pa. 1956); *Aldom v. Borough of Roseland,* 127 A.2d 190, 196-97 (N.J. Super. Ct. App. Div. 1956).

The regulations of KSPLA and PPLA mirror the common law. Members of the KSPLA Board are required to avoid conflicts of interest in carrying out their duties. *See* PPLA Reg. Part VI, § 3(b). A Board member must disclose the existence and nature of any conflicts to the Board, *see id.* at § 3(e), and cannot participate in any discussion or vote concerning a matter in which he or she has a conflict. *See id.* at § 3(b); KSPLA Reg. § 105(b). The corollary is that a transaction in which board members have a financial interest is not invalid if the members properly recuse themselves.

⊥358 There is no evidence that Ibedul Gibbons [are sic] Delegate Seid acted in their capacity as Board members to obtain approval of the lease. Instead, it is undisputed that the KSPLA Board knew of the financial interest of Ibedul Gibbons and Delegate Seid in the lease, and that both members disqualified themselves from Board proceedings. Defendants have provided evidence that Ibedul Gibbons and Delegate Seid did not participate in the discussions concerning the lease at a September 1998 meeting at which the lease was first approved, and did not vote on the lease.

[3] A copy of this opinion is also found as Opinion No. 80, Trial Division Opinions, vol. 2, maintained in the Law Library.

Defendants also note that neither member attended the September 23, 1999, meeting at which the Board voted to ratify the lease. Plaintiff has not disputed these claims. Additionally, Plaintiff has not identified any confidential information used by Ibedul Gibbons and Delegate Seid in forming the joint venture with Hawaii Belau Rock, Inc.

The next issue is the propriety of the vote by the rest of the Board. Government officials who do not have a conflict of interest have discretion when entering into transactions for the benefit of the public, and absent fraud or an abuse of discretion, courts will not entertain challenges to the validity of their actions. *See Sulphur Springs Valley Elec. Coop. v. City of Tombstone,* 407 P.2d 76 (Ariz. 1965) (en banc). *See generally* 56 Am. Jur. 2d *Municipal Corporations, etc.* § 546 (1971). Defendants claim that Koror state will earn $2 million from the lease. This revenue is not so insubstantial that the lease can be deemed an abuse of the Board's discretion, even if there is a possibility that more revenues could have been generated under alternative arrangements.

Plaintiff asserts that the Board did not act independently in approving the lease because Ibedul Gibbons appointed two of the voting members and the Board members cannot be expected to contravene the wishes of Ibedul. However, this argument is one of policy which should be pressed in the legislative branches of the state and national government. It does not raise constitutional or statutory objections cognizable by this court.

Plaintiff is dissatisfied with the Board's decisions concerning this lease because he shares a different vision of the future of Koror than Defendants. From his perspective, he finds it disquieting that the most prominent members of the KSPLA happen to be the very persons who are leased government land that apparently will generate millions of dollars in revenue. But this decision was not made in secret. The record in this case indicates that scores of persons objected in writing to the quarry, and its location. These policy concerns are properly matters for the court of public opinion and the ballot box, and are not reviewable here, absent a violation of law.

2. Ratification of the Lease

Plaintiff contends that the lease is invalid because it was executed without being approved by the KSPLA Board at a duly-announced public meeting as required by KSPLA regulations. *See* KSPLA Reg. §§ 104(b), (c). Defendants counter by suggesting that the Board cured any defects in the execution of the lease by ratifying the lease at a September 23, 1999, meeting which fully complied with regulations.

Defendants are entitled to summary judgment on this issue. The government has the power to ratify unauthorized contracts that it could have approved when initially executed. *See ROP v. Etpison,* 5 ROP Intrm. 313, 317-19 (Tr. Div. 1995) (holding that the O.E.K. could ratify unauthorized annual leave payments); *see also Restatement (Second) of Agency* § 82 (1958). Plaintiff has not disputed that the Board approved the lease by a vote of 3-1 at the September 23, 1999, meeting or that ⊥359 this meeting complied with the applicable regulations. Plaintiff contends that the Board did not give sufficient public notice that the lease would be on the agenda. However, the public notice announcing the meeting listed "BIDC lease ratification" as

an item on the proposed agenda. This is all the notice that was required by KSPLA regulations. *See* KSPLA Reg. § 104(c).

3. Delegate Seid As a KSPLA Board Member

On April 6, 2000, the Trial Division issued an order in unrelated litigation declaring that Delegate Seid held his seat on the KSPLA Board in violation of Section 10, Article IX, of the Palau Constitution. Delegate Seid subsequently resigned from the Board, although he has appealed the decision.

Plaintiff maintains that the lease is invalid because it was executed while Delegate Seid was on the Board. Defendants suggest that Delegate Seid's position of the Board does not invalidate the lease because Delegate Seid acted as a *de facto* officer during his tenure. A *de facto* officer is

> one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: . . . under the color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition.

See Horowitz v. Bd. Of Medical Exam'rs of State of Colo. , 822 F.2d 1508, 1516 (10th Cir. 1987) (quotation omitted). *See generally* 63C Am. Jur. 2d *Public Officers* § 23 (1997).

As a common law rules, the *de facto* officer doctrine should be limited to applications which advance the purpose of the rule. *See Andrade v. Lauer,* 729 F.2d 1475, 1499 (D.C. Cir. 1984). The doctrine serves to protect the interests of persons who have relied on the actions of public officials and to prevent wholesale invalidation of government action. *See Ryder v. United States,* 115 S.Ct. 2031, 2034 (1995); *Horowitz*, 822 F.2d at 1516; *Matter of Stockwell,* 622 P.2d 910, 913 (Wash. Ct. App. 1981). However, the purposes of the doctrine are not advanced where claims are brought at or around the time of the challenged government action and where the government had reasonable notice of the defect in the official's title. *See Andrade,* 729 F.2d at 1499.

The reasoning of *Ryder v. United States,* 115 S.Ct. 2031, 2035 (1995), is pertinent here. *Ryder* involved a challenge to the ruling of a panel of the U.S. Court of Military Appeals on the grounds that two of the judges were not appointed by the President, the courts, or heads of departments as required by the U.S. Constitution. The court held that the claim was not barred by the *de facto* officer doctrine, relying on the rule of *Glidden Co. v. Zdanok,* 82 S.Ct. 1459, 1465 (1962), that the doctrine does not bar challenges to the rulings of judges appointed in violation of "basic constitutional protections designed in part for the benefit of litigants." *Ryder,* 115 S.Ct. at 2035 (quotation omitted). The court reasoned: "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Id.*

As in *Ryder* and *Glidden,* Plaintiff is challenging the acts of an official who held office in violation of a Constitutional ⊥360 provision designed for their protection. Plaintiff brings this taxpayer action on behalf of the public alleging conflicts of interest. Prohibitions against dual office-holding are designed to protect the public from one person from holding two public offices the duties of which could give rise to conflicts of governmental interest. *See* 63C Am. Jur. 2d *Public Officers and Employees* § 58 (1997) (citing *Crain v. Gibson,* 250 N.W.2d 792, 796 (Mich. Ct. App. 1977)).

Furthermore, with respect to timeliness, this complaint was filed forty days after the lease was executed, and four months before it was to take effect. In addition, the lease was executed after the Special Prosecutor brought suit alleging that Delegate Seid held his seat on the Board in violation of the Constitution. KSPLA knew of the challenge to Delegate Seid's position when the lease was executed. Ruling on Plaintiff's timely claim will not open the doors to wholesale invalidation of KSPLA actions. The only issue raised is whether leases granted to Delegate Seid during the time he maintained both KSPLA seat and his Delegate seat can be challenged and voided.

Defendants' motions for summary judgment on Plaintiff's claims that this specific lease is invalid because of Delegate Seid's position on the Board is therefore denied. Ruling is reserved on the issue whether the KSPLA Board ratification is valid during the time when Delegate Seid was a member, or whether Plaintiff has standing to bring a taxpayers' action to challenge actions taken by the KSPLA Board based on Delegate Seid's membership. These issues have not been directly raised nor briefed in any detail by the litigants, and judgment on these issues is reserved.

4. The Remaining Claims

Plaintiff alleges that the quarry is a nuisance and that KSPLA acted illegally in regards to a lease held by Plaintiff Emeraech Baules. Defendants' motions to dismiss these claims is granted. Plaintiff has conceded that he cannot maintain these claims after the voluntary dismissal of Baules, Sechelong Baules, and Minoru F. Ueki from the case.[4]

Conclusion

Defendants' motions for summary judgment are granted on Plaintiff's claims that the lease is invalid due to the conflicts of interest held by Ibedul Gibbons and Delegate Seid as members of the KSPLA Board and shareholders in BIDC, and on Plaintiff's claim that the lease was not approved in conformity with KSPLA regulations. Defendants' motions for summary judgment are denied on Plaintiff's claim that the lease is invalid because Delegate Seid held a position on the Board in violation of the Constitution.

Defendants' motions to dismiss Plaintiff's nuisance claim and the claims relating to

[4] In his response to the motion to dismiss, Plaintiff Koshiba conceded dismissal of the claims relating to Baules' lease and requested 20 days to locate a plaintiff with standing to bring the nuisance claim. At oral argument, Koshiba conceded dismissal of the nuisance claim.

Plaintiff Baules' lease are granted.

This opinion does not resolve outstanding discovery requests and objections. The parties are instructed to meet and confer regarding outstanding discovery, which presumably may be pared down with the elimination of some claims for relief. The parties may file subsequent discovery motions to compel or for protective orders if the need arises. At this time I will consider all pending discovery motions moot.