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Clerk
District Court

DEC 12 2003

For The Northern Mariana Islands
By _____
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Case No. CV-02-0016-ARM

FRANCISCO M BORJA, Mayor of)

Tinian and Aguiguan, a chartered)

municipality and political)

subdivision of the Commonwealth)

of the Northern Mariana Islands;)

and the COMMONWEALTH OF THE)

NORTHERN MARIANA ISLANDS,)

Defendants.)

**ORDER ON MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

THIS MATTER is before the Court on Defendant Commonwealth of the Northern Mariana Islands' Motion to Dismiss First Amended Complaint (Doc. #26) and Plaintiff United States of America's Opposition to Motion to Dismiss (Doc. #30). Upon review of the record, memoranda of the parties and the applicable law, the Court makes the following disposition.

I. BACKGROUND

Starting in October of 1991 and continuing to 1996, the then Mayors of Tinian and Aguiguan executed "Joint Funding Agreements" with the United States Department of the Interior, Geological Survey,

1 for water resource investigation on the island of Tinian. Each of
2 the agreements only named the "Municipality of Tinian" as a party to
3 the agreement. Each agreement was signed solely by the then Mayor
4 of Tinian on behalf of the "Municipality of Tinian." The cumulative
5 effect of these agreements was that the United States was owed
6 \$2,765,499.83 in 1999.

7 On May 28, 1999 and July 26, 1999, Charles A. Wilson,
8 Director, Debt Management Services, United States Department of the
9 Treasury, submitted letters to the current Mayor of Tinian and
10 Aguiguan, Francisco M. Borja, advising him that the Secretary of the
11 Interior would accept a reduced amount of \$1,589,367.96 as compromise
12 payment of the total debt. As part of this compromise, the Mayor was
13 to make a \$393,648.00 payment on September 1, 1999, a \$619,736.00
14 payment on September 1, 2000 and a \$575,983.96 payment on September
15 1, 2001. The Mayor agreed to the compromise. However, the Mayor paid
16 only \$249,000 for the first payment and never made any other payments
17 to the United States.

18 On April 30, 2002, the United States filed the instant
19 action. Alleging that the Mayor of Tinian and Aguiguan "at all times
20 relevant to this complaint was acting on behalf of the Municipality
21 of Tinian and Aguiguan, or the Commonwealth of the Northern Mariana
22 Islands ["CNMI"], or both," (Compl. ¶ 5), the United States sought
23 to collect monies, penalties and interest owed under the agreements.
24 Following certification to the Commonwealth Supreme Court to
25 determine whether Tinian and Aguiguan was a chartered municipality,

1 see United States v. Borja, No. 02-0001-OA, 2003 MP 8 (holding that
2 Municipality of Tinian and Aguiguan was a chartered municipality that
3 could sue and be sued), the United States filed an amended complaint
4 (Doc. #20) on June 2, 2003. On July 30, 2003, Defendant CNMI filed
5 the Fed.R.Civ.P. 12(b)(6) motion to dismiss now before the Court.
6 The United States filed its brief in opposition and the matter was
7 submitted to the Court on October 9, 2003.

8 II. STANDARD OF REVIEW

9 Dismissal of a claim under Fed.R.Civ.P. 12(b)(6) is
10 appropriate only where "it appears beyond doubt that the plaintiff
11 can prove no set of facts in support of his claim which would entitle
12 him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Navarro
13 v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted
14 under 12(b)(6) where the complaint lacks a cognizable legal theory
15 or where the complaint presents a cognizable legal theory yet fails
16 to plead essential facts under that theory. Robertson v. Dean Witter
17 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

18 In reviewing a Fed.R.Civ.P. 12(b)(6) motion to dismiss, the
19 court must assume the truth of all factual allegations and must
20 construe them in the light most favorable to the nonmoving party.
21 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).
22 However, legal conclusions need not be taken as true merely because
23 they are cast in the form of factual allegations. Roberts v.
24 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). When ruling on a
25 motion to dismiss, the court may consider the facts alleged in the
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1 complaint, documents attached to the complaint and matters of which
2 the court takes judicial notice. Venetian Casino Resort L.L.C. v.
3 Cortez, 96 F.Supp.2d 1102, 1106 (D.Nev. 2000).

4 III. DISCUSSION

5 A. CNMI Motion and Argument

6 The CNMI argues that the United States fails to state a claim
7 for which relief can be granted.¹ Specifically, the CNMI argues that
8 the First Amended Complaint and the attached documents fail to show
9 that the CNMI was a party to the joint funding agreements such as to
10 obligate the CNMI to the United States for any monies still due.
11 This lack of contractual privity between the CNMI and the United
12 States, the CNMI asserts, mandates dismissal of the claims by this
13 Court.

14 Where the United States is a party to a contract, the
15 contract is construed according to general principles of contract
16 interpretation. Mobil Oil Exploration v. United States, 530 U.S.
17 604, 607 (2000); Saavedra v. Donovan, 700 F.2d 496, 498 (9th Cir.
18 1983). In general, "the obligation of contracts is limited to the
19 parties making them, and ordinarily, only those who are parties to
20 contracts are liable for their breach." 17A Am. Jur.2d Contracts §
21 421 (1991). To determine whether the CNMI is a party to the joint
22 funding agreements, the Court must first look solely at the words
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24 ¹ The CNMI also argues that the claims asserted in the complaint are
25 barred by the statute of limitations and the doctrine of sovereign
26 immunity. As the Court disposes of this case on an alternate basis, the
Court will not address these issues.

1 used within the agreements. If the language of the agreements is
2 plain and unambiguous, the intention expressed in that language
3 controls rather than whatever may be claimed to have been the actual
4 intention of the parties. Id. § 352 .

5 A plain reading of the joint funding agreements readily
6 indicates that the CNMI is a stranger to the agreements. Each of the
7 agreements only named the "Municipality of Tinian" as a party to the
8 agreement. Each agreement was solely signed by the then Mayor of
9 Tinian on behalf of the Municipality of Tinian. The CNMI is not
10 mentioned in the agreements in any capacity, let alone a capacity
11 obliging it to the United States for payment of money. The wording
12 used in the agreements solely bind the Municipality of Tinian.
13 Accordingly, the words of the agreements evidence that the CNMI is
14 not a party to the agreements and cannot be held liable for their
15 breach.

16 B. United States' Response

17 The United States nevertheless argues that the CNMI is still
18 liable for monies due under the joint funding agreements. In
19 opposition to the CNMI's motion, the United States contends that
20 privity exists between the CNMI and the United States because the
21 Mayor of Tinian and Aguiguan acted as an agent of the CNMI in
22 undertaking duties imposed by the CNMI Constitution.

23 1. Express Authority

24 The United States first argues that, under the Constitution
25 and statutes of the CNMI, the Mayors of Tinian and Aguiguan had
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1 express authority to bind the CNMI when they signed the joint funding
2 agreements. Specifically, the United States argues that "[t]he
3 constitutionally required delegation by the Governor of
4 'responsibility for... the administration of public services" to the
5 Mayor of Tinian and Aguiguan, N.M.I. Const. art. III § 17, 'in the
6 Commonwealth government,' 1 CMC § 5101, combined with the 'additional
7 duty' imposed through a public law passed by the legislature and
8 signed by the Governor to provide water service in the public
9 interest, 1 CMC § 5107(h)(2), all in furtherance of the Covenant's
10 command that '[t]he executive power of the Northern Mariana Islands
11 will be vested in a popularly elected Governor and such other
12 officials as the Constitution or laws of the Northern Mariana Islands
13 may provide,"² lead to the ineluctable conclusion that as a matter
14 of law, the Mayor of Tinian and Aguiguan is an agent of the executive
15 branch of the CNMI government." (Doc. #30, United States' Oppo. Mot.
16 Dismiss at 11).

17 a. 1 CMC § 5101

18 The United States' argument suggests that 1 CMC § 5101
19 expressly designates the Mayor of Tinian and Aguiguan as a member of
20 the CNMI executive branch of government. In this regard, the United
21 States misapprehends the position and role of a Mayor as set forth
22 in the Constitution and statutes of the CNMI.

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24 ² Quoting but not citing section 203(b) of the Covenant to Establish
25 a Commonwealth of the Northern Mariana Islands in Political Union with the
United States of America, 48 U.S.C. § 1801 note.

1 N.M.I. Const. art. VI § 1 states that "[a]gencies of local
2 government shall be established as provided by this article."
3 Section 2 of Article VI establishes the Office of Mayor in Rota,
4 Tinian and Aguiguan, Saipan and the islands north of Saipan and calls
5 for the election of the mayor. Section 3 of Article VI outlines the
6 mayor's powers and duties. Section 4 of Article VI authorizes
7 compensation for the mayor. Section 6 of Article VI mandates the
8 creation of municipal councils in Rota, Tinian and Aguiguan, Saipan
9 and the islands north of Saipan, lists qualifications needed to serve
10 on the councils, and outlines the procedure by which vacancies shall
11 be filled. Section 7 of Article VI lists the powers and duties of
12 the councils. Finally, Section 8 of Article VI establishes the
13 chartered municipality form of government on Rota and Tinian and
14 Aguiguan. See Borja, No. 02-001-OA, 2003 MP 8, at ¶22.

15 Title 1, Division 5 of the Commonwealth Code mirrors and
16 helps implement N.M.I. Const. art. VI. 1 CMC § 5101 provides that:
17 "There are in the Commonwealth government as agencies of local
18 government the offices of the mayors, composed of the duly-elected
19 mayors of Saipan, Rota, Tinian and Aguiguan, and the islands north
20 of Saipan." 1 CMC §§ 5102-5104 mandate the election of mayors,
21 describe what should be done in case of a vacancy in the Office of
22 Mayor and lists the qualifications to run for mayor. 1 CMC § 5106
23 lists powers and duties of mayors similar to those contained in
24 N.M.I. Const. art. VI § 3. Finally, 1 CMC § 5107 lists additional
25 powers and duties conferred on mayors by the legislature pursuant to
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1 N.M.I. Const. art. VI § 3(h) ("A mayor shall perform other
2 responsibilities provided by law").

3 Contrary to the United States' interpretation, the term "in
4 the Commonwealth government as agencies of local government" in 1 CMC
5 § 5101 does not mean that the mayor is a member of the executive
6 branch exercising executive power at the local government level.
7 Rather, the term designates those governmental entities that exercise
8 specified power and duties over designated geographical subdivisions
9 of the Commonwealth on behalf of and for the people of that
10 geographical subdivision. C.f. Analysis of the Constitution of the
11 Commonwealth of the Northern Mariana Islands 107 (1976) (hereinafter
12 Analysis of the Constitution). The designation of the mayor as an
13 agency of local government is meant to emphasize the limited powers
14 and duties of a mayor as opposed to the Commonwealth wide powers and
15 duties of the Governor, Congress or Judiciary. As such, a mayor is
16 not a member or agent of the executive branch such that an exercise
17 of its powers and duties will necessarily bind the CNMI, e.g., the
18 Director of the Department of Public Works.

19 In reaching this conclusion, the Court notes that such an
20 interpretation is consistent with the concept that all the executive
21 power of the CNMI is vested in the Governor. See N.M.I. Const. Art.
22 III § 1; Analysis of the Constitution at 58. Such an interpretation
23 also makes sense in light of the fact that the constitutional
24 sections providing for mayors are grouped in the same article as the
25 sections establishing municipal councils and the chartered

1 municipality form of government, entities clearly not related to the
2 executive branch. Such an interpretation makes even more sense when
3 read in light of the fact that mayors and municipal councils are
4 elected solely by, and can only exercise their powers and duties
5 solely for the people within their designated island jurisdictions.
6 See N.M.I. Const. art. VI §§ 2-7. Accordingly, the Mayor of Tinian
7 and Aguiguan is not a member or agent of the executive branch such
8 that an exercise of its powers and duties will necessarily bind the
9 CNMI.

10 b. N.M.I. Const. art. III § 17

11 Although the Mayor of Tinian and Aguiguan is not a member of
12 the executive branch such that its actions necessarily binds the
13 CNMI, the Court must still determine whether the Mayor of Tinian and
14 Aguiguan could render the CNMI government liable in this case.
15 Specifically, the Court must determine if N.M.I. Const. art. III §
16 17 could provide the Mayor of Tinian and Aguiguan with express
17 authority to render the CNMI liable on the joint funding agreements.

18 N.M.I. Const. art. III § 1 states that: "The executive power
19 of the Commonwealth shall be vested in a governor who shall be
20 responsible for the faithful execution of the laws." N.M.I. Const.
21 art. III § 17 states in relevant part that:

22 (a) The governor shall delegate to a mayor...,
23 responsibility for the execution of Commonwealth laws
24 as deemed appropriate, and the administration of
25 public services in the island or islands in which the
26 mayor has been elected. Services being provided on a
decentralized basis in Rota, and Tinian and Aguiguan,
on the effective date of this provision shall

1 continue. In furtherance of this section, the mayor
2 shall have the responsibility for ensuring that the
3 resident department heads faithfully execute their
4 duties under the law and in accordance with the
policies of the Commonwealth government for the
administration of public services, in the island or
islands in which the mayor has been elected.

5 (b) Public services on Rota, Tinian and Aguiguan,
6 shall be headed by a resident department head in the
departments providing the services...

7 The unique and confusing relationship between the Governor
8 and Mayors engendered by these constitutional provisions was
9 extensively analyzed in Inos v. Tenorio, No. 94-1289 (N.M.I. Sup. Ct.
10 June 14, 1995).³ Construing N.M.I. Const. art III §§ 1 and 17, the
11 court first declared that:

12 It is [] important to distinguish between executive
13 power on the one hand and executive duties and
14 responsibilities on the other. N.M.I. Const. art. III
repeatedly directs the Governor to delegate executive
15 duties and responsibilities to other officers within
the executive branch. N.M.I. Const. art. III §§ 3, 11
and 14. However, nowhere in N.M.I. Const. art. III
16 is the Governor forced to relinquish his or her
ultimate control over the executive power.

17 Id. at 14(emphasis in original). The court next declared that the
18 definition of "delegate" contained in N.M.I. Const. art III § 17(a)
19 meant "merely entrusting power to another to act for the good of the
20 one who authorizes him," "rather than a complete surrender of
21 relinquishment of power." Harmonizing these declarations, the court

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23 ³ Ordinarily, a federal court is not bound by a trial court level
24 decision interpreting state or territorial law. See Allen v. City of Los
25 Angeles, 92 F.3d 842, 847 (9th Cir. 1996). However, the Supreme Court for
the CNMI has stated that Inos is "authoritative law until the CNMI Supreme
Court determines otherwise." Commonwealth v. Anglo, 5 N.M.I. 228, 230 n.9
(1999).

1 then concluded that "the phrase 'shall delegate' in the first
2 sentence of N.M.I. Const. art III § 17(a) does not divest a Governor
3 of his or her executive power, but requires him to delegate certain
4 duties and responsibilities to the mayors." Id. at 16.

5 The court next construed the scope of delegation mandated by
6 N.M.I. Const. art III § 17. Finding that the "as deemed appropriate"
7 language only qualifies that portion of N.M.I. Const. art. III § 17
8 requiring the Governor to delegate the duty to execute Commonwealth
9 laws, the court ruled that the "Governor may refuse to delegate any
10 authority to the Mayor over those departments whose primary function
11 is the execution of law." Id. at 17-18. Conversely, the court ruled
12 that where a department's primary function is the administration of
13 public services, N.M.I. Const. art III § 17 mandates the delegation
14 of the Governor's duties.⁴ What constituted "public services" under
15 N.M.I. Const. art. III § 17 was broadly construed by the court to
16 include "all those public services which the executive branch has an
17 obligation to deliver. Id. at 21. Delegation of administration of
18 public services does not necessarily mean that a mayor is directly
19 in charge of a department's services as a resident department head.
20 See Id. at 31 n.24. C.f. 1 CMC § 5201. However, it does mean that
21 a mayor has at least a supervisory responsibility over the
22 department's services. Id. at 22. This supervisory responsibility

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24 ⁴ In a later issued decision, Inos v. Tenorio, No. 94-1289
25 (N.M.I. Sup. Ct. Oct. 18, 1995), the court clarified its prior ruling
26 by declaring that a delegation of responsibility has to be over the
entire department. Id. at 5-6.

1 taking the form of "ensuring that the resident department heads
2 faithfully execute their duties under the law and in accordance with
3 the policies of the Commonwealth government." See Id. at 22-23.

4 In light of the Inos court's interpretation, N.M.I. Const.
5 art. III § 17 could provide the Mayor of Tinian and Aguiguan with
6 express authority to render the CNMI liable on the joint funding
7 agreements. To have such authority, the Governor must have delegated
8 to the Mayor of Tinian and Aguiguan responsibility over a department
9 that administers public services.⁵ The Mayor then must have entered
10 into the joint funding agreements in his capacity as resident
11 department head. Finally, the Mayor must have acted within the scope
12 of CNMI law when it entered into the joint funding agreement. 72 Am.
13 Jur.2d States, Territories and Dependencies § 72 (2001) (stating that
14 "officers must act within their authority; a state is not bound by
15 the unauthorized contracts of its officers").

16 As stated, the Court believes that the Mayor of Tinian and
17 Aguiguan must be a resident department head in order to act as an
18 agent of the CNMI. The delegation under N.M.I. Const. art. III §
19 17(a) gives mayors "supervisory responsibility" over the resident
20 department head to ensure that he fulfills his duties and follows the
21 Governor's policies. Inos, No. 94-1289, at 22 (N.M.I. Sup. Ct. June
22 14, 1995). This supervisory responsibility grants a mayor the
23 authority "to remove, discipline and ultimately control the actions

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25 ⁵ The United States does not argue that the Mayor of Tinian and
26 Aguiguan entered into the joint funding agreements through a delegation of
responsibility to execute Commonwealth law.

1 of the resident department heads". Id. at 31. By way of
2 illustration,

3 [I]f mandatory AIDS...testing for doctors and nurses
4 employed at Commonwealth public hospitals became the
5 policy of the Commonwealth government, the Secretary
6 of Public health would be charged with the
7 responsibility to implement the policy. As the
8 recipient of delegated authority over the
9 administration of public services on [Tinian and
10 Aguiguan], the Mayor would act as the secretary's eyes
11 and ears on [Tinian and Aguiguan] to make sure that
12 his Resident Department Head for Public Health on
13 [Tinian and Aguiguan] implemented the Commonwealth-
14 wide policy. If a resident department head failed to
15 timely comply with the mandatory AIDS testing policy,
16 the Mayor, as supervisor, would have a duty to take
17 immediate steps to insure the policy's implementation,
18 including reasonable disciplinary action.

19 Id. Consistent with this delegation of supervisory responsibility,
20 if a mayor believes that the department should enter into a contract,
21 he must order the resident department head to enter into the contract
22 on behalf of the CNMI. The delegation of supervisory responsibility
23 under N.M.I. Const. art. III § 17(a) does not permit a mayor to enter
24 into the contract on behalf of the CNMI.

25 Only if a mayor is designated the resident department head
26 can he contract on behalf of the CNMI. Resident department heads are
part of the executive branch of the CNMI government. N.M.I. Const.
art. III § 17(b). See, e.g., Inos, No. 94-1289, at 22, 30-31 (N.M.I.
Sup. Ct. June 14, 1995). 1 CMC § 5201 permits the appointment of a
mayor as a resident department head. If so appointed, a mayor is
then part of the executive branch and can thus exercise any power a
resident department head may have to contract. See also 1 CMC §
5201 (stating that "the Mayor of Tinian and Aguiguan," if designated

1 a department's resident head, "shall have the authority necessary to
2 efficiently and effectively carry out the administration and delivery
3 of public services"). A contract so executed would be binding on the
4 CNMI. Therefore, the Mayor of Tinian and Aguiguan must be a resident
5 department head in order to act as an agent of the CNMI.

6 With the above discussion in mind, the Court must determine
7 if the United States pleads a claim for relief against the CNMI.
8 Other than the conclusory allegation that the Mayor of Tinian and
9 Aguiguan acted as an agent of the CNMI, the United States pleads no
10 facts demonstrating that the Governor delegated to the Mayor of
11 Tinian and Aguiguan responsibility over a department that administers
12 public services, that the Mayor entered into the joint funding
13 agreements in his capacity as resident department head and that the
14 Mayor was authorized to enter into the joint funding agreements.
15 Accordingly, the Court finds that the United States fails to state
16 a claim that the Mayor of Tinian and Aguiguan bound the CNMI through
17 N.M.I. Const. art. III § 17.⁶

18 2. Apparent Authority

19 The United States next argues that the CNMI is liable on the
20 joint funding agreements because the Mayors of Tinian and Aguiguan
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22 ⁶ The court notes that 1 CMC § 5107(h)(2) does not create any sort
23 of agency relationship between the CNMI and the Mayor of Tinian and
24 Aguiguan. Under the statute, a mayor has discretion to provide "[w]ater
25 service to individual residences or community centers in villages, farms,
26 or homestead areas" so long as the provision of such service is "in the
public interest or are of benefit to the community." Such service is
provided solely by a mayor pursuant to power granted it by the legislature
under N.M.I. Const. VI § 3(h). It cannot be construed as permitting a
mayor to contract with another on behalf of the CNMI.

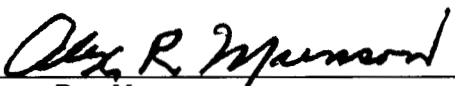
1 were acting with the apparent authority of the CNMI. However, this
2 theory of liability is not viable against the CNMI.

3 Governments cannot be held liable to a contract through
4 apparent authority. 81A C.J.S. States § 156 (1977). See, e.g.,
5 Thomas v. I.N.S., 35 F.3d 1332, 1338 (9th Cir. 1994) (stating that
6 "[e]stopper and apparent authority will not substitute for actual
7 authority to bind the United States government"); ARA Health Servs.,
8 Inc. v. Dept. of Pub. Safety & Correctional Servs., 685 A.2d 435, 440
9 (Md. 1996). To hold otherwise could eviscerate the well-settled rule
10 that a state or territorial government is not bound by a contract
11 entered into by an agency acting beyond the power specifically
12 conferred on it by law. 81A C.J.S. States, supra; See, e.g., SIU de
13 Puerto Rico, Carib y Latinoamerica v. Virgin Islands Port Auth., 42
14 F.3d 801, 803 (3d Cir. 1994). As a result, the United States cannot
15 claim that the Mayor of Tinian and Aguiguan was an agent that could
16 bind the CNMI through apparent authority.

17 IV. CONCLUSION

18 Based on the foregoing, it is **ORDERED** that Defendant CNMI's
19 Fed.R.Civ.P. 12(b)(6) Motion to Dismiss First Amended Complaint (Doc.
20 #26) is **GRANTED**. Accordingly, all claims for relief by the United
21 States of America against the CNMI are hereby **DISMISSED**.

22 **DATED** this 12TH day of December, 2003.

23
24 
25 Alex R. Munson
26 United States District Court