



By the order of the court, Judge David A Wiseman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FOR PUBLICATION



E-FILED
CNMI SUPERIOR COURT
E-filed: Mar 21 2013 01:48PM
Clerk Review: N/A
Filing ID: 51248031
Case Number: 12-0194-CV
N/A

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**JANET U. MARATITA, RAY ANTHONY
N. YUMUL, for themselves and on behalf
of the taxpayers of the CNMI and the
ratepayers of CUC, AND THE
NORTHERN MARIANAS
COMMONWEALTH SENATE,**

Plaintiffs,

vs.

**BENIGNO R. FITIAL, EDWARD T.
BUCKINGHAM, COMMONWEALTH
UTILITIES CORPORATION, AND
SAIPAN DEVELOPMENT, LLC,**

Defendants.

CIVIL CASE NO. 12-0194

**ORDER VACATING PRELIMINARY
INJUNCTION AS TO SAIPAN
DEVELOPMENT AND AMENDING
PRELIMINARY INJUNCTION**

I. INTRODUCTION

THIS MATTER came before the Court March 6, 2013. Attorney Ramon K. Quichocho appeared for Plaintiffs Janet U. Maratita, Ray Anthony N. Yumul, and the Commonwealth Senate (“Plaintiffs”). Assistant Attorney General David Lochabay appeared for defendants Benigno R. Fitial¹ and Joey P. San Nicolas, Attorney General² (“Government Defendants”). Deborah E. Fisher appeared for the

¹Since the complaint was filed Benigno R. Fitial has resigned as Governor of the Commonwealth. On February 8, 2013 Government Defendants filed a motion to substitute the Commonwealth for Fitial as defendant and a motion to dismiss Fitial as an individual. Both motions remain pending at the time of this writing.

²Edward Buckingham, former Attorney General, was originally named in the lawsuit. NMI R. Civ. P. 25(d)(1) provides that upon resignation, “the officer’s successor is automatically substituted as a party.” Following Buckingham’s resignation, Viola Alepuyo became Acting Attorney General and party to this lawsuit. Currently Joey P. San Nicolas is the Attorney General, and is automatically substituted as a party thereby.

1 Commonwealth Utilities Corporation (“CUC”). William M. Fitzgerald appeared on behalf of Saipan
2 Development, LLC (“SDLLC”). Having reviewed the record, applicable law and arguments of counsel the
3 Court renders this written decision.

4 **II. BACKGROUND**

5 On August 20, 2012, Plaintiffs filed a taxpayer lawsuit seeking a temporary restraining order
6 (“TRO”) and preliminary injunction. On August 21, 2012, the Court issued a TRO in Plaintiffs’ favor. On
7 August 30, 2012, Government Defendants filed a statement of non-opposition to injunctive relief. On the
8 same day, Plaintiffs filed a First Amended Complaint (“FAC”). On August 31, 2012, the Court issued a
9 preliminary injunction, enjoining all defendants,

10 . . . their agents, assistants, employees, successors, and all other persons
11 acting in concern or cooperation with any of the Defendants, or under their
12 control . . . from continuing, pursuing, and/or performing on the August 3,
2012 Power Purchase Agreement and associated agreements.

13 (Prelim. Inj. 2.)

14 On September 4, 2012 the Court held a preliminary injunction hearing.³ At the hearing the
15 Government Defendants and CUC consented to injunctive relief. Plaintiffs’ counsel, Ramon Quichocho
16 represented to the Court that SDLLC had been served. Following the hearing the Court issued a
17 supplemental preliminary injunction. (Supp. Prelim. Injunction 2.)

18 On September 14, 2012 the Government Defendants filed a motion to dismiss and a motion to strike
19 which the Court granted in part and denied in part in a written decision dated December 28, 2012. (*See*
20 *Order Partially Grant and Den. Defs’ Mot. to Dismiss and Strike*.) Following this decision three causes of
21 action remain: Count I for breach of fiduciary duty against the Government Defendants and CUC brought
22 pursuant to Art. X, § 9; (FAC 13); Count IV for declaratory relief against all defendants (FAC 19); and

24 ³SDLLC was not present for the preliminary injunction hearing and did not file any statement of non-opposition.
25 SDLLC’s involvement in the suit is more thoroughly explained in this Court’s order denying SDLLC’s motion to dismiss.
(*See Order Den. Def.’s Mot. Dismiss*).

1 Count V for injunctive relief against all defendants (FAC 21).

2 On October 5, 2012, SDLLC filed a motion to dismiss, which the Court denied in a written decision
3 on January 4, 2013 (*See Order Den. Def.'s Mot. Dismiss*). The Court in its decision reasoned that the
4 Plaintiffs survived the motion to dismiss as to Counts IV and V in part because as taxpayers they have
5 standing to sue for declaratory and injunctive relief pursuant to Art. X § 9. (*Id.* 7-8.)

6 On December 13, 2012, SDLLC filed a motion to vacate the preliminary injunction arguing that the
7 Court lacked personal jurisdiction. On January 2, 2013, the Court in a written decision treated the motion
8 to vacate as one for reconsideration and granted reconsideration of the preliminary injunction as to SDLLC.
9 A hearing on injunctive relief began January 17, 2012, spanned several days, and ended on March 6, 2013.
10 Presently before the Court is whether injunctive relief against SDLLC is proper.

11 **III. DISCUSSION**

12 Initially the Court addresses jurisdiction. The Court previously ruled in this case that the Plaintiffs
13 have standing to sue for declaratory and injunctive relief generally pursuant to Art. X § 9. The Court
14 acknowledged that Counts IV and V against all defendants are cognizable because they are brought pursuant
15 to Art. X§ 9. However, the Court did not reach the issue of whether the Court has jurisdiction to issue
16 injunctive relief against a private party, SDLLC, as part of a taxpayer lawsuit. This is an issue of first
17 impression in the Commonwealth.

18 Normally, private individuals lack standing to sue to redress public wrongs; however, in the
19 Commonwealth the right of taxpayers to challenge their government under certain circumstances is expressly
20 granted by the Constitution. *Mafnas v. Commonwealth*, 2 NMI 248, 261 (1991); NMI Const. Art. X § 9.
21 In a taxpayer action brought pursuant to Art. X § 9, the Court must have jurisdiction to grant the type of
22 relief sought. *See Mafnas v. Commonwealth*, 2 NMI 248, 263 (1991) (holding Art. X, § 9 authorizes both
23 declaratory and injunctive relief.); *see also, Rayphand v. Tenorio*, 2003 MP 12 ¶ 28 (holding the recovery
24 of monies already misspent is encompassed in the standing granted to taxpayers by Article X, Section 9).
25 Courts have a duty to raise standing issues sua sponte, because standing is a prerequisite to jurisdiction. *See*

1 *Cody v. N. Mariana Islands Ret. Fund*, 2011 MP 16 ¶ 10 (courts must address jurisdictional issues sua
2 sponte).

3 NMI Const. Art. X § 9 provides:

4 A taxpayer may bring an action against the government or one of its
5 instrumentalities in order to enjoin the expenditure of public funds for other
6 than public purposes or for a breach of fiduciary duty. The court shall award
costs and attorney’s fees to any person who prevails in such an action in a
reasonable amount relative to the public benefit of the suit.

7
8 Here, SDLLC is a private company. It is neither a government entity, nor an instrumentality of the
9 government. It has no power or ability to spend public funds, and no fiduciary duty to the taxpayers. As
10 such, the Court lacks power to enjoin the actions of SDLLC pursuant to Art. X § 9. Consequently, the Court
11 **VACATES** the preliminary injunction as to SDLLC.

12 **IV. INJUNCTIVE RELIEF**

13 The Court initially notes that it has inherent power to correct or revise a prior decision at any time
14 before the entry of final judgment. *See* NMI R. Civ. P. 54(b). In light of concerns raised by Plaintiffs and
15 CUC at the hearing on the motion for reconsideration, the Court exercises this power to amend the
16 preliminary injunction to more clearly set out the legal basis for the injunction and the scope of the
17 injunction.

18 “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted
19 unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S.
20 968, 972 (1997). The purpose of a preliminary injunction is to preserve the status quo pending a final
21 determination on the merits. *Pacific Am. Title Ins. & Escrow (CNMI), Inc. v. Anderson*, 6 NMI 15 ¶ 8
22 (1999). The status quo is the last uncontested status prior to the pending controversy. *Id.* In deciding
23 whether to grant a preliminary injunction, Commonwealth courts consider (1) whether the plaintiff has a
24 strong likelihood of success on the merits; (2) the level of the threat of irreparable harm to the plaintiff if
25 the relief is not granted; (3) the balance between of harms to the parties; and (4) the public interest.

1 *Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12 ¶ 20.

2 Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a
3 combination of probable success on the merits and the possibility⁴ of irreparable harm or the existence of
4 serious questions going to the merits and a balance of hardships sharply tipping in its favor. *Pacific Am.*,
5 6 NMI 15 ¶ 9.

6 Rule 65(d) requires that every injunctive order sets forth the reasons for its issuance. NMI R. Civ.
7 P. 65(d). Here, the Court reiterates that the Government Defendants and CUC, have consented to be
8 enjoined. Additionally, the requirements for injunctive relief have been met in this case.

9 First, Plaintiffs have shown a likelihood of irreparable harm; should CUC be forced to build a
10 substation, the cost to the ratepayers, many of whom are taxpayers, would be extremely difficult to calculate.
11 This is because of the human costs associated with having no electricity. Given the high price of power in
12 the CNMI, and the struggling economy, this concern is not merely speculative. Second, Plaintiffs have
13 shown a strong likelihood of success in demonstrating a right to declaratory relief finding that the Power
14 Purchase Agreement is unenforceable. Third, the potential harm to taxpayers should CUC be forced to
15 perform is more serious than any harm to the government from being enjoined. Government Defendants
16 and CUC have not alleged any harm as a result of the injunction. Finally, the case raises serious issues of
17 public concern including the Commonwealth's potential choice to develop renewable energy rather than
18 continue to rely on diesel. On balance, extraordinary relief is warranted in this case to preserve the status
19 quo until the case can be heard on the merits.

20
21 ⁴The United States Supreme Court has held that the "possibility" standard is too lenient, writing:

22 The lower courts held that when a plaintiff demonstrates a strong likelihood of success on
23 the merits, a preliminary injunction may be entered based only on a "possibility" of
24 irreparable harm. The "possibility" standard is too lenient. This Court's frequently
25 reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that
irreparable injury is *likely* in the absence of an injunction.

Winter v. NRDC, Inc., 555 U.S. 7, 8 (2008) (emphasis in original).

1 The Preliminary Injunction is **AMENDED** as follows, and **VACATED** to the extent inconsistent
2 with this order.

3 **V. PRELIMINARY INJUNCTION**

4 For the reasons set forth in this decision the Court orders the following:

5 Benigno R. Fitial,⁵ Joey P. San Nicolas, and the Commonwealth Utilities Corporation, their officers,
6 agents, servants, employees, and attorneys, and those persons in active concert or participation with them
7 who receive actual notice of this order are hereby restrained, enjoined, and prohibited from:

- 8 1. Performing on the August 3, 2012 Power Purchase Agreement, or associated agreements;
- 9 2. Expending funds in furtherance of performing on those agreements, including but not limited
10 to any expenditure related to designing and building a new power substation;
- 11 3. Increasing CUC rates for the express purpose of raising revenue to perform on the August
12 3, 2012 Power Purchase Agreement or associated agreements.

13
14 **IT SO ORDERED** this 21st day of March, 2013.

15
16 _____ / s / _____

17 David A. Wiseman, Associate Judge

18
19
20
21
22
23
24
25 _____
⁵See note 1.