IN THE SUPREME COURT OF GUAM

GUAM PACIFIC ENTERPRISE, INC.
Plaintiff-Appellant,

v.

GUAM PORESIA CORPORATION, FRANK S.N. SHIMIZU and JOSEPH S.N. SHIMIZU, in their capacity as Trustees of the Ambrosio T. and Rufina S.N. Shimizu Inter Vivos Trust, and Does 1-5, Inclusive,
Defendants-Appellees.

Supreme Court Case No.: CVA05-010
Superior Court Case No.: CV1541-02

OPINION

Cite as: 2007 Guam 22

Appeal from the Superior Court of Guam
Argued and Submitted on October 9, 2006
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore.*

CARBULLIDO, C.J.:

[1] Plaintiff-Appellant Guam Pacific Enterprise, Inc. ("GPE") appeals from the trial court's grant of summary judgment in favor of Defendants-Appellees Frank S.N. Shimizu and Joseph S.N. Shimizu, in their capacity as Trustees of the Ambrosio T. and Rufina S.N. Shimizu *Inter Vivos* Trust ("the Trust"), wherein the court held that the Notice of Non-Responsibility ("Notice") posted and recorded by the Trust served to put GPE on notice that the Trust denied any liability for materials requested by Defendant-Appellee Guam Poresia Corporation ("Poresia").

[2] We hold that the trial court erred in determining that the Notice of Non-Responsibility posted and recorded by the Trust was sufficient to defeat GPE's mechanic's lien under 7 GCA § 33203(b). Additionally, we hold that where a lessee is held to be the agent of the lessor, in applying the factors as discussed in this opinion, a lessor cannot shield its liability by posting and recording a Notice of Non-Responsibility as required under section 33203(b). We therefore reverse the trial court's grant of summary judgment in favor of the Trust and remand for further proceedings in accordance with this opinion.

I.

[3] On August 11, 1992, Defendants-Appellees Frank S.N. Shimizu and Joseph S.N. Shimizu, in their capacity as Trustees of the Ambrosio T. and Rufina S.N. Shimizu *Inter Vivos* Trust, ("the Trust") entered into a Lease Agreement ("Lease"), which lease was not recorded, with GFG Corporation to develop a championship golf resort in two phases. Record on Appeal ("RA"), tab 25 (Ground Lease). Construction of Phase I included the development of an 18-hole golf-course, and all golf resort amenities such as a clubhouse. The Lease, originally entered between the Trust

and GFG Corporation, was later assigned to Guam Poresia Corporation[1] ("Poresia").[2]

[4] On April 9, 1999,the Trust posted a Notice of Non-Responsibility ("Notice") at Poresia's field office in Togcha, and recorded the Notice on May 3, 1999. Appellant's Excerpts of Record ("ER"), pp. 10-13 (Notice of Non-Responsibility). A building permit for the construction of the clubhouse was issued to Poresia in June 2001. Record on Appeal ("RA"), tab 25 (Building Permit). Sometime in September 2001 and continuing through March 2002, at Poresia's request, GPE began furnishing Poresia with construction materials for the construction of the clubhouse. RA, tab 2 (Complaint). Work on the clubhouse continued until at least June 2002. ER, p. 26 (Decision and Order).

[5] As a result of Poresia's failure to pay the outstanding balance to GPE, GPE issued its Pre-Lien notice to the Trust and Poresia, then later filed and recorded its claim of lien on the clubhouse. Poresia was also in default with its rental payments to the Trust and, as a result, the Trust filed an unlawful detainer action wherein the court ordered the lease forfeited and awarded the Trust damages for the outstanding unpaid rents. RA, tab 21 (Mem. Support of Mtn. for Sum. J.). GPE and the Trust filed motions for summary judgment and the trial court granted the Trust's motion and denied GPE's motion holding that the Notice of Non-Responsibility provided by the Trust was sufficient to defeat the lien filed by GPE. A final judgment was entered and GPE timely filed this appeal.

II.

[6] This court has jurisdiction over this appeal from a final judgment pursuant to 7 GCA §§ 3107(b) and 3108(a) (2005).

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[1] At the time the instant appeal was filed, Guam Poresia Corporation was a defunct corporation. Appellant's Opening Brief, p. 3 n.1 (April 26, 2006).

[2] The Lease was first assigned by GFG Corporation to Guam Togcha Corporation on November 19, 1993, however the assignment was not recorded. RA, tab 25 (Lessor's Conditional Consent to Assignment). On August 2, 1996 Guam Togcha Corporation assigned the Lease to Guam Poresia Corporation which assignment was recorded with the Department of Land Management on August 5, 1996. RA, tab 25 (Assignment of Lease).

III.

[7] GPE appeals from the trial court's grant of summary judgment, wherein the court held that GPE had sufficient notice that the Trust denied any liability for materials requested and that the notice of non-responsibility was sufficient to cover Phase I, which included the construction of the clubhouse.

[8] "A trial court's decision granting a motion for summary judgment is reviewed *de novo*." *Arashi & Co., Inc. v. Nakashima Enter., Inc.*, 2005 Guam 21 ¶ 10 (quoting *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Hemlani v. Flaherty*, 2003 Guam 17 ¶ 7 (quoting Guam R. Civ. P. 56(c)). "There is a genuine issue, if there is 'sufficient evidence' which establishes a factual dispute requiring resolution by a fact-finder." *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7 (citing *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987)). Also, "the dispute must be as to a 'material fact'" which is a fact "that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *Id.* (quoting *T.W. Elec. Serv.*, 809 F.2d at 630).

IV.

[9] GPE argues on appeal that the Notice of Non-Responsibility ("Notice") issued by the Trust was invalid because the Notice was prematurely given and failed to comply with Guam's mechanic's lien laws. Further, GPE argues that notwithstanding the timeliness of the posting of the Notice, the Trust was a participating owner in the construction of the clubhouse and could not shield its liability by recording the Notice. We first address the timeliness of the Notice issued by the Trust.

A. Timeliness of the Trust's Notice of Non-Responsibility

[10] GPE first argues that the Notice issued by the Trust was prematurely and failed to comply

with Guam's mechanic's lien statutes. GPE asserts that Guam's mechanic's lien s,tatutes require an owner of real property, when issuing a notice of non-responsibility, to provide such notice within ten days of the owner obtaining actual knowledge of the construction. GPE argues the "statute does not authorize the giving of a general notice to be applied wholesale and indiscriminately to all future improvements . . ." Appellant's Opening Brief, p. 8-9 (Apr. 26, 2006). Thus, GPE contends that the Notice here was prematurely given because it was posted on April 9, 1999 and recorded on May 3, 1999, and work on the clubhouse did not commence until sometime in 2001, more than two years before construction began. Further, GPE asserts that "the trial court erroneously concluded, without any legal analysis, that an owner could give a general notice" which would apply "to all future improvements as long as the construction was characterized as a 'Phase' of construction." Appellant's Opening Brief, p. 9 (Apr. 26, 2006).

[11] The Trust, however, submits that the Notice was not prematurely given because work on the property began in 1999 before the Notice was posted. The Trust argues that it was "communications from unpaid contractors who had performed . . . work" on the property that caused the Trust to issue the Notice. Appellee's Brief, p. 7 (June 19, 2006). Although GPE began supplying materials in 2001, the Trust maintains that it was not required to provide a new notice each time work was done on the property.

[12] "A mechanic's lien is a procedural device for obtaining payment of a debt ow[ ]ed by a property owner for the performance of labor or the furnishing of materials used in construction." *North Bay Const., Inc. v. City of Petaluma*, 49 Cal. Rptr. 3d 455, 456 (Ct. App. 2006) (alteration in original). The essential purpose of mechanic's lien statutes is to secure payment to mechanics or materialmen for labor performed or materials furnished. *Bay Lumber Co. v. Pickering*, 7 P.2d 371, 373 (Cal. Ct. App. 1932).

[13] "While the essential purpose of the mechanics' lien statutes is to protect those who have performed labor or furnished material towards the improvement of the property of another, inherent

in this concept is a recognition also of the rights of the owner of the benefitted property." *Baker v. Hubbard*, 161 Cal. Rptr. 551, 556 (Ct. App. 1980) (quoting *Borchers Bros. V. Buckeye Incubator Co.*, 379 P. 2d 1, 4 (Cal. 1963). "It has been stated that the lien laws are for the protection of the property owners as well as lien claimants and the laws relating to mechanics' liens result from the desire of the Legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material." *Id.*

[14] The underlying principle of the entire theory of a mechanic's lien is that of equitable estoppel. *John R. Gentle & Co. v. Britton*, 111 P. 9, 11 (Cal. 1910). "The owner of real property having, either by his own act or that of another with his consent or knowledge, procured the improvement of such property and received the benefit of the labor or material of another thereby, is deemed to have created an equitable lien upon the premises to secure the payment of the value of such labor and materials. " *Id.*

[15] Thus, in applying the lien statutes, we stated in *Manvil Corp. v. E.C. Gozum & Co., Inc.*, 1998 Guam 20, that "[w]e adopt a fair and reasonable construction and application of our mechanics' lien statutes to the facts in each particular case, so as to afford materialmen and laborers the security intended by the legislation's remedial purpose. Where the statutes are clear on their face, however, we will not read further." *Id.* at ¶ 17.

[16] The issuance of a non-responsibility notice is governed by 7 GCA § 33203(b), which provides:

> **Land Subject to Lien: Building Deemed Constructed, at Owner's Instance: Interest Subject to Lien: Notice of Non-responsibility: Posting, Filing, Time for: Requisites of Notice: Verification.**
>
> (b) Every building or other improvement or work mentioned in this Chapter, constructed, altered, or repaired upon any land, with knowledge of the owner or of any person having or claiming any estate therein, and the work or labor done or materials furnished mentioned in any of said sections, with the knowledge of the owner or persons having or claiming any estate in the land, shall be held to have been constructed, performed or furnished at the instance of such owner or person having or claiming any estate therein, and such interest owned or claimed shall be subject

> to any lien filed in accordance with the provisions of this Chapter, unless such owner or person having or claiming any estate therein shall, within ten (10) days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also, within the same period, file for record a verified copy of said notice in the Department of Land Management. Said notice shall contain a description of the property affected thereby sufficient for identification, with the name, and the nature of the Chapter or interest of the person giving the same, name of purchaser under contract, if any, or lessee if known; said copy so recorded may be verified by anyone having a knowledge of the facts, on behalf of the owner or person for whose protection the notice is given.

7 GCA § 33203(b) (2005).

[17] "[*W*]*ork of improvement* and *improvement* mean the entire structure or scheme of improvement as a whole." 7 GCA § 33202(b)(2005). Under section 33203(b), "labor done or materials furnished" for every building constructed, altered or repaired with the owner's knowledge or others having or claiming interest in said property, "*shall be held to have been constructed, performed or furnished at the instance of* [*the*] *owner* . . . . and such interest . . . . shall be subject to a lien "unless [the] owner . . . provide[s] a notice of non-responsibility" in accordance with the statute. 7 GCA § 33203(b) (emphasis added). Thus, to defeat a mechanic's lien under section 33203(b), an owner, shall "within ten (10) days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible" for claims made by posting a written notice in some conspicuous place on the property and within the same time period record a verified copy of such notice with the Department of Land Management. 7 GCA § 33203(b).

[18] Whether the notice requirement has been satisfied under the lien statute is a question of fact for the court to determine from the evidence before it. *English v. Olympic Auditorium, Inc.*, 20 P.2d 946, 948-949 (Cal. 1933). The object of a notice of non-responsibility is "to bring home to those who are expending labor or materials upon a building the fact that the owner of the land will not be responsible for such labor or materials." *Id.* at 948. Strict compliance is required in order to relieve

an owner from liability. *Hayward Lumber & Inv. Co. v. Ross*, 90 P.2d 135, 136 (Cal. Dist. Ct. App. 1939).

[19] In its decision, the trial court stated there was no dispute to the technical formalities of the posting of the Notice, as "both parties represented to the Court that the Notice was posted sometime around May 1999." ER, p. 30 (Decision & Order). The court held, based on the representations, that the "posting requirements mandated by section 33203(b)" were satisfied but that the timeliness of the posting of the Notice was in dispute. ER, p. 30 (Decision & Order). The court, in finding that the Notice was sufficient to cover construction on the clubhouse, noted as alleged by the Trust, that the Notice was posted and filed "while Poresia was actively working on Phase I of the project, which included the construction of the clubhouse." ER, p. 30 (Decision & Order). Further, the court held that "because the Notice was posted in a conspicuous place upon the property and recorded accordingly," GPE was put on notice that the Trust denied any liability for the materials Poresia requested. ER, p. 30 (Decision & Order).

[20] While the court found that the posting requirements mandated by section 33203(b) were satisfied, the court made no finding of when the construction began. The court in effect found that because the Trust alleged construction was ongoing when the Notice was posted, the Notice was sufficient to defeat GPE's lien. Such a finding, however, is not supported by the record.

[21] The record here shows that the Lease entered on August 11, 1992 was for the construction of a golf resort.[3] Phase I of the Lease included construction of the clubhouse, the property which GPE asserts it has a valid mechanic's lien. As to commencement of construction on the property, the Lease implies that construction of Phase I was to start on January 1, 1993, however, the Rental Schedule amended in August 1996 states that construction on Phase I should begin either on June

[3] Paragraph 8(a) of Lease provides that Phase I shall consist of the development of an eighteen-hole golf resort and shall also include all golf resort amenities such as a clubhouse, restaurants, pro shop, meeting rooms, practice range, putting greens, and swimming pools. RA, tab 25 (Deposition of Frank S.N. Shimizu, Ex. A p.10).

20, 1995 or September 30, 1996. RA, tab 25 (Amended Exhibit B attached to Lessor's Conditional Consent to Assignment by Lessee and Lessee's Acceptance of Conditions). In addition, the deposition testimony of Frank Shimizu ("Shimizu") revealed that construction may have started sometime after the Lease was entered into. Shimizu stated when asked about the date the original construction began, that he believed construction may have started sometime after the Lease was signed in 1992. Shimizu later explained, however, that when Poresia took over, some work had been done; for instance, designs, surveys, permits, and mapping. Shimizu testified at his deposition that he was uncertain of when "actual construction" on the clubhouse began (RA tab 25 Deposition p. 16), but stated that the Trust issued the Notice in April 1999 because contractors' claims were not being paid by Poresia. At the time the Notice was issued, Shimizu stated that construction on the clubhouse started, otherwise, the Notice would not have been issued. RA tab 25 Deposition p. 22 The evidence further revealed that the Notice was posted on April 9, 1999 at Poresia's field office in Togcha and recorded on May 3, 1999. ER pp. 10-13 (Notice of Non-Responsibility). The building permit on the clubhouse was issued in June 2001 and GPE began supplying materials to Poresia around September 2001 up until March 2002. No evidence was presented on the actual date the Trust first obtained knowledge of any construction on the property, which would show whether the Trust complied with the requirements of section 33203(b).

[22] It is clear under section 33203(b), that an owner must provide written notice by posting and recording the notice within ten days after obtaining knowledge of construction on the property, and we will not read further. *Manvil* at ¶ 17. The trial court believed that because construction was ongoing when GPE supplied Poresia materials, that the Trust complied with section 33203(b), without stating whether the Notice was in fact posted and recorded within the prescribed time. While there is no dispute that the Notice was posted on the property and recorded, it is unclear from the record whether the Notice was posted and recorded within the time periods prescribed under section 33203(b). GPE claims that construction on the clubhouse started after the Notice was given.

In contrast, the Trust argues that construction already began when the Notice was posted. The issue here is whether the Notice issued by the Trust was sufficient to defeat GPE's lien. Deciding whether the Notice was sufficient requires a determination of whether the notice was given in accordance with section 33203(b). There is a factual dispute on when the Trust first obtained knowledge of any construction on the property which is a material fact relevant to the Trust's defense that it is not liable for the lien filed by GPE.

[23] Even assuming *arguendo* that the notice was posted within ten days of the Trust obtaining knowledge of construction on the property, section 33203(b) also requires that such Notice be recorded within the same time period. The Notice here was posted on April 9, 1999 and recorded on May 3, 1999, twenty-four days later. We agree, however, with the trial court that a new notice is not required each time work is done on leased property where the work is provided for a scheme of improvement as a whole. The purpose of a non-responsibility statute is to provide notice to materialmen and laborers that an owner will not be responsible for the work done or materials furnished. *English* 20 P.2d at 948-949. Further, a non-responsibility statute provides relief for an owner of real property from claims made by materialmen, but an owner must strictly comply with the provisions of the statute. *Hayward Lumber* at 136.

[24] We therefore find that the trial court erred in holding that the Notice was sufficient to relieve the Trust from GPE's lien in accordance with section 33203(b) because it is unclear from the record whether the Trust in providing its non-responsibility notice, complied with the requirements mandated under section 33203(b). Although we hold that, based on the record, the evidence was insufficient to show compliance with section 33203(b), courts in other jurisdictions have held an owner liable despite the posting and recording of a notice of non-responsibility when a lessee is held to be the agent of the lessor for purposes of the mechanic's lien laws. We therefore examine the effect of a notice of non-responsibility where a lessee is held to be the agent of the lessor as followed in other jurisdictions.

B. Effect of Notice of Non-Responsibility

[25] GPE next argues that the Trust was a participating owner under California case law who could not shield its liability by recording a notice of non-responsibility. GPE contends that based on California case law, the Trust was a participating owner because (1) the Lease obligated Poresia to construct various improvements, including the clubhouse; (2) the Trust was entitled to be actively involved in the design process; and (3) the improvements immediately attached to the real property. The Trust argues that even if the lien is valid, it only attaches to Poresia's leasehold interest. The Trust asserts that the fact that the trial court did not make a finding on the issue of whether the Trust was a participating owner does not justify reversing the judgment. In fact, the trust argues that GPE simply failed to provide sufficient evidence to show that the Trust was a participating owner. The Trust also maintains that the participating owner doctrine does not automatically apply when a lease requires the lessee to construct improvements. To the extent that an agency relationship exists, the Trust argues that the courts can also look to the acts and conduct of the parties and not solely rely on the lease language.

[26] While an owner with knowledge of construction may avoid claims for mechanic's liens by exempting his property through recording and posting a notice of non-responsibility, as required under the statute, courts in other jurisdictions have held a lessor liable for such liens where the lessee is held to be the agent of the lessor in contracting for the labor or materials furnished in connection with improvements made on the leased premises. *Idaho Lumber, Inc. v. Buck*, 710 P.2d 647, 651-652 (Idaho Ct. App. 1985). The burden of establishing an agency relationship rests on the party asserting it. *Transamerica Leasing Corp. v. Van's Realty Co.*, 427 P.2d 284, 291 (Idaho 1967).

[27] The Supreme Court of Michigan in *Rowen & Blair Elec. Co. v. Flushing Operating Corp.*, 250 N.W.2d 481, 484 (Mich. 1977), when discussing the use of the agency theory, stated:

The use of the agency theory is based upon the policy consideration that:

> It would open the door to great fraud in practice to allow the owner of property to lease it to another, contract with the other to put on permanent improvements, improvements that are only valuable when standing upon the premises, and then say that the materialmen and laborers who placed these permanent improvements upon defendant's property have no claim against the property, and must go unrewarded if the tenant is insolvent. It would be an invitation to short leases with agreements in the lease that the tenant should build permanent structures upon the premises during the term of the lease and this without jeopardizing any interest which the owner had in the property, while he greatly profited from the transaction.

[28] Under Guam's mechanic's lien statutes, labor done or materials furnished for every building constructed, altered or repaired with the owner's knowledge is held to have been constructed at the instance of the owner, and is subject to any valid lien, unless a notice of non-responsibility is given in accordance with the statute. 7 GCA § 33203(b). Moreover, "every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, addition to, or repair, in whole or in part, of any building or other work of improvement *shall be held to be the agent of the owner.*" 7 GCA § 33202(c) (2005) (emphasis added).

[29] "The statutory language 'at the instance of . . .' requires either an express or implied contract between the lessor or his agent and the contractor." *Advanced Restoration, L.L.C. v. Priskos*, 126 P.3d 786, 792 (Utah Ct. App. 2005) (quoting *Interiors Contracting Inc. v. Navalco*, 648 P.2d 1382 (Utah 1982)). In interpreting similar statutory language courts have stated that work done or materials furnished "at the instance of the owner, or of any other person acting by his authority" means more than just the owner's knowledge and acquiescence in the improvements in order for a lien to be had on the property. Specifically, the improvements must have been requested by the owner of the land. *Idaho Lumber*, 710 P.2d at 651. When the lease requires the lessee to make certain improvements, however, some courts have held that the lessee is said to become the agent of the owner, and the interest of the lessee and the owner are subject to the lien. *Id.* at 651-652.

[30] In California, courts examining the agency theory, use the term "participating owner." *Los Banos Gravel Company v. Freeman*, 130 Cal. Rptr. 180, 184 (Dist. Ct. App. 1976) (stating that "an owner who has authorized construction, either by himself or through an agent cannot escape liability despite the filing of a notice of nonresponsibility. In expressing this rule, the phrase 'participating owner' is sometimes used"). Under the participating owner doctrine, the lessee is held to be the implied agent of the lessor. *See Ott Hardware Co., Inc. v. Yost*, 159 P.2d 663, 666 (Cal. Dist. Ct. App. 1945) (stating that "[w]here the lease contains a provision requiring the lessee to make improvements, it is generally held that the lessee is thus constituted the agent of the lessor for that purpose, within the contemplation of mechanic's lien laws").

[31] We first discuss below the cases that developed the doctrine and examine the factors, so that we may determine whether such factors should be considered in our jurisdiction for purposes of our mechanic's lien laws.

[32] The seminal case discussing the development of the participating owner doctrine was *Ott Hardware Co. v. Yost*, 159 P.2d 663 (Cal. Dist. Ct. App. 1945). In *Ott Hardware*, the parties entered into a lease to renovate an old building on defendant's property. The terms of the lease provided that, inter alia,: (1) the lessee was obligated to make the improvements, (2) the plans and specifications be approved by the lessors, (3) any improvements made on the property not be removed by the lessee at the expiration or termination of the lease, (4) lessee provide lessor a statement of the materials used and labor supplied as the work progresses, and (5) the lease remain in escrow until the improvements are completed and paid in full. *Id.* at 664. Lessees failed to pay plaintiffs for the materials and labor provided and as a result liens against the property were recorded. *Id.*

[33] The appellate court, in affirming the trial court's judgment in favor of the liens, indicated its approval of the rule that irrespective of a notice of nonresponsibility, a mechanic's lien attaches to the lessor's real property for improvements made by the lessee when the terms of the lease revert to

the lessor, are mandatory, permanent, and benefit the lessor. *Id.* at 666. The court explained that the rule applied:

> [w]here the instrument creating the relationship is such that the transaction establishes, in effect, that the lessee is but an agent of the owner in causing the improvements to be made to the owner's property, where the making of the improvements is not optional with the lessee, and the lessee is obligated, as a condition or covenant of the lease, to make the improvements, and where a breach of the condition or covenant returns the property to the owner greatly enhanced in value and the owner promises to repay to the lessee the estimated cost of the major portion of the improvements out of future rents. *Id.*

[34] The court stated that "[a] participating owner, even though acting through his agent, is not entitled to relieve his property from such liens by filing a nonresponsibility notice." *Id.* at 667. After reviewing the written lease, addenda, and other undisputed writings, the court concluded that the lien attached to the real property expressing that it was "convinced that by their terms, the lessee was obligated to make the alterations and improvements as a condition to the effectiveness of the lease" and that the "right to cause the improvements to be made was not optional with the lessee." *Id.* at 667-668.

[35] Later in *Los Banos Gravel Co. v. Freeman*, 130 Cal. Rptr. 180 (Dist. Ct. App. 1976), the appellate court reversed the trial court judgment in favor of the owners who had posted and filed notices of non-responsibility. The court addressed the issue of whether the lessors were participating owners in the construction of improvements on the property. *Id.* Similar to the holding in *Ott Hardware Co. v. Yost*, the court held that the improvements made by the lessee under the lease provisions were not optional but were mandatory. *Id.* at 187. To support its conclusion that the lessor was a participating owner, the court provided the following factors: (1) that the leased property comprised a small portion of a much larger acreage owned by lessor, (2) that lessor was a sophisticated and highly experienced commercial developer who prepared a lease which compelled the lessee to construct the service station and facility, closely limiting the time to complete the improvements, (3) lessor closely restricted the use of the premises to avoid competing and

conflicting with other commercial uses, and (4) lessor wrote the lease to provide for a percentage rental agreement, the effect of which is to give him an on-going interest in the continuing operation of the premises. *Id.* Ultimately the court held that "a reasonable interpretation of the lease agreement leads to the conclusion that [lessor] was a participating owner and as such, is not entitled to claim the benefit of the nonresponsibility statute to exempt his property from the claims of lien of the . . . suppliers of materials and services." *Id.* at 188.

[36] A few years later, in *Baker v. Hubbard*, 161 Cal. Rptr. 551 (Dist. Ct. App. 1980), the appellate court, in affirming the trial court judgment, held that the lessor was not a participating owner where the lease required the lessee to pay for repairs and maintenance of the building and to obtain the lessor's consent before making the alterations. The court found that the alterations made were not contemplated at the time the lease was singed and the lessor specifically declined to approve the alterations. *Id.* at 557. The court held that the record was insufficient to show that the lessor imposed a mandatory duty on the lessee to make alterations. *Id.* at 557-558. In applying its previous holdings in *Ott Hardware* and *Los Banos*, the appellate court noted that although the lease required the lessee to make improvements on the property, the record did not support a finding of a mandatory, nonoptional duty imposed by the owner as described in the lease. *Id.* at 557. Thus, the appellate court did not find the lessee to be a participating owner where the lessee was only required to repair and maintain the leased premises. *Id.* at 558.

[37] In sum, under California case law, a lessor is held to be a participating owner if the terms of the lease require the lessee to make the improvements on the leased property. Based on California's participating owner doctrine, developed from the cases discussed above, a lessor cannot shield its property interests from the liability for mechanic's liens attached as a result of the lessee's actions. From these cases, we have discerned the following factors as relevant in determining if a lessor is held to be a participating owner; and, thus, liable for mechanic's liens placed on the leased property, notwithstanding the posting and recording of a notice of non-responsibility.

[38] The first factor is whether the lessor would have entered into the agreement in the first place, where the lessee did not make any assurances that substantial improvements would be made. The second factor is whether the contract between the lessor and lessee specifically required or obligated the lessee to make leasehold improvements. In applying this factor, the improvements must go beyond providing money to complete improvements or requiring the lessee to perform routine maintenance on the property. The third factor is whether the lessor retained substantial control over the activities of the lessee, such as: (1) requiring the lessee to provide the lessor with a portion of the leasehold profits; or (2) requiring the lessee to get the lessor's approval of plans and specifications for the improvements; or (3) requiring the reversion of all improvements to the lessor upon termination of the lease. Finally, the courts must evaluate the level of sophistication of the parties to the lease. This factor additionally indicates that, where a lessor is well-versed in the leasing of the property and the lessee is not, the lessor is a participating owner.

[39] To apply a "fair and reasonable construction and application of our mechanics' lien statutes," *Manvil*, 1998 Guam 20, we agree that the factors announced under California's participating owner doctrine should be applied in determining whether an agency relationship exists for purposes of our mechanic's lien laws. However, in applying these factors, we should not be limited to the lease provisions alone when determining if such relationship exists under our lien statutes. We therefore discuss below the agency theory as applied in other jurisdictions.

[40] As a general rule, an agency is not created by the mere relation of a landlord and tenant. *Ott Hardware*, 159 P.2d at 665; *Sol Abrahams & Son Constr. Co. v. Osterholm* 136 S.W. 2d 86, 92 (Mo. Ct. App. 1940). There is also no agency relationship where consent by the lessor is only given orally or by implication through the lessor's failure to object to the making of the alterations or improvements on the leased property. *See Sol Abrahams* 136 S.W. 2d at 92. Finally, an agency relationship does not exist when the lessor has knowledge of, and acquiescence in, the alterations or improvements. Similar to California's participating owner doctrine, an agency may be created,

by giving effect to certain provisions of a lease which relate to the improvements or alterations made on the leased premises.

[41] In determining whether an agency relationship exists between a lessor and lessee, courts have looked at the lease provisions to find the intent to form such a relationship. *Bell v. Tollefsen*, 782 P.2d 934, 938 -939 (Okla.1989); *see also, Messina Bros. Constr. Co. v. Williford*, 630 S.W.2d 201, 207 (Mo. Ct. App. 1982). Some jurisdictions have held that, where the lease provisions clearly require the lessee to make improvements or alterations on the leased property, the lessee is considered the agent of the lessor for that purpose within the contemplation of mechanic's lien statutes. *Masterson v. Roberts*, 78 S.W.2d 856, 858 (finding that lessees were the agents of the lessors when the owner of the life estate made the contract in the lease which obligated the tenants to alter the building, from a garage to a moving picture theater, by requiring substantial alterations); *McGuinn v. Federated Mines & Mill. Co.*, 141 S.W. 467, 468 (Mo. Ct. App. 1911) (recognizing that where the landlord binds the tenant to make substantial improvements on the property, he constitutes the latter his agent within the meaning of the mechanic's lien law, and his property is subject to the lien for materials furnished in making such improvements under the contract with the tenant.); *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So. 2d 34, 39 (Fla. Dist. Ct, App. 2004) ("It has long been established . . . that [i]n order for a lessor's interest to be subject to mechanics' liens arising from improvements made on its property [by lessee], the lease agreement must require the lessee to make certain improvements or the improvements must constitute the pith of the lease.").

[42] However, where the improvements made are primarily for the benefit of the lessee, although the lease may obligate the lessee to make such improvements, such provisions have been held not to constitute the lessee the agent of the lessor. *Dierks & Sons Lumber Co. v. Morris*, 156 S.W. 75 (Mo. Ct. App. 1913); *Albaugh v. Litho-Marble Decorating Co.*, 14 App. D.C. 113 (1899), 1899 WL 16374, * 4.

[43] In *Dierks & Sons Lumber Co. v. Morris*, 156 S.W. 75 (Mo. Ct. App. 1913). lessee entered into a ninety-nine year lease which provided that lessee keep the premises in good repair, and make alterations and improvements subject to the approval of the lessor. The court held that such covenant alone did not constitute the lessee the agent of the lessor especially where the improvements were really for the benefit of the lessee. *Id.* at 77.

[44] The court in so holding, stated that:

> [I]n order to make such covenant constitute an agency between the lessor and lessee, we are necessarily bound to look at the facts to determine whether there was an agency or not. If, on account of the shortness of the lease, the extent, cost, and character of the improvements, or other facts in evidence, such as the participation by the lessor in the erection or construction thereof, it can be seen that the improvement is really for the benefit of the lessor, and that he is having the work done through his lessee, then it can be said with justice that the lessee in such case is acting for the lessor. But if the facts do not show this it would seem to be untenable to say that the mere inclusion in a lease of a covenant to improve and repair on the part of the lessee will create the relation of agency between the tenant and the landlord, especially where the tenant is to do the work at his own expense, and is expressly denied any authority to bind the landlord.

Id. at 77-78.

[45] However, some courts still give effect to provisions in a lease expressly stipulating that nothing in the lease shall be deemed to constitute the lessee the agent of the lessor or to impose any liability on the lessor for mechanic's liens even where the lease obligates the lessee to make the improvements. For instance, in *Stewart v. Talbott*, 146 P. 771 (Colo. 1915), the lease required the lessee to construct a building which would revert to the lessor, denied any authority in the lessee to charge the fee with any mechanic's liens, and also required the lessee to furnish bond as protection against such liens. *Id.* at 772-773. The court, giving effect to such provision in the lease, held that the lease did not constitute the lessee the lessor's agent, so as to invest him with authority to confer a lien enforceable against the fee. *Id.* at 780.

[46] A few other courts, however, have disregarded stipulations holding that such a provision in the lease cannot defeat the right of a contractor to a lien on the leased premises based on the agency

theory. *Allen Estate Ass'n. v. Boeke*, 254 S.W. 858, 860-861 (Mo. 1923); *Seattle Lighting Fixture Co. v. Broadway Cent. Mkt.*, 286 P. 43, 45 (Wash. 1930); *Gem State Lumber Co. v. Union Grain & Elevator Co.*, 278 P. 775 (Idaho 1929).

[47] In *Allen Estate Association v. Boeke*, lessor leased the property for ninety-nine years to lessee. Provisions in the lease included, inter alia, (1) that lessee make alterations and improvements making the building suitable for hotel and commercial purposes; (2) that the plans and specifications for the proposed alterations were subject to the approval by the lessor; (3) that no provision in the lease whether requiring or authorizing the lessee to make improvements, alterations, or repairs shall be construed to constitute the lessee the agent of the lessor; and (4) that all persons providing labor or furnishing materials for improvements or alterations made to the leased premises shall look solely to the lessee for payment or for the enforcement of any liens against the lessor's interest in the property. *Allen Estate Ass'n.* 254 S.W. at 859-862.

[48] Section 7216 of Missouri's mechanic's lien statute provides in pertinent part that:

> Every mechanic or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land, or for repairing the same, under and by virtue of any contract with the owner or proprietor thereof, *or his agent*, trustee, contractor or subcontractor . . . shall have . . . a lien.

Id. at 860.

[49] The court held that notwithstanding the negative covenant in the lease, the lessee was the agent of the lessor in making the improvements. *Id.* In its analysis, the court stated that the lessor's reversionary interest was enhanced by the improvements made to the property, in a substantial manner that would entitle the mechanic's to a lien on the property. *Id.*

[50] Further, the court stated:

> While it is true that a tenant, as such, is not the agent of the owner to the extent that he may establish a lien against the land of the owner for improvements made by the tenant for his own benefit and at his own costs, nevertheless, if it appears that the owner has obligated the tenant to construct permanent and substantial improvements on the property beneficial to the reversionary interest of the owner, those furnishing

> labor or material for such improvements by virtue of contracts with the tenant have a right to mechanics' liens against the reversionary interest of the owner in the property improved.

Id. at 862.

[51] Courts have also looked outside the lease provisions to determine whether the lessee is the agent of the lessor. *Advanced Restoration, LLC v. Priskos*, 126 P.3d 786, 792 (Utah Ct. App. 2005).

[52] Ordinarily, whether the lessee is the agent of the lessor is a question of fact; however, where the question depends on the construction of an undisputed, unambiguous written lease, then it becomes a question of law for the court. *Bell v. Tollefsen*, 782 P.2d 934, 938 -939 (Okla.1989); *Ott Hardware Co.* 159 P.2d at 667. "Where . . . the question of agency turns on the acts and conduct of the parties, as well as upon the provisions of a written lease, the issue is a mixed one of fact and of law." *Idaho Lumber, Inc. v. Buck*, 710 P.2d 647, 651 (Idaho Ct. App. 1985). Moreover, whether a lease creates an agency between the lessor and the lessee is determined by the facts of the transaction. *Advanced Restoration*, 126 P.3d at 792.

> In determining whether an agency should be implied the courts have often, perhaps of necessity, gone beyond the agreement and into the whole circumstances of the letting in order to find the answer. . . . Where the premises are let for a specific purpose and where the nature of the premises is such that the purpose cannot be accomplished except by the making of substantial improvements to the freehold, then the tenant is, by implication, required to make such improvements. He has no other option, and hence he is the landlord's (implied) agent to the extent of subjecting the property to a lien, this upon the theory that the landlord contemplated the necessity and required that such necessity be met.

Id.

[53] In *Allen Estate Association v. Fred Boeke & Son,* 254 S.W. 858, 861 (Mo. 1923), the court stated:

> While the lease should, if such connection exists, sufficiently disclose the lessor's finger prints of same, it is not upon this instrument alone, however, but to all the facts connected with the transaction, that we may look in determining whether a connection in the nature of an agency exists between the parties and as a consequence the right of the respondents to the liens.

[54] In this case, the trial court did not address whether Poresia was the agent of the Trust or whether the Trust was a participating owner. Under the terms of the lease, Poresia was obligated to construct a golf resort on the leased premises. For instance, Paragraph 8(a) states that the primary purpose of the Lease was to develop a championship golf resort in two phases. Under Phase I, Lessee is obligated to develop an 18 hole golf course and all golf resort amenities including the clubhouse. Additionally, Paragraph 10(a) states that the Lessee shall provide Lessor with the preliminary plans sixty days before any construction begins. Paragraph 10(b) required Lessor's designee to be named to the Board of Directors of Lessee. Paragraph 10(f) states that all buildings and improvements made by the Lessee on the premises shall become the Lessor's property when the Lease expires or is terminated. The Lease also provided notice to potential lien claimants that the Trust would not be responsible for any liens as a result of lessee's actions.

[55] In sum, we believe that the lease provisions alone should not dictate whether an agency relationship exists. Rather, the trial court must also look outside the lease provisions and consider the facts and circumstances, if any, in each particular case so as to afford protection to those who have performed labor or supplied materials while recognizing the rights of the property owners for purposes of our mechanic's lien laws.

V.

[56] In conclusion, we first hold that the trial court erred in finding that the Notice of Non-Responsibility issued by the Trust was sufficient to defeat GPE's lien for the materials it supplied because it is unclear from the record whether the Trust in providing its non-responsibility notice, complied with the requirements mandated under section 33203(b).

[57] We further hold that, in determining whether an agency relationship exists, under our lien statutes, the factors announced under California's participating owner doctrine shall be applied. However, an agency relationship should not be gleaned from the lease provisions alone. Rather, the

provisions and consider the facts and circumstances, if any, in each particular case.

[58] We find that if a lessee is held to be the agent of the lessor, for purposes of our mechanic's lien laws, that a lessor cannot escape liability of such lien by posting and recording a notice of non-responsibility as required under section 33203(b). Here, the trial court did not determine whether the lessee was the agent of the lessor.

[59] On remand, the trial court, in applying the factors discussed above, must first determine whether Poresia shall be held to be the agent of the Trust. If the trial court determines that Poresia was the agent of the Trust, then the Notice issued by the Trust is insufficient to defeat GPE's lien. If, however, the trial court determines that Poresia is not deemed to be the agent of the Trust, then the trial court must next determine whether the Notice issued by the Trust was in compliance with the requirements of section 33203(b).

[60] Accordingly, we, **REVERSE** the trial court's grant of summary judgment for the Trust and **REMAND** this matter for further proceedings consistent with this opinion.

Richard H. Benson

RICHARD H. BENSON
Justice *Pro Tempore*

Robert J. Torres

ROBERT J. TORRES, JR.
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[59] On remand, the trial court, in applying the factors discussed above, must first determine whether Poresia shall be held to be the agent of the Trust. If the trial court determines that Poresia was the agent of the Trust, then the Notice issued by the Trust is insufficient to defeat GPE's lien. If, however, the trial court determines that Poresia is not deemed to be the agent of the Trust, then the trial court must next determine whether the Notice issued by the Trust was in compliance with the requirements of section 33203(b).

[60] Accordingly, we, **REVERSE** the trial court's grant of summary judgment for the Trust and **REMAND** this matter for further proceedings consistent with this opinion.

RICHARD H. BENSON
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Chief Justice