IN THE SUPREME COURT OF GUAM

M ELECTRIC CORPORATION,
Plaintiff-Appellant,

v.

PHIL-GETS (GUAM) INTERNATIONAL TRADING CORPORATION dba J&B MODERN TECH and CHUNG KUO INSURANCE COMPANY LTD.,
Defendant-Appellees.

Supreme Court Case No.: CVA15-013
Superior Court Case No.: CV1423-10

OPINION

Cite as: 2016 Guam 35

Appeal from the Superior Court of Guam
Argued and submitted on February 22, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] Plaintiff-Appellant M Electric Corporation ("MEC") appeals from a final judgment entered in favor of Defendant-Appellees Phil-Gets (Guam) International Trading Corporation d/b/a J&B Modern Tech, and Chung Kuo Insurance Company, Ltd. ("Chung Kuo") (collectively, "J&B"). MEC argues that the trial court (1) abused its discretion in denying its request for Leave to File Amended Complaint ("motion to amend") to include a claim for compensable overtime costs ("overtime claim"), (2) erred in finding that its claim for equipment standby costs ("standby claim") was barred by a "no damage for delay" ("NDFD") contract provision, and (3) erred in dismissing its claim for additional excavation expenses ("excavation claim").

[2] J&B argues that the judgment should be affirmed because (1) the Supreme Court of Guam does not have jurisdiction over the denial of MEC's motion to amend or, in the alternative, the trial court's decision was not an abuse of discretion, (2) the NDFD clause is valid and relevant exceptions do not apply, and (3) the terms of the Subcontracts bar MEC's excavation claim. J&B also raises the issue of whether the overtime claim is time barred as to Defendant-Appellee Chung Kuo by arguing that MEC failed to present any evidence concerning Chung Kuo, and failed to bring suit on the overtime claim against Chung Kuo within the applicable one-year deadline. MEC responds by arguing that Chung Kuo is jointly and severally liable by the terms of 5 GCA § 5304 as a surety of J&B's bond obligations.

[3] We hold that this court has appellate jurisdiction, that the trial court abused its discretion when denying the motion to amend, that the overtime claim is not time-barred with respect to Chung Kuo, that NDFD clauses stated in the contracts at issue cover the type of delays incurred

by MEC but further findings are required to determine whether an exception to the NDFD clauses applies, and that the trial court did not err in denying MEC's excavation claim. For the reasons detailed herein, we affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

[4] MEC initiated the underlying action by filing its Complaint for Declaratory Relief and Money Owed on Construction Project. J&B answered and moved for summary judgment. The trial court entered judgment in favor of J&B upon its Motion for Summary Judgment. MEC filed its first appeal.

[5] Upon review, this court reversed the trial court's grant of summary judgment and remanded the case for further proceedings. *M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.* ("*M Elec. I*"), 2012 Guam 23 ¶ 50.

[6] On remand, MEC requested leave to amend its Complaint. After accepting opposition and reply briefs, the trial court denied MEC's request. After a bench trial, the trial court entered judgment on the merits in favor of J&B. MEC timely filed its second appeal in this matter.

B. Factual Background

[7] Guam Power Authority ("GPA") hired J&B under construction contracts ("Contracts") to perform work on two underground power line conversion projects (collectively, "Projects"). The first was to convert power lines from the Macheche Substation to the Guam International Airport Authority ("GIAA"). The second was to convert power lines from Macheche Substation to Harmon Substation to San Vitores existing electrical manhole ("San Vitores"). J&B hired MEC

as a subcontractor to "provide labor, equipment, and materials to excavate, install underground pipes, and restore excavated areas and roads." *M Elec. I*, 2012 Guam 23 ¶ 3.

[8] GPA held a pre-bid conference prior to awarding the Contracts to J&B. An engineering manager for GPA, Joven Acosta, testified that he informed bidders at the pre-bid conference that delays obtaining permits from the Guam Department of Public Works ("DPW") should be expected. He also testified that he informed bidders to increase their bids to account for delay-related costs because "getting the permits from DPW [would] be a challenge." *See* Transcripts ("Tr.") at 31 (Bench Trial, Nov. 13, 2014).

[9] Generoso Bangayan, J&B's president, testified that he was present at the pre-bid conference and heard Acosta's comments. Acosta's comments were not reflected in writing in any of the contracts or related documents.

[10] Noel Lomtong, MEC's project engineer on the Projects, testified that he and Carlos Nunez were present for the pre-bid conference. The sign-in sheet for the pre-bid conference showed the names of both men and listed their company of affiliation as "M Electric." Def.'s Ex. I (Sign In Sheet for Pre-Bid Conference Bid No. GPA-020-07), M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., CV1423-10. The contact number listed for Nunez was MEC's phone number.

[11] MEC's president and general manager, Marcelo Moises, testified that Nunez was an MEC employee at the time of the pre-bid conference but Lomtong was not. He also testified that Nunez was simultaneously employed as a project manager with DA-RI Trenchless ("DA-RI"), a Philippine company. He testified that MEC was not involved in the Projects at the time of the pre-bid conference because it was not capable of performing the horizontal drilling originally

required by J&B. The trial court was not persuaded that Nunez and Lomtong did not attend the pre-bid conference as representatives of MEC.

[12] MEC began working with J&B on the Projects after the pre-bid conference when J&B accepted MEC's written job proposals. J&B accepted and signed the proposals for each of the Projects and drafted corresponding subcontracts ("Subcontracts"). Moises signed the Subcontracts and initialed each page. This court held in *M Electric I* that the Subcontracts were supported by consideration and binding on the parties.

[13] The Subcontracts both contained "time of the essence" ("TOE") clauses. The GIAA Subcontract read: "The Subcontractor shall substantially complete the Work to the satisfaction of the Contractor and the Owner on or before December 20, 2008. Time shall be of the essence in the Subcontractor's performance of this Agreement." Record on Appeal ("RA"), tab 15, Ex. A at 2 (Subcontract Agreement, Mar. 24, 2008). The San Vitores Subcontract contained a nearly identical clause, modifying only the completion date, January 13, 2009. RA, tab 15, Ex. B at 2 (Subcontract Agreement, Apr. 16, 2008).

[14] The Subcontracts and prime Contracts each contained NDFD clauses. The Subcontract NDFD clauses provided for extension of time as the exclusive remedy available to MEC for delays caused by J&B. The NDFD clauses required a written claim "within five . . . days from the inception of such delay." RA, tab 15, Ex. A at 2 (Subcontract Agreement, Mar. 24, 2008); RA, tab 15, Ex. B at 2 (Subcontract Agreement, Apr. 16, 2008). The prime Contracts between GPA and J&B contained a general NDFD clause which stated that "[n]o extended overhead costs or standby costs shall be awarded/granted as a result of delays from the Civil work." Def.'s Ex. C at SP-2 (Special Provisions, San Vitores Contract), M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., CV1423-10. The Subcontracts contained "Changes to Plans" provisions,

requiring a written, signed order prior to any work performed that differed from that described by the agreements and stating that "the Contractor shall be under no obligation to pay for . . . unauthorized work." RA, tab 15, Ex. A at 2-3 (Subcontract Agreement, Mar. 24, 2008); RA, tab 15, Ex. B at 2-3 (Subcontract Agreement, Apr. 16, 2008).

[15] At numerous times during performance of work under the Subcontracts, MEC experienced delays based on not being able to obtain the necessary permits from the Department of Public Works ("DPW"). Lomtong testified that no change order was made until the Projects were completed. Tr. at 85 (Bench Trial, Nov. 5, 2014) ("No, because they told us that . . . we have to do the other change order until [sic] . . . the project was done."). The vice-president of J&B, Nelia Bangayan, testified that upon completion of the Projects, J&B paid MEC the full contract amount. GPA did not pursue liquidated damages for the delays. Acosta testified at trial that GPA did not assess damages against J&B because the company understood that obtaining highway encroachment permits from DPW would be difficult and inclement weather was to be expected.

[16] J&B moved for summary judgment, arguing that the plain and unambiguous terms of the Contracts and Subcontracts barred MEC's claims. MEC opposed J&B's motion, arguing that the Subcontracts were not legally binding. The trial court entered judgment in favor of J&B upon its Motion for Summary Judgment in March 2012 ("March 2012 Judgment").

[17] MEC appealed the March 2012 Judgment, arguing that its job proposals were legally binding, the Subcontracts were not legally binding, NDFD clauses were not enforceable in Guam, and the trial court erred by not addressing its other claims for damages.

[18] On appeal, this court in *M Electric I*, 2012 Guam 23, reversed the trial court's grant of summary judgment and remanded for further proceedings. We held that the Subcontracts were

legally binding on MEC and J&B and that material questions of fact existed that required further proceedings.

[19] Addressing the substance of MEC's arguments, we held that (1) a material question of fact existed as to whether work delays were unreasonable and not contemplated by the parties at the time of the agreement, *id.* ¶ 46; (2) the terms of the Subcontracts did not preclude MEC from claiming damages based on the additional costs for trench excavation and backfilling, *id.* ¶ 47; and (3) MEC mistakenly brought its claim for overtime pay for the first time in opposition to J&B's motion for summary judgment, *id.* ¶ 48 ("[A]n issue or claim may not be raised for the first time in an opposition to a motion for summary judgment.").

[20] After remand, MEC moved to amend its Complaint to include its overtime claim in the amount of $213,314.23. MEC acknowledged that it did not include this claim in its Complaint but argued that it previously provided notice of the overtime costs in a response to J&B's request for discovery, and in opposition to J&B's summary judgment motion.

[21] J&B opposed the motion, arguing that MEC's delay in asserting the overtime claim prejudiced J&B. J&B argued that MEC demonstrated bad faith and asserted futile claims. The trial court denied MEC's motion to amend.

[22] After a bench trial, the trial court entered judgment on the merits in favor of J&B.

II. JURISDICTION

[23] This court has jurisdiction over appeals from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-254 (2016)); 7 GCA §§ 3105, 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[24] Whether this court has appellate jurisdiction "is a threshold issue which must be resolved prior to review of the merits of a dispute." *Hawaiian Rock Prods. Corp. v. Ocean Hous., Inc.*, 2016 Guam 4 ¶ 13 (citations omitted). This determination "requires an interpretation of relevant statutory authority as well as resolution of a mixed question of law and fact, both of which are conducted *de novo*." *Id.* (citations omitted).

[25] Whether the trial court erred by denying a Guam Rules of Civil Procedure ("GRCP") Rule 15(a) motion to amend is reviewed for abuse of discretion. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (applying abuse of discretion standard to denial of FRCP 15(a) request to amend); *see also Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1151 (9th Cir. 2007) (applying abuse of discretion standard to denial of FRCP 15(b) request to amend).[1]

[26] Whether a claim is time-barred as to a defendant is a mixed question of law and fact. We review mixed questions of law and fact *de novo*. *Gutierrez v. Guam Power Auth.*, 2013 Guam 1 ¶ 8.

[27] Whether a claim is barred by the terms of a NDFD clause and whether the trial court erred in denying MEC's excavation claim are mixed questions of law and fact. We review mixed questions of law and fact *de novo*. *Gutierrez*, 2013 Guam 1 ¶ 8.

[28] Findings of fact upon which a trial court's ruling is based are set aside only if clearly erroneous. *Macris v. Swavely*, 2008 Guam 18 ¶ 9 (citation omitted).

[1] GRCP 15 was derived from its federal counterpart, Guam R. Civ. P. 15, SOURCE, and federal decisions construing rules from which our own are derived are persuasive authority, *see, e.g.*, *People v. Quitugua*, 2009 Guam 10 ¶ 10.

IV. ANALYSIS

A. Whether this Court has Appellate Jurisdiction to Hear MEC's Appeal of the Trial Court's Denial of its GRCP 15(a) Motion to Amend to Include its Overtime Claim

[29] MEC's Notice of Appeal designated an appeal from Judgment of the Superior Court dated June 1, 2015 ("Final Judgment"). RA, tab 89 at 1 (Notice of Appeal, June 17, 2015) (designating appeal from RA, tab 85 (Judgment, June 1, 2015)). Likewise, MEC's "Jurisdictional Statement" designated "appeal of a final judgment . . . which disposed of the merits of the claims therein." Appellant's Br. at 1 (Sept. 1, 2015). The trial court denied MEC's motion to amend in a Decision and Order dated August 21, 2013. RA, tab 50 at 4 (Dec. & Order, Aug. 21, 2013).

[30] J&B argues that the Supreme Court of Guam does not have jurisdiction over the issue of MEC's overtime claim because MEC did not properly appeal the trial court's denial of its motion to amend. Appellee's Br. at 54 (Oct. 26, 2015). Specifically, J&B argues that MEC was required by Rules 3(c)(1) and 4.1 of the Guam Rules of Appellate Procedure ("GRAP") to designate the Decision and Order denying MEC's motion to amend in either its Notice of Appeal or its Statement of Jurisdiction. *Id.* at 54-55. MEC argues that its Notice of Appeal is sufficient under GRAP 3(c)(1) and 4.1 because it designated the Final Judgment. Appellant's Reply Br. at 1-3 (Nov. 23, 2015). Specifically, MEC argues that a designation of a final judgment "is sufficient to support review of all earlier orders that merge in the final judgment." *Id.* at 2 (emphasis omitted) (quoting 5 Am. Jur. 2d *Appellate Review* § 303). We are therefore asked to determine whether designating a final judgment in a notice of appeal is sufficient to provide jurisdiction over a previous decision and order entered within the same litigation.

[31] GRAP 3(c)(1) states in pertinent part: "The notice of appeal shall . . . specify the party or parties taking the appeal; and . . . designate the judgment, order, or part thereof appealed from."

GRAP 4.1(a)(5) states that "the Appellant shall submit a statement of jurisdiction to the court. Such statement shall contain . . . an attached copy of the judgment or order appealed from."

[32] The purpose of the notice of appeal is "to advise the opposing party that an appeal is being taken from a specific judgment." *Sananap v. Cyfred, Ltd.*, 2008 Guam 10 ¶ 18 (quoting *Markam v. Holt*, 369 F.2d 940, 942 (5th Cir. 1966)). "[S]uch notice should . . . contain sufficient information so as not to prejudice or mislead the appellee." *Id.* (alteration in original) (quoting *Markam*, 369 F.2d at 942); *see also Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 ("The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.").

[33] A court may not waive the jurisdictional requirements of a notice of appeal, even for good cause shown. *Sananap*, 2008 Guam 10 ¶ 10. Examples of jurisdictional defects include failure to name the appellant, *Torres*, 487 U.S. at 318, and failure to name any judgment, order, or part thereof, *Brooks v. Toyotomi Co.*, 86 F.3d 582, 584 (6th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998). We retain jurisdiction when a notice of appeal is the "functional equivalent" of that which is required by the rules. *Sananap*, 2008 Guam 10 ¶ 13.

[34] Federal courts facing this issue have held that a notice of appeal that names only the final judgment is "sufficient to support review of all earlier orders that merge" into that judgment. *McBride v. CITGO Petrol. Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002); *see also Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976) (holding that interlocutory orders that are not appealed individually merge in the final judgment and may be challenged in an appeal from that judgment); *Blitzstein v. Ford Motor Co.*, 288 F.2d 738, 740 (5th Cir. 1961) (ruling that appellate

jurisdiction is supported when final judgment is designated and the record indicates a party's clear intent to raise a particular issue).

[35] J&B cites *Sananap* for the proposition that an appellant must comply strictly with GRAP 3(c)(1), or face "consequences." *See* Appellee's Br. at 54-55 (quoting *Sananap*, 2008 Guam 10 ¶ 10). J&B's reliance on *Sananap* is misguided.

[36] In *Sananap*, we dismissed an appeal as untimely based on failure to comply with GRAP 3(a). *See* 2008 Guam 10 ¶¶ 6, 32. In that case, appellants filed their September 22, 2006 Notice of Appeal immediately after the entry of final judgment, but the Notice designated appeal from a Findings of Fact and Conclusions of Law ("Findings") issued August 1, 2006 (*i.e.*, past the 30-day deadline required by GRAP 3(a)). *Id.* ¶¶ 4, 6. Therefore, we held that the Notice of Appeal was "untimely with respect to the Findings to which it refers." *Id.* ¶¶ 6, 9 ("If the Notice of Appeal had instead referred to the First Amended Judgment docketed that same morning, it would have been timely."). When questioned at oral argument, counsel for appellants refused to acknowledge the deficiency, insisted the notice was compliant with GRAP 3(a), and argued the rule was ambiguous. *Id.* ¶ 22. For these reasons, we held the appellants responsible for their untimeliness. *See id.* ¶ 24 ("We are confident, therefore, that a dismissal will further our policy of encouraging compliance with our Rules, while at the same time avoiding substantial injustice to the parties.").

[37] Here, unlike in *Sananap*, MEC's Notice of Appeal—designating appeal from the Final Judgment of the trial court—is not defective. MEC's designation of the Final Judgment does not preclude it from raising an issue decided by a prior, interlocutory order because such orders are merged in the judgment.

[38] In summary, this court has jurisdiction over MEC's appeal of the denial of its overtime claim because MEC's Notice of Appeal properly designated the Final Judgment in accordance with GRAP 3(c)(1) and the prior interlocutory order merged with that judgment.[2]

B. Whether the Trial Court Erred by Denying MEC's GRCP 15(a) Motion to Amend

[39] MEC argues that the trial court abused its discretion in denying its motion to amend the Complaint to include an overtime claim because GRCP 15(a) announces a liberal policy toward granting amendment and limits the trial court's discretion. Appellant's Br. at 7. MEC also argues the evidence does not show bad faith or prejudice to J&B. *Id.* at 7-9. J&B argues the trial court did not abuse its discretion in denying MEC's motion to amend because MEC acted in bad faith and MEC's delay prejudiced J&B.[3] Appellee's Br. at 56-58. Specifically, J&B argues that MEC delayed its decision to raise the overtime claim until after J&B had "waived and lost any opportunity to claim indemnification from GPA" and lost the ability to defend against the overtime claim by performing a meaningful investigation of the alleged overtime work and costs. *Id.* at 57.

[40] GRCP 15 allows for amendment to pleadings "by leave of court or by written consent of the adverse party" and states that "leave shall be freely given when justice so requires." Guam R. Civ. P. 15(a). This rule was derived from its federal counterpart, Rule 15 of the Federal Rules of Civil Procedure ("FRCP"). Guam R. Civ. P. 15, SOURCE. While these rules are not identical, GRCP 15 generally tracks the language of FRCP 15. *Compare* Guam R. Civ. P. 15(a)

[2] J&B also argues that no valid oral motion was made that could be encompassed by the Final Judgment. Appellee's Br. at 55. However, because the prior interlocutory order merges with the Final Judgment, this argument is moot.

[3] J&B also argues the overtime claim included requests for compensation in the form of gross receipts tax ("GRT") reimbursements that were futile and duplicative. Appellant's Br. at 58-59. The trial court discussed but did not reach MEC's requests for GRT reimbursements in its ultimate ruling because it denied MEC's overtime claim. RA, tab 50 (Dec. & Order, Aug. 21, 2013).

("[L]eave [to amend] shall be freely given when justice so requires . . . ."), *with* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). "Generally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction." *Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 7. Therefore, federal interpretation of FRCP 15 is persuasive when interpreting our own GRCP 15.

[41] Whether the trial court erred by denying a GRCP 15(a) motion to amend is reviewed for abuse of discretion. *See Foman*, 371 U.S. at 182 (applying abuse of discretion standard to denial of FRCP 15(a) request to amend); *cf. Rosenbaum*, 484 F.3d at 1151 (applying abuse of discretion standard to denial of FRCP 15(b) request to amend). "A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard." *Agana Beach Condo. Homeowners' Ass'n v. Untalan*, 2015 Guam 35 ¶ 12 (citing *Bank of Guam v. Reidy*, 2001 Guam 14 ¶ 11). "A finding of fact is clearly erroneous where it is not supported by substantial evidence, and this court is left with a definite and firm conviction that a mistake has been made." *Ptack v. Ptack*, 2015 Guam 5 ¶ 24 (quoting *Kloppenburg v. Kloppenburg*, 2014 Guam 5 ¶ 17).

[42] Federal courts grant leave to amend liberally and deny a request to amend only when an apparent reason for denying the amendment exists. *See Foman*, 371 U.S. at 182. In *Foman*, the United States Supreme Court announced the following general standard to be employed by the district courts:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing

> party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id. The Court also stated that "outright refusal to grant the leave without any justifying reason" amounts to an abuse of the trial court's discretion and is "inconsistent with the spirit" of the rules of procedure. *Id.* We have acknowledged and applied the *Foman* standard as a matter of Guam law, *Arashi & Co. v. Nakashima Enterprises, Inc.*, 2005 Guam 21 ¶ 16, and directed trial courts to consider the *Foman* factors when deciding a request for leave to amend, *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3 ¶ 26.

[43] MEC first raised its overtime claim, albeit improperly, in opposition to J&B's Motion for Summary Judgment, approximately ten months after filing its Complaint.[4] *M Elec. I*, 2012 Guam 23 ¶ 48; *see also* RA, tab 22 at 16 (Pl.'s Opp'n Mot. Summ. J., June 23, 2011) (claim raised); RA, tab 1 (Compl., Aug. 19, 2010) (claim not raised). MEC moved to amend following resolution of its first appeal, more than two years after the filing of the Complaint. RA, tab 40 (Leave to File Am. Compl., Mar. 1, 2013); RA, tab 1 (Compl.). MEC provided only one justification for such delay, arguing that its overtime claim was not included in its Complaint as the result of "oversight." RA, tab 41 at 1 (Mem. Supp. Pl.'s Am. Compl., Mar. 1, 2013). MEC did not elaborate on the facts and circumstances surrounding the oversight or provide particular reasons for the oversight. RA, tab 50 at 3 (Dec. & Order).

[44] Courts generally allow leave to amend pleadings to correct mere oversight. *See Lanahan v. Kawasaki Motors Corp., U.S.A.*, 93 F.R.D. 397, 399 (D. Md. 1982); *Green v. Wolf Corp.*, 50 F.R.D. 220, 223 (S.D.N.Y. 1970); *Brennan v. Smith's Estate*, 301 F. Supp. 307, 308 (M.D. Pa. 1969); *Schwartz v. Am. Stores Co.*, 22 F.R.D. 38, 38 (E.D. Pa. 1958). There is no maximum

[4] MEC argues that it notified J&B of its overtime claim as early as March 2, 2011, Appellant's Br. at 8; however, this court has already found that the claim was first raised on June 23, 2011. *See M Elec. I*, 2012 Guam 23 ¶ 48.

number of days or "deadline within which a party must file a motion to amend." *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 572 (E.D. Mich. 2009) (citing *Lloyd v. United Liquors Corp.*, 203 F.2d 789, 793 (6th Cir. 1953)).

[45] In *Lanahan*, the United States, as third-party defendant, moved to amend its answer to deny allegations after initially admitting to the allegations in its original answer. 93 F.R.D. at 398. The district court granted its motion for leave to amend, holding that filing of its original answer was "occasioned by oversight," counsels were put on notice approximately one week after the oversight, and the motion was filed approximately one month after the original answer was filed. *Id.* at 399. When arriving at its holding, the court relied on three primary rationales: (1) the liberal policy of allowing amendment, (2) the fact that the opposing party would not be prejudiced by the amendment, and (3) the relatively short duration of delay. *See id.*

[46] In *Green*, plaintiff moved to amend his complaint nearly four years after filing but before trial, offering no excuse for the delay other than that a new theory had not occurred to the attorney previously.[5] 50 F.R.D. at 223. The district court granted his motion for leave to amend, holding that defendant failed to adequately show that it would be prejudiced by plaintiff's proposed amendment:

> Defendants aver that they have conducted this litigation thus far on the basis of the claims asserted in the original complaint. This may be assumed, but

[5] The court stated the following with regard to the plaintiff's justification:

> Plaintiff offers little to exculpate himself. He does not assert a change of law or newly discovered facts or some other cognate excuse. Rather, he admits frankly that all of the information necessary for his proposed amended complaint was known to him from the start. The only explanation offered is that the securities laws are complex and that the theory which he attempts to plead now simply did not occur to him previously. These points are raised by defendants in opposition to plaintiff's motion. However, neither long delay nor the fact that a proposed amendment is motivated by an afterthought of counsel as to the best theory upon which to proceed, by themselves, suffice as reasons for denying leave to amend.

Green, 50 F.R.D. at 223 (citing *Middle Atl. Utils. Co. v. S. M. W. Dev. Corp.*, 392 F.2d 380, 384-385 (2d Cir. 1968)).

> defendants do not go beyond this statement to demonstrate what real prejudice arises from this state of facts. For example, no showing is made of what delay aside from the time required to file an answer will ensue if the proposed amendment is allowed. Nor do defendants attempt to demonstrate that evidence relevant to plaintiff's new claims now is no longer available. In short, defendants' mere statement of the obvious advances their claim of prejudice not at all.

Id. The court acknowledged that "[d]elay as a predicate for a finding of bad faith is a sufficient reason to deny leave to amend," but nonetheless chose not to find bad faith "since it is berely [sic] possible that even skilled counsel might overlook an apparent theory of law for approximately four years." *Id.*

[47] In *Brennan*, plaintiff moved to amend its complaint to add the name of the administratrix of the defendant estate as a party after initially naming only the estate itself. 301 F. Supp. at 308. The district court granted plaintiff's motion for leave to amend because "failure to designate the proper party was an excusable oversight." *Id.* at 309. The court reasoned that the plaintiff did not commit its error in designating the defendant party deliberately and that the administratrix "knew or should have known" that the action "would have been brought against her as administratrix" but for such an error. *Id.*

[48] In *Schwartz*, defendant moved to amend its answer to include the applicable statute of limitations as a defense. 22 F.R.D. at 38. The court held that "justice so requires" leave to amend "where the granting of the motion results in no prejudice to the opposing party." *Id.* The court held further that simple prejudice of a plaintiff's claim becoming barred by the applicable statute of limitations does not constitute sufficient prejudice to deny leave to amend under Rule 15(a). *Id.*

[49] These rulings are all consistent with the controlling principle that a non-moving party, or the court itself, must evidence something more than delay based on mere oversight in order to

justify a denial of leave to amend. That is to say, an affirmative showing of something more than an honest mistake is required. As above, delay may serve as "a predicate for a finding of bad faith" or other justification, but even under those circumstances there must be a showing of something more. *Green*, 50 F.R.D. at 223.

[50] In its Decision and Order denying leave to amend, the trial court agreed with J&B's argument that MEC's "failure to assert or explain its oversight is persuasive evidence of the inferred finding of a bad faith motive or dilatory tactic." RA, tab 50 at 3 (Dec. & Order). We interpret this endorsement as an inferred finding of bad faith, supported by various facts described in J&B's argument in opposition to MEC's motion to amend:

> [MEC] had to know it was paying that overtime when the project was underway. [MEC] has offered no explanation for not withholding the overtime claim in its progress billings, in its November 2009 meeting with Ms. Bangayan, in its claim to Chung Kuo, and finally its complaint in this action. No construction company would simply forget to assert a claim for over $213,314.23 in overtime through all these steps, and then suddenly remember it long after the project was over and try to sneak it into a case in a discovery response. It can only be inferred that [MEC] acted in bad faith because of some perceived tactical advantage in delaying notice of the overtime claim, such as precluding a timely and thorough investigation of a dubious claim.

RA, tab 46 at 6-7 (Opp'n Mot. Am. Compl., Mar. 29, 2013).

[51] On appeal, J&B cites a number of cases for the proposition that a trial court may infer bad faith "when plaintiffs possess relevant information concerning facts or claims before filing their complaints but, without any satisfactory explanation . . . withhold such facts or claims from the complaint and instead seek leave to amend to add such . . . claims after litigation is well underway." Appellee's Br. at 58 (citing *Williams v. Savage*, 569 F. Supp. 2d 99, 107-08 (D.D.C. 2008) (denying leave to amend and finding bad faith where movant requested dismissal of case despite knowing facts constituting amendment at time of initial pleadings and providing no justification for delayed request); *Aloe Vera of Am., Inc. v. United States*, 233 F.R.D. 532, 535-

36 (D. Ariz. 2005) (denying leave to amend and finding bad faith where movant requested during discovery after twelve of thirteen depositions had been performed); *GSS Props., Inc. v. Kendale Shopping Ctr., Inc.*, 119 F.R.D. 379, 380-81 (M.D.N.C. 1988) (denying leave to amend and finding bad faith where movant requested during discovery despite knowing all facts constituting amendment prior to filing action and stipulating to satisfactory pleadings); *Sprint Commc'ns Co. v. Vonage Holdings Corp.*, 500 F. Supp. 2d 1290, 1347-48 (D. Kan. 2007) (denying leave to amend where movant requested on last day of discovery after multiple extensions)). We view these cases favorably to the extent that they provide examples of a number of acceptable scenarios under which a trial court may infer a finding of bad faith.

[52] Indeed, other courts have held that denial of a motion to amend is justified when the moving party is motivated to amend its pleadings as a tactic intended to delay or defeat an unfavorable ruling upon summary judgment. *See Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139-40 (5th Cir. 1993); *Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D. 505, 509-10 (N.D. Cal. 2011), *aff'd*, 475 Fed. Appx. 334 (Fed. Cir. 2012) (per curiam); *Reisner v. Gen. Motors Corp.*, 511 F. Supp. 1167, 1172 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91, 100 (2d Cir. 1982), *cert. denied*, 459 U.S. 858 (1982).

[53] Nevertheless, GRCP 15(a) is governed by a liberal policy, weighted in favor of granting amendment. *See Foman*, 371 U.S. at 182. The rule bestows upon a plaintiff a right, albeit a qualified one, to have his or her valid claim heard on the merits. *See id.* ("[A] plaintiff . . . ought to be afforded an opportunity to test his claim on the merits."). We will therefore allow amendment of a complaint to correct "mere oversight" in the absence of aforementioned *Foman* factors.

[54] When reviewing the record in this case, we find that the trial court's inferred finding of bad faith is not supported by substantial evidence. The record shows that all work on the Projects was completed by late November 2009, prior to filing of the Complaint. Tr. at 35-36 (Bench Trial, Nov. 5, 2014); RA, tab 1 (Compl.). Therefore, the trial could have properly inferred that MEC knew of the facts related to the compensable overtime costs prior to filing. However, the trial court was unsupported in inferring more.

[55] We disagree with the trial court that MEC's knowledge of the facts and failure to act was sufficient to support an inferred finding of bad faith. We see no compelling reason to foreclose the possibility that MEC's failure to initially plead its overtime claim was the result of an honest mistake.

[56] The trial court agreed with J&B's arguments in an opposition motion when making its inferred finding. RA, tab 50 at 3 (Dec. & Order) ("[J&B] also argue[s] that [MEC's] failure to assert or explain its oversight is persuasive evidence of the inferred finding of a bad faith motive or dilatory tactic. The Court agrees."); *see also* RA, tab 46 at 5-7 (Opp'n Mot. Am. Compl.). However, neither the trial court nor J&B have persuaded this court that MEC's failure to include its overtime claim was motivated by bad faith or was solely intended to frustrate J&B's motion for summary judgment.

[57] The trial court also made an explicit finding of prejudice. RA, tab 50 at 3-4 (Dec. & Order) ("[A]llowing [MEC] to amend its [C]omplaint would unduly prejudice [J&B]."). Left with little explanation for this finding, we shall assume the court found J&B's arguments persuasive. Assuming the finding was supported by J&B's argument that MEC's bad-faith delay prevented J&B from seeking indemnification from GPA and carrying out timely and thorough

discovery of the delayed overtime claim, we will assess those rationales. *See* RA, tab 46 at 5 (Opp'n Mot. Am. Compl.).

[58] We are not persuaded by J&B's argument that it was prejudiced by losing the opportunity to seek indemnity from GPA. The prime Contracts between GPA and J&B expressly indemnified GPA against "all loss, damage, or expense . . . arising out of the performance of the work." M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., CV1423-10 (Def.'s Ex. E at GC-12 (General Conditions, San Vitores Contract)). While we acknowledge the merits of this issue were not litigated, we view this language as relevant to the extent that it shows a lack of substantial evidence in support of the trial court's finding of prejudice based on J&B's lost indemnity argument. The record contains no other evidence with regard to this issue, and thus we cannot say that the trial court's decision is substantially supported under this rationale.

[59] We must now assess the court's finding of prejudice based on the rationale that J&B suffered a diminished opportunity to carry out effective discovery as a result of MEC's delay. RA, tab 50 at 3-4 (Dec. & Order) ("[A]llowing [MEC] to amend its Complaint would unduly prejudice [J&B]."); RA, tab 46 at 5 (Opp'n Mot. Am. Compl.).

[60] In its opposition to MEC's motion to amend, J&B argued the following:

> J&B may have been able to adequately investigate what workers actually worked what hours on what projects if [MEC] had claimed the alleged overtime costs when submitting progress billings. It would have been more difficult for J&B to investigate the overtime claims if [MEC] had raised them when it first presented J&B with all of [MEC's] other claims in November of 2009. The difficulty increased by the time [MEC] filed its original [C]omplaint . . . on August 19, 2010. . . . By withholding the overtime claim and not seeking leave to amend until now long after the projects are over, [MEC] has prejudiced the ability of the defendants to . . . defend against the overtime claim . . . .

RA, tab 46 at 5-6 (Opp'n Mot. Am. Compl.).

[61] The record shows work on the Projects was completed by late November 2009. Tr. at 35-36 (Bench Trial, Nov. 5, 2014). MEC first asserted its overtime claim in opposition to J&B's Motion for Summary Judgment, more than one year later, in June 2011. RA, tab 22 at 16 (Pl.'s Opp'n Mot. Summ. J.). We cannot say with any certainty that J&B was unduly prejudiced based solely upon this lapse of time.

[62] When asserting its overtime claim for the first time, MEC stated:

> On both projects J&B ordered acceleration of the work to make up for delays, requiring MEC to work 24 hours a day, 7 days a week. As a result of this change, MEC had to pay overtime to its workers, costing MEC a total of $213,314.23, which J&B has not paid.

RA, tab 22 at 5 (Pl.'s Opp'n Def.'s Mot. Summ. J.). After resolution of the appeal in *M Electric I*, MEC requested leave to amend its Complaint to include, in part, the following language:

> J&B ordered [MEC] to accelerate its work by working around the clock, seven days a week, for which [MEC] had to pay its workers $213,314.23 in overtime pay. This was a major change in the work sequence for which [MEC] is entitled to compensation, including a reasonable allowance for overhead, profit, and GRT reimbursement, under either the changes in Work clause of the [S]ubcontract, or in quantum meruit for work performed outside the contract.

RA, tab 41, Attach. ¶ 11 (Mem. Supp. Pl.'s Am. Compl., Draft Am. Compl., Mar. 1, 2013). MEC filed, simultaneously with its Memorandum in Support of its leave to amend, a copy of its 2011 Responses to J&B's first discovery request, which included twelve pages of documented overtime costs. RA, tab 39, Attach. (Decl. Thomas M. Tarpley Supp. Pl.'s Mot. Am. Compl., Overtime Costs, Mar. 2, 2011). This evidence shows that MEC had calculated its overtime costs and provided them to J&B as early as March 2, 2011. Despite the availability of this evidence, the trial court was persuaded by J&B's argument that J&B was unduly limited in collecting its own evidence with regard to MEC's claim. We are not persuaded.

[63] In summary, the trial court's findings of bad faith and prejudice were clearly erroneous because they were not supported by substantial evidence. This court is left with a definite and firm conviction that a mistake has been made and that MEC should have been granted the opportunity to test its claim on the merits at trial. We therefore hold that the trial court abused its discretion in denying MEC's motion to amend.

C. Whether the Overtime Claim is Time Barred as to Defendant-Appellee Chung Kuo

[64] J&B raises the issue of whether the overtime claim is time barred as to Chung Kuo by arguing that MEC failed to present evidence at trial concerning the party, Appellee's Br. at 50, and that Chung Kuo is "only liable on the express terms of the bonds," *id.* at 60 (citing 74 Am. Jur. 2d *Suretyship* § 18). MEC responds by arguing that Chung Kuo is jointly and severally liable by the terms of 5 GCA § 5304 (Contract Performance and Payment Bonds) as a surety of J&B's bond obligations ("Bonds"). Reply Br. at 17-18 (citing 12 Am. Jur. 2d *Bonds* § 21).

[65] A surety bond is a contract, and "[i]n determining whether a party is relieved of its duty to perform under a surety bond, courts interpret the bond, like any other contract, according to its terms." *Granger Constr. Co. v. TJ, LLC*, 21 N.Y.S.3d 491, 493 (App. Div. 2015). However, to the extent that a surety bond conflicts with the Guam Code, our statutes are controlling. *See* 18 GCA § 88101 (2005) (declaring unlawful any contract contrary to express provision of law); *see also Minardus v. Zapp*, 112 S.W.2d 496, 498 (Tex. Civ. App. 1938) ("A contract is illegal where it is made in violation of a statute, or a regulatory rule making effective such statute, or where it is contrary to public policy . . . ."). "A bond issued to meet a specific statutory obligation may not, as a matter of public policy, dilute the minimum statutory protections provided the statutory beneficiaries, and minimum requirements are read into the bond." *Mount Florence Grp. v. City of Peekskill*, 652 N.Y.S.2d 814, 816 (App. Div. 1997) (citation omitted).

[66] Title 5 GCA § 5304(d) and (e) grants materialmen, laborers, and subcontractors, such as MEC, a right to bring suit on unpaid claims, subject to the limitation that such a suit is brought within one year of completion of work.

[67] "An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." Guam R. Civ. P. 15(c), (c)(2).

[68] MEC completed work on the Projects in November 2009. MEC filed its Complaint in the underlying action on August 19, 2010. Therefore, MEC satisfied the one-year statutory deadline to bring suit on unpaid claims. The terms of the bond establish a similar one-year filing deadline with no mention of relation back. The issue here is that the original Complaint did not contain a claim for overtime damages. J&B argues that failing to bring suit on the overtime claim within the one-year bond deadline relieved Chung Kuo of liability under the terms of the bond. However, the overtime claim, when added to the Complaint, will relate back to the date of the original Complaint. This will satisfy the one-year, 5 GCA § 5304(e) limitation. The terms of the surety bond may not limit MEC's statutory right to bring suit within this time period.

[69] Taking the above into account, we hold that the overtime claim is not time-barred with respect to defendant Chung Kuo.

D. Whether the NDFD Clause Stated in the Prime Contract Barred MEC's Standby Claim

[70] The trial court denied MEC's standby claim as barred by NDFD clauses contained within the Subcontracts, finding that none of the exceptions previously enumerated by this court applied that would allow the claim. RA, tab 84 at 11-13 (Finds. Fact & Concl. L., May 22, 2015) (analyzing each of four exceptions previously enumerated in *M Electric I*, 2012 Guam 23 ¶ 37).

[71] MEC argues the trial court erred in denying its standby claim because J&B caused unreasonable delays resulting in a breach of contract. *See* Appellant's Br. at 10-19. J&B argues the standby claim was properly denied because NDFD clauses, both those provided by the terms of the Subcontracts and those incorporated therein by reference to the Contracts, barred the claim. *See* Appellee's Br. at 29-39 (discussing enforceability of NDFD clauses and disputing applicability of exceptions to the present facts).

[72] We are therefore asked to determine whether NDFD clauses barred MEC's standby claim. This requires determining whether the delays experienced by MEC fall under applicable NDFD clauses and, if so, whether an exception applies that would nevertheless allow the claim.

[73] NDFD clauses are contract provisions that exculpate a party from liability for damages resulting from delays in performance by limiting the other party's remedy to an extension of time to complete the performance. *M Elec. I*, 2012 Guam 23 ¶ 33. Such clauses are valid and enforceable in Guam, subject to the following recognized exceptions:

> (1) unreasonable delays not contemplated by the parties when the agreement was made; (2) delays not covered by the plain language of the clause; (3) delays caused by the contractor's bad faith or its willful, malicious, or grossly negligent conduct; and (4) delays resulting from a breach of a fundamental obligation of the contract.

Id. ¶ 37 (footnote omitted).

[74] While the trial court focused on the terms of the Subcontracts, it overlooked the fact that the Contracts between GPA and J&B contained NDFD clauses under Section 6 of their Special Provisions. RA, tab 84 at 11-13 (Finds. Fact & Concl. L.); RA, tab 15, Ex. C at SP-2 (Special Provisions, GIAA Contract); RA, tab 15, Ex. D at SP-2 (Special Provisions, San Vitores Contract). Because the Subcontracts between J&B and MEC incorporated the terms of the Contracts, the Contract NDFD clauses must also be considered. Section 6 of the Contract

Special Provisions stated the following: "No extended overhead costs or standby costs shall be awarded/granted as a result of delays from the Civil work." RA, tab 15, Ex. C at SP-2 (Special Provisions, GIAA Contract) (emphasis omitted); RA, tab 15, Ex. D at SP-2 (Special Provisions, San Vitores Contract) (emphasis omitted).

[75] First, we must determine whether the delays at issue fall within the definition of the "Civil work." "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." 18 GCA § 87104 (2005). When capitalized terms are used in building contracts, we first look to their meaning as defined in the General Conditions of the contract. 4 Am. Jur. *Legal Forms* 2d § 47:179. If the terms are not defined in the General Conditions, we next look to their meaning in accordance with their use in the portion of the contract where the terms are found, followed by their ordinary meaning. *Id.*; *see also State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St. 3d 559, 2004-Ohio-7102, 820 N.E.2d 910, at ¶ 23 (holding undefined words are assigned ordinary meaning unless other meaning is clear from the document). "The fact that the parties fail to specifically define a term within the contract does not make the term ambiguous." *Id.* (citation omitted). "Instead, common, undefined words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or some other meaning is clearly evidenced from the face or overall contents of the instrument." *Id.* (citation and internal quotation marks omitted).

[76] The term "Civil work" does not appear in the "Definitions" section of the General Conditions of the Contracts, *see, e.g.*, M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., CV1423-10 (Def.'s Ex. E at GC-1 (General Conditions, San Vitores Contract)), and is used only once in the remaining sections of the General Conditions, restating the previous Special

Conditions language verbatim. *See* RA, tab 15, Ex. E at GC-33 (General Conditions, GIAA Contract); RA, tab 15, Ex. F at GC-33 (General Conditions, San Vitores Contract).

[77] However, the Contracts employ the term "work" throughout the documents. *See, e.g.*, M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., CV1423-10 (Def.'s Ex. E at GC-16 (General Conditions, San Vitores Contract)) ("The Contractor shall provide competent engineering services to execute the *work* in accordance with the contract requirements." (emphasis added)). This usage is not defined and must be assumed to be in accordance with the common meaning of the term "work." The common meaning of "work" is broad and includes all labor and tasks performed in fulfillment of the Contracts. *Work*, *Black's Law Dictionary* (10th ed. 2014) ("Physical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor.").

[78] MEC attributed the delays giving rise to its standby claim to delays in obtaining permits, caused by the discovery of differing subsurface conditions. It is our view that these delays were attributable to the "work" under the Contracts. Therefore, based on the generally accepted definition of "work," the delays at issue fall within the scope of the NDFD clause, subject to any applicable exceptions.

[79] We must now determine whether the delays fall within the first recognized exception. *See generally* Appellant's Br. (raising only first exception). That is, we must determine whether the delays were "unreasonable delays not contemplated by the parties when the agreement was made." *M Elec. I*, 2012 Guam 23 ¶ 37. This analysis is twofold.

[80] To determine whether delays are "not contemplated by the parties," *id.*, the court must inquire into the reasonable foreseeability of the type of delays in question, *see J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 642 N.E.2d 1215, 1222 (Ill. 1994) ("Reasonable

foreseeability is the touchstone of the exception."); *Peckham Rd. Co. v. State*, 300 N.Y.S.2d 174, 176 (App. Div. 1969) ("[C]ontemplation involves only such delays as are reasonably foreseeable . . . ."), *aff'd*, 269 N.E.2d 826 (N.Y. 1971). Foreseeability analysis requires consideration of the nature of the relationship between the contracting parties, the objectives of that relationship, and any relevant attendant circumstances, such as trade practices and customs. *See J & B Steel Contractors*, 642 N.E.2d at 1222; *Ace Stone, Inc. v. Wayne*, 221 A.2d 515, 520 (N.J. 1966) (holding that when ascertaining contemplation of parties, "the attendant circumstances including trade practices and customs [are] clearly admissible"). Such an inquiry necessarily requires consideration of extrinsic evidence. "Only unforeseeable delays and obstructions or those not naturally arising from performance of the work itself or the subject of the contract come within the exception." *J & B Steel Contractors*, 642 N.E.2d at 1222; *see also Corinno Civetta Constr. Corp. v. City of New York*, 493 N.E.2d 905, 910 (N.Y. 1986) ("[E]ven broadly worded exculpatory clauses . . . are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract.").

[81] To determine whether the delays are "unreasonable," *M Elec. I*, 2012 Guam 23 ¶ 37, the court must look to whether the delays were of an unreasonable duration considering the facts and circumstances surrounding the agreement, *see Howard Contracting Inc. v. G.A. MacDonald Constr. Co.*, 83 Cal. Rptr. 2d 590, 595-96 (Ct. App. 1999) (holding four-month delay by owner obtaining permits unreasonable under circumstances); *Dickinson Co. v. Iowa State Dep't of Transp.*, 300 N.W.2d 112, 114-15 (Iowa 1981) (holding party failed to show two-year delay for 50-day construction project was unreasonable in highway construction).

[82] A delay must satisfy both elements in order to qualify for the exception, unless the delay was so manifestly extreme that the parties cannot be said to have contemplated such a delay. *Dickinson Co.*, 300 N.W.2d at 114-15 ("[A] delay may be so extreme as to be a kind not contemplated."). If the delays reach the level of manifestly extreme unreasonableness, then it cannot be said that they were actually contemplated by the parties and the exception must apply to bar the enforcement of the NDFD clause, thus allowing the claim.

[83] MEC has raised the issue of whether a court may consider extrinsic evidence when determining whether this exception applies. MEC argues the parol evidence rule bars a trial court from considering any extrinsic evidence when interpreting integrated contracts such as the ones at issue in this case. Appellant's Br. at 16 ("The subcontract was an integrated document, excluding such prior oral statements or understandings.").

[84] We recognize that courts take a variety of approaches when confronted with the question before us. Some courts have expressly forbidden the introduction of parol evidence to determine whether delays were contemplated by the parties. *See, e.g.*, *W. Eng'rs, Inc. v. State*, 437 P.2d 216, 218 (Utah 1968) (holding that a broad NDFD provision was not ambiguous and that parol evidence was not admissible to show that delay was unreasonable or was not contemplated by the parties). Other courts have expressly permitted the introduction of parol evidence to determine whether delays were contemplated by the parties. *See, e.g.*, *Ace Stone*, 221 A.2d at 520 (holding that when ascertaining contemplation of parties, "formal interpretive rules are readily subordinated and parol evidence of the attendant circumstances including trade practices and customs is clearly admissible"). We adopt the latter approach. We hold that extrinsic evidence is admissible in order to determine whether delays were unreasonable and not contemplated by the parties.

[85] In *M Electric I,* we stated that time of the essence ("TOE") clauses "complicate matters . . . because, when violated, they can result in material breach and render a delay per se 'unreasonable.'" 2012 Guam 23 ¶ 43 (citing *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004); *Lotz v. City of McKeesport*, 453 A.2d 74, 76 (Pa. Commw. Ct. 1982)). Although we discussed the possibility that violation of a TOE clause may render delays unreasonable, we did not commit ourselves to the position that such delays invariably amount to a per se breach of contract. Instead, the court must consider a TOE clause as part of its determination of reasonableness, unique to the facts and circumstances of the individual case.

[86] In this case, neither party clearly articulated the individual periods of delay in its appellate briefs or at oral argument.[6] However, the trial court's findings of fact provide some insight, delineating two distinct periods of delay for a total of 162 days: "(1) from March 30, 2009 to July 11, 2009, for which MEC claims 103 days; and (2) from August 17, 2009 to October 15, 2009, for which MEC claims 59 days." RA, tab 84 at 8 (Finds. Fact & Concl. L.).

[87] In summary, determining whether the delays were unreasonable delays not contemplated by the parties when the agreement was made requires a determination of whether the parties contemplated the types of delays and whether the duration of each period of delay was reasonable. We believe the trial court is in the best position to make these determinations in the first instance.

[88] Taking the aforementioned into account, we ask the trial court to determine whether the delays giving rise to MEC's standby claim satisfy the first recognized exception, given the facts and circumstances. In order to satisfy the first exception, the trial court must find either (1) that both the type of delays was unforeseeable and the actual delays experienced were of an

[6] *See, e.g.*, Appellant's Br. at 3-4 (describing the delays as "various," resulting in a standby claim for 162 days).

unreasonable duration, or (2) that the duration of delay reached the level of manifestly extreme unreasonableness—even if the delays were of a type theoretically contemplated. Stated another way, if the type of delays was foreseeable,[7] then the first NDFD exception does not apply unless the delays were of a manifestly extreme duration.[8] If the delays were of a reasonable duration, then the first NDFD exception does not apply and MEC's standby claim is barred by the NDFD clause in the prime Contracts.

[89] This determination will require consideration of the nature of the relationship between the contracting parties, the objectives of that relationship, and any relevant extrinsic evidence and attendant circumstances. We therefore reverse and remand to the trial court to determine this issue in accordance with this opinion.

E. Whether the Trial Court Erred in Denying MEC's Excavation Claim

[90] MEC argues that the trial court's denial of its excavation claim was based upon an improper, *sua sponte* adoption of the affirmative defense of "failure-to-give-notice." Appellant's Br. at 21. J&B responds by arguing that it properly raised the lack of notice defense at trial. Appellee's Br. at 39.

[91] A responsive pleading must contain all affirmative defenses. Guam R. Civ. P. 8(c). "Failure to bring a defense at that time results in waiver and precludes a party from asserting it at a later point." *Hemlani v. Hemlani*, 2015 Guam 16 ¶ 23. An affirmative defense is a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim,

[7] To determine foreseeability, the trial court must determine whether the type of delays was contemplated by the parties, for example, whether the parties contemplated a single period of delay to obtain a single permit, or multiple periods of delay to obtain numerous permits for smaller portions of the projects. If the court determines that the parties contemplated the type of delays experienced, then the first NDFD exception cannot apply unless the actual duration of the delays reached the level of manifestly extreme unreasonableness. Such manifestly extreme unreasonableness will serve to override the foreseeability requirement.

[8] To determine whether the actual duration of the delays reached the level of manifestly extreme unreasonableness, the trial court must consider the evidence before it, including any relevant extrinsic evidence.

even if all the allegations in the complaint are true." *Affirmative Defense, Black's Law Dictionary* (10th ed. 2014). Affirmative defenses need not be pleaded in specific terms:

> In determining whether general, non-specific language in a defendant's answer, as was used here, suffices to preserve an affirmative defense, an inquiring court must examine the totality of the circumstances and make a practical, commonsense assessment about whether Rule 8(c)'s core purpose—to act as a safeguard against surprise and unfair prejudice—has been vindicated.

Williams v. Ashland Eng'g Co., 45 F.3d 588, 593 (1st Cir. 1995), *abrogated on other grounds by Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 138 (1st Cir. 2000); *see also Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 546-547 (6th Cir. 2012) (general pleading put plaintiff on notice of defendant's collateral estoppel defense and could have conducted necessary discovery and briefed issue on appeal), *cert. denied*, 133 S. Ct. 653 (2012).

[92] J&B included in its Answer the affirmative defense of "the terms of the Subcontracts between [MEC] and . . . J&B." RA, tab 7 at 4 (Answer, Aug. 30, 2010). We found in *M Electric I*, 2012 Guam 23 ¶ 49, that the Subcontracts were valid and binding on the parties.

[93] Article Four of the Subcontracts required written "change orders" prior to compensation of additional work claims:

> **Section 4.1.** No alterations shall be made to the Work described in the plans and specifications, except upon written order of the Contractor or the Owner. The Contractor may, at any time, by written order, make changes in the plans and specifications, which changes shall be evidenced by "change orders" signed by the Contractor and accepted by the Subcontractor.
>
> . . . .
>
> **Section 4.3.** If any extra, additional, or different work be performed by the Subcontractor without previous written order by the Contractor, the Contractor shall be under no obligation to pay for such unauthorized work.

RA, tab 15, Ex. A at 2-3 (Subcontract Agreement, Mar. 24, 2008); RA, tab 15, Ex. B at 2-3 (Subcontract Agreement, Apr. 16, 2008).

[94] The Subcontracts also incorporated the terms of the Contracts, which required notification prior to disturbing materially different subsurface or latent conditions. Article III(1)(b) of the prime Contracts states the following:

> If, in the performance of the contract, subsurface or latent conditions at the site are found to be materially different from those indicated on the drawings and specifications . . . the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. Upon such notice . . . the Contracting Officer shall promptly make such changes in the drawings and specifications as he finds necessary to conform to the different conditions, and any increase or decrease in the cost of the work shall be adjusted as provided under Changes in Work.

M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp., CV1423-10 (Def.'s Ex. E at GC-5 (General Conditions, San Vitores Contract)); *see also* RA, tab 84 at 14 (Finds. Fact & Concl. L., May 22, 2015).

[95] By pleading the terms of the Subcontracts as an affirmative defense, J&B put MEC on notice at the outset of the litigation that J&B intended to rely on the two Subcontracts at issue in this litigation to avoid MEC's claims. This included any incorporated terms, such as Article III(1)(b) of the prime Contracts. Thus, J&B satisfied Guam requirements for including an affirmative defense in its responsive pleading.

[96] The trial court denied the excavation claims based on a finding that MEC failed to satisfy the Contracts because it did not provide notice to J&B of the changed circumstances. RA, tab 84 at 14 (Finds. Fact & Concl. L.) ("[MEC] failed to introduce any persuasive specific evidence that [J&B's] attention was immediately called to the changes or that the change order process was timely initiated."). Specifically, the trial court found that "MEC did not request additional trenching costs before doing the additional work, or at any time before February 2010." RA, tab 84 at 9 (Finds. Fact & Concl. L.). A trial court's findings of fact will be set aside only if clearly erroneous. *Macris v. Swavely*, 2008 Guam 18 ¶ 9 (citation omitted). The court's finding is not

clearly erroneous, and thus we will not overturn it.[9] The trial court reasoned that because MEC did not adhere to the procedures provided by the Contracts for seeking additional compensation for materially different conditions, its excavation claim must fail.[10] *See* RA, tab 84 at 14 (Finds. Fact & Concl. L.). We agree.

[97] In summary, we affirm the trial court's decision to deny the excavation claim, finding no error.

V. CONCLUSION

[98] As a threshold matter, we hold that this court has appellate jurisdiction to hear MEC's appeal of the trial court's denial of its motion to amend because MEC's Notice of Appeal properly designated the Final Judgment, and the relevant interlocutory order merged with that judgment. Next, we hold that the trial court abused its discretion by denying MEC's GRCP 15(a) motion to amend because the findings upon which its decision was based were not supported by substantial evidence, and the liberal policy of granting amendment should have afforded MEC the opportunity to litigate the merits of its overtime claim. We hold that the overtime claim is not time-barred with respect to Chung Kuo because the claim will relate back to the date of the original Complaint, satisfying the one-year statutory limitation. We find that the NDFD clause stated in the prime Contracts, by its terms, covers the type of delays incurred by MEC. However, we ask the trial court to determine, taking into account relevant extrinsic evidence, whether the first exception to the applicability of such clause applies. Finally, we hold that the trial court did not err in denying MEC's excavation claim.

[9] MEC does not contest this finding of fact.

[10] This conclusion was dispositive with regard to the claim for excavating below and around existing utilities as well as the claim for excavation related to the manhole stubs. RA, tab 84 at 13-14 (Finds. Fact & Concl. L.).

[99] For the reasons described herein, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice