IN THE SUPREME COURT OF GUAM

MANVIL CORPORATION, Plaintiff-Appellant, vs. **E.C. GOZUM & CO., INC., MDI GUAM CORP. fka MIYAMA GUAM, INC., SUMITOMO CONSTRUCTION CO., LTD. DOES I THROUGH V,** Defendants-Appellees, **SUMITOMO CONSTRUCTION CO. and FEDERAL INSURANCE CO.,** Supplemental Defendants-Appellees. **SUMITOMO CONSTRUCTION CO., LTD. and MDI GUAM CORPORATION,** Cross-Claimants, vs. **E.C. GOZUM & CO., INC.,** Cross-Defendants.	Supreme Court Case No. **CVA 97-039** Superior Court Case No. **CV0218-94** **OPINION**

Cite as: **1998 Guam 20**
Appeal from the Superior Court of Guam
Argued and Submitted on 18 February 1998
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS and JOSE I. LEON GUERRERO, Associate Justices.

WEEKS, J.:

[1] Plaintiff-Appellant Manvil Corporation (Manvil) is appealing a Rule 54 (b) grant of Partial Summary Judgment in favor of Defendants-Appellees Sumitomo Construction Co., Ltd. (Sumitomo), MDI Guam, and Federal Insurance Company (Federal). Appellant appeals the determination by the trial court that the mechanic's lien was untimely filed, and that the lien failed to properly identify the land pursuant to the Land Registration Act. This court finds that the trial court properly found that no genuine issue existed as to any material fact, and thus affirms the grant of partial summary judgment in favor of Sumitomo.

I.

[2] The Leo Palace Resort Phase 1 Project (Leo Palace Project) is a $230 million dollar development which involved the construction of a golf clubhouse, three (3) high-rise condominiums, a 200 unit hotel, 52 duplex units, and a number of other structures. On or about 2 November 1990, Sumitomo entered into a contract with MDI for the construction of the Leo Palace Project. The contract was supplemented on 25 March 1991, 29 August 1991 and 19 November 1991. Sumitomo subcontracted out to E.C. Gozum & Co, Inc. (Gozum) certain work involving Condominium No. 1 of the Leo Palace Project. Gozum subsequently entered into a $296,000 subcontract with Manvil to perform plastering, painting, chipping and masonry work on Condominium 1 of the Leo Palace Project (Gozum-Manvil sub-subcontract). Manvil claims that Gozum failed to pay Manvil for work

in the amount of $239,000.

[3] On or about 8 June 1993, the staff architect with Taniguchi, Ruth, Smith & Associates executed Certificates of Substantial Completion which extended to the entire Leo Palace Resort Project. MDI accepted the Project as being completed on 15 June 1993. Sumitomo filed a mechanic's lien against MDI and the property on 30 June 1993. The Sumitomo lien included a $7,709,549.00 claim for the improvements to Condominium No. 1, the property improved by Manvil. Manvil later filed its mechanic's lien on 12 November 1993.

[4] On 10 February 1994 Manvil filed suit against Gozum for breach of contract and related claims, and against MDI and Sumitomo to foreclose the 12 November 1993 mechanic's lien. A First Amended Complaint was filed on 17 February 1994. Gozum answered denying any money owed to Manvil. Sumitomo answered, also denying liability to Manvil. Thereafter, in December of 1994, Sumitomo obtained a mechanic's lien release bond from Federal. The release bond replaced the Leo Palace Resort Project as the property subject to the mechanic's lien.

[5] On 12 November 1996, Sumitomo and MDI filed for summary judgment, raising for the first time the affirmative defense of Manvil's non-compliance with the Guam Land Registration Act upon the filing of its lien. Thereafter, Manvil filed a Supplemental Complaint on 10 December 1996, adding Federal as an additional defendant, based upon the recording of the mechanic's lien release bond. Sumitomo and Federal then added the affirmative defense of Manvil's failure to comply with the provisions of the Guam Land Registration Law in their responsive pleading. The trial court granted summary judgment in favor of Sumitomo and MDI, and dismissed the claims based upon the mechanic's lien. Manvil then moved for reconsideration, requesting Rule 54(b)

certification. By order dated 4 August 1996, the trial court denied the motion for reconsideration and certified the grant of partial summary judgment for interlocutory appeal. The Notice of Appeal was timely filed on 12 August 1997.

II.

[6] The Supreme Court of Guam has jurisdiction pursuant to 48 U.S.C. § 1424-3(d) (1984). The partial summary judgment was certified under Guam Rule of Civil Procedure 54(b) as final and appealable. This court will review *de novo* the trial court's granting of summary judgment. *Iizuka Corporation v. Kawasho International (Guam), Inc.*, 1997 Guam 10, ¶ 7; *Castro v. Peck, dba B.B.H.S. Contracting and Standard Plytrade Corp.,* 1998 Guam 2, ¶ 4. The court may grant summary judgment pursuant to Rule 56 when "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." Guam R. Civ. P. 56(c). There is a genuine issue of fact if there is sufficient evidence which establishes a factual dispute requiring resolution by a fact-finder. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). The court must view the evidence and draw inferences in the light most favorable to the non-moving party. *Castro,* at ¶ 4.

III.

[7] Manvil argues that the mechanic's lien was timely filed, that questions of fact exist as to when the project was "completed" for purposes of the mechanic lien, and that summary judgment

in favor of Sumitomo was improperly granted. Mechanic's liens are governed by the language of 7 GCA § 33302 (c)(1994), which provides:

> (c) The owner shall within ten (10) days after the completion of the work of improvement, file for record a notice of completion as provided in subdivision (f) of this section. . . . If such notice be not so filed, then, except as to any persons who were required to file for record claims of lien as provided in subdivision (b) of this section, all persons claiming the benefit of this Title shall have ninety (90) days after the completion of such work of improvement within which to file their claims of lien.

Under 7 GCA § 33302(b), *work of improvement* and *improvement* mean the entire structure or scheme of improvement as a whole. In this case, no notice of completion was filed. Therefore, Manvil had ninety (90) days from completion of the project as a whole in which to file its lien.

[8] Sumitomo claims that the contract was completed on or about 15 June 1993, evidenced by (1) Certificates of Substantial Completion signed by the project's architect Richard Reed on 8 June 1993 and accepted by MDI on 15 June 1993; (2) deposition testimony of Manvil's President Suk Bong Choi stating that the work stopped sometime in July 1993; and (3) Sumitomo's own mechanic's lien filed on 30 June 1993. Manvil argues that the work continued through September of 1993, submitting work records and declarations from the President of Manvil, Suk Bong Choi, and the President of Reliable Builders, Jong K. Kim, which purport to authenticate these records as work performed for Sumitomo through 30 September 1993. Manvil claims that the work was not completed but in large part "postponed" due to financial difficulties. Under this "cessation of labor" theory, Manvil would be entitled to file its lien 150 days (60 plus 90 days) after the cessation of labor.

7 GCA § 33302(d)(3) provides:

> (d) In all cases, except as provided in subdivision (e) of this section, any of the following shall be deemed equivalent to a completion: . . .
> (3) after the commencement of a work of improvement, a cessation of labor thereon for a continuous period of sixty (60) days or a cessation of labor thereon for a continuous period of thirty (30) days or more if the owner files for record a notice of cessation as provided for in subdivision (h) of this section, except that the time for and manner of filing claims of lien where there has been such a cessation of labor shall be as provided in subdivisions (g) and (h) of this section.

No notice of cessation was filed for record by MDI.

[9] The trial court found that no genuine issue existed as to when the project was completed. Upon our review of the record, we concur. The Certificates of Substantial Completion were signed and accepted by MDI on 15 June 1993. The staff architect, in his Declaration in Support of Motion for Summary Judgment dated 4 November 1996, stated that all work required on Condominium No. 1 was completed on 8 June 1993. Manvil claims that notice of such acceptance was never communicated to them, and that a secret acceptance of an uncompleted project that does not give notice to the materialmen does not constitute "completion" for purposes of the commencement of the period to record lien claims. *See Hammond Lumber Co. v. Barth Inv. Corp.*, 202 Cal. 606, 611-612, 262 P. 31, 33-34 (1927). We note, however, that Guam lien statutes provide no statutory obligation on the part of the primary contractor or the owner for such notice to its materialmen. 7 GCA § 33302(c) simply requires that a notice of completion be filed with the Department of Land Management within ten (10) days of completion of the work of improvement; if not, except as otherwise required, all persons claiming the benefit of the lien have ninety (90) days after the completion of the work of improvement within which to file their claims of lien. Although Manvil

was never provided with actual notice of MDI's acceptance of the Certificates of Substantial Completion, we believe that the filing of Sumitomo's own mechanic's lien on 30 June 1993 provided constructive notice of its existence to Manvil. "Constructive notice through recording of instruments is a creature of statute, unknown to the common law 'and not of common right or abstract justice.'" *Scottsdale Memorial Health Systems, Inc. v. Clark,* 759 P.2d 607, 611 (1988), quoting 66 AM. JUR. 2D, *Records and Recording Laws* § 47 (1973). Recording statutes serve to protect intending purchasers and encumbrancers against the evils of secret grants and secret liens and the subsequent frauds attendant upon them. *Id.* In our view, Manvil's constructive knowledge of Sumitomo's claim of lien served to put Manvil on notice of the contract's completion.

[10] On 12 November 1996, Sumitomo filed its Motion for Summary Judgment; two days later, on 14 November 1996, Suk Bong Choi corrected his deposition testimony to reflect a new work stoppage date of September 1993. As well, in its Opposition to Sumitomo's Motion for Summary Judgment dated 25 November 1996, Manvil submitted the Declaration of Suk Bong Choi which reiterated the change in his previous deposition testimony concerning the work stoppage date, along with worksheets and invoices purporting to show work ongoing until 30 September 1993. Contrary to Manvil's position, we find *Radobenko v. Automated Equip.Corp.*, 520 F.2d 540 (9th Cir. 1975) persuasive. There the court found that inconsistencies between the deposition testimony given by the plaintiff under oath and the affidavit which he filed in opposition to a motion for summary judgment did not create genuine issues of material fact precluding summary judgment. *Id.* at 544. We find such similarities in the case at bar. Further, the trial court properly found that the documents submitted with Mr. Choi's declaration were not properly authenticated, in accordance with *Canada*

v. Blain's Helicopters, Inc., 831 F.2d 920 (9th Cir. 1987) (holding that unauthenticated documents found in a report of the National Transportation Safety Board could not be relied on to defeat a motion for summary judgment). Manvil has presented no credible evidence to persuade this court that the contract was not substantially completed and accepted by MDI on 15 June 1993, or that any work done after the 15 June 1993 acceptance was required under the contract, thus proving the agreement incomplete.

[11] Manvil argues that the mechanic's lien release bond filed by Sumitomo and recorded with the Department of Land Management on 23 December 1994 pursuant to 7 GCA § 33303 (1994) entitles Manvil to statutory recovery under 7 GCA § 33408(b) (1994). Those statutes provide as follows:

> **§33303. Bond of Person Disputing Lien: Recording: Amount: Freeing Property: Permissible Principals.** If the owner of the property sought to be charged with a claim of lien as provided in §33301 Chapter, or if any contractor named in said claim of lien or whose duty it is under his contract with the owner to keep such property free from liens, or any subcontractor named in said claim of lien as the person by whom the claimant was employed to perform his labor or to whom he furnished the materials, disputes the correctness or validity of such claim of lien, he may record or cause to be recorded either before or after the commencement of an action to enforce such claim of lien, in the Department of Land Management in which such claim or lien was recorded, a bond executed by some corporation authorized to issue surety bonds in Guam, in a penal sum equal to one and one-half (11/2) times the amount of the claim, or, if such claim of lien affects more than one parcel or parcels in the claim of lien, which bond shall guarantee the payment of any sum which the claimant may recover on the claim, together with his costs of suite in the action, if he recovers therein; if the owner or other person falling into any of the classes above-named records, or causes to be recorded, such bond, then the real property described in such bond shall be freed from the effect of such claim of lien and any action brought to foreclose such lien. The principal upon such a bond may be either the owner of the property or the owner of an interest in the said property, or the contractor, or any subcontractor affected by said claim of lien. [1]

[1]This section is derived from Cal. Civ. Code § 3143.

> **§33408. Liability of Sureties: Provisions Limiting Action: Filing of Bond: Notice to Sureties: Presumption. (b) Bond to be Construed Against Sureties.** All bonds given pursuant to the provisions of this Chapter will be construed most strongly against the surety and in favor of all persons for whose benefit such a bond is given, and under no circumstances shall a surety be in anywise released from liability to the said laborers or materialmen, or persons furnishing appliances, teams, or power, for whose benefit said bond has been written, by reason of any breach of contract between owner and contractor, or on the part of any obligee named in said bond, but the sole condition of recovery on the part of such person furnishing labor or material, or appliances, teams, or power, as aforesaid, shall be that said labor or material has been used or consumed in, or said appliances, teams, or power have contributed to the work of improvement to which said bond refers, and that the said third person for whose benefit said bond has so been made to inure has not been actually paid some part or all of the sums due him for the same.[2]

7 GCA §§ 33303 and 33408(b). As stated by the court in *Hutnick v. U.S. Fidelity & Guaranty Co.*, 47 Cal. 3d 456, 463, 253 Cal. Rptr. 236, 239-240 (1988)*:*

> Because recovery on the bond is a part of the process for enforcing the mechanic's lien, authorities from other jurisdictions have concluded that a cause of action to foreclose a mechanic's lien is substantially the same whether relief is sought against the liened property or against a bond which has been substituted for the property. Thus it has been said that the bond "does not change the relation or rights of the parties otherwise than in substituting its obligations for the [property] subject to the lien, and it was not within the legislative purpose in permitting the substitution to deteriorate the lienor's rights."

The statutory language of the mechanic's release bond does not give Manvil recovery rights beyond that to which it is entitled against the liened property. Both 7 GCA §§ 33303 and 33408(b) must be

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[2]Contrary to Manvil's argument, 7 GCA §33408(b) is derived from California Civil Code § 3226, which provides:

> **[Construction of bonds: Effect of breach of contract]** Any bond given pursuant to the provisions of this title will be construed most strongly against the surety and in favor of all persons for whose benefit such bond is given, and under no circumstances shall a surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner and original contractor or on the part of any obligee named in such bond, but the sole conditions of recovery shall be that claimant is a person described in Section 3110, 3111, or 3112, and has not been paid the full amount of his claim.

read together to effect the legislative purpose of preserving the claimant's rights. Manvil must prove its case in the same manner as if relief were sought against the liened property. Because the dispute centers around the timeliness of Manvil's lien, that issue must be determined as an initial step to recovery on the bond. A surety may raise all defenses allowed to the principal and must only pay on the bond "if the claimant establishes, without reference to the bond, a legal obligation on the part of the principal to pay." *Royster Constr. Co. v. Urban West Communities,* 40 Cal. App. 4th 1158, 1168-69, 47 Cal. Rptr. 2d 684, 690 (1995). Manvil's argument that the recording of the release bond has "mooted" the issue of the validity of the lien is therefore without merit.

[12] As well, we find no merit in Manvil's argument that the lien attaches to the property, if not the land. The cases offered in support of Manvil's position bear little resemblance to the case at bar. *See English v. Olympic Auditorium, Inc.*, 217 Cal. 631, 20 P.2d 946 (1933); *American Transit Mix Co. v. Webber*, 106 Cal. App .2d 74, 234 P.2d 732 (1951); *Cain v. Whiston,* 58 Cal. App. 2d 738, 137 P.2d 479 (1943). First, these cases do not indicate that they involve registered land; second, in each case, notices of non-responsibility were statutorily recorded to relieve the owner of the lien. *Id.* at 634-5, 20 P.2d at 947; *Am. Transit Mix Co.,* 106 Cal. App. 2d at 75, 234 P.2d at 733; *Cain,* 58 Cal. App. 2d at 740, 137 P.2d at 480. The issue determined by the courts was whether such notices of non-responsibility were effective against either the land or the property. *Id.* at 639; 20 P.2d at 951; *Am. Transit Mix Co.,* 106 Cal. App. 2d at 77; 234 P. 2d at 734; *Cain,* 58 Cal. App. 2d at 745, 137 P.2d at 483. A notice of non-responsibility[3] was not recorded in the instant case. Consequently,

[3] 7 GCA § 33203(b) (1994) states in relevant part:

(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

Manvil's argument matters little to our determination.

[13] There remains Manvil's assertion that Sumitomo waived its affirmative defense of non-compliance with the Guam Land Registration Act because Sumitomo raised it for the first time in its summary judgment motion of 12 November 1996.[4] Sumitomo argues that this affirmative defense was raised in their answer to Manvil's Supplemental Complaint of 10 December 1996. Guam R. Civ. Pro. 8(c) provides in relevant part:

> **(c) Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, **illegality,** injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, **and any other matter constituting an avoidance or affirmative defense**. . . .

(Emphasis added.) GRCP 8(c).

[14] In *Healy Tibbitts Constr. Co. v. Ins. Co. of N. Am.*, 679 F.2d 803, 804 (9th Cir. 1982), the

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> 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. . . .

[4]This waiver issue was not addressed by the trial court. The trial court instead found that Manvil was in non-compliance with the Guam Land Registration Act based upon a strict interpretation of 21 GCA § 29148 (1994), which provides:

> **Duty of Registrar Where Instrument Affecting Registered Land Offered For Filing.** Any instrument offered for filing with the registrar which affects registered land must have noted thereon a statement of the fact that said land is registered land, with the name of the registered owner and with the number or numbers of the certificate or certificates of the last registration thereof; otherwise, none of such instruments shall be filed, nor shall the same affect the title for the whole or any part of said land, nor will the same impart any notice to the registered owner or to any person dealing with such land.

Ninth Circuit liberalized the requirement that affirmative defenses be raised in a defendant's initial pleading, absent prejudice to the plaintiff. There the defendant insurance company was allowed to raise the affirmative defense that the insurance policy exclusion clause precluded recovery (by way of a motion for summary judgment), despite the fact that this defense was not raised in its answer to plaintiff's initial complaint. *Id.* In *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993), the court allowed the affirmative defense of qualified immunity to be raised for the first time at summary judgment, in the absence of a showing of prejudice. In *Camarillo*, the plaintiff had neither claimed prejudice, nor was it suggested by the record. *Id.*

[15] In the instant case, Manvil's first notice of this affirmative defense was at Sumitomo's motion for summary judgment, some two and a half years after the initial filing of the complaint. Manvil claimed prejudice from the delay, to the extent of bringing a claim against the Department of Land Management that would now prove untimely under the statute of limitations. The trial court, however, did not address this threshold issue; nevertheless, it made a finding of Manvil's non-compliance with the Guam Land Registration Act. Under these circumstances, based on the two and a half year delay in raising this affirmative defense, Manvil's assertions of prejudice, as well as the trial court's silence in addressing this issue, we believe that Manvil was prejudiced to the extent of its ability to fairly and effectively present its case.

[16] This court has previously addressed the untimely raising of an affirmative defense in *Citizens Security Bank v. Bidaure*, 1997 Guam 3, ¶ 20, where an affirmative defense was presented on appeal, arguably raised at trial (at closing argument), but not included in the pleadings. There we stated that in the interest of fairness, we would not address the affirmative defense issue on appeal. *Id.* at ¶ 21.

We apply this same reasoning to the case at bar. Sumitomo's belated raising of this affirmative defense in its answer to Manvil's Supplemental Complaint, some two and a half years after the filing of the initial complaint, with first notice to Manvil in Sumitomo's motion for summary judgment, has operated as a waiver to assert this affirmative defense. Although we find this untimely assertion to be both procedurally improper and prejudicial to Manvil's position, our determination of this issue does not operate to ultimately change the holding of the trial court, with which this court agrees. Manvil's related issue of alleged non-compliance with the Guam Land Registration Act, therefore, is consequently not reached by this court.

IV.

[17] We 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. In the instant case, applying a fair and reasonable construction of the statutes to the facts, we conclude that completion and acceptance of the project as a whole occurred on or about 15 June 1993. Pursuant to 7 GCA § 33302(c), claimants have ninety (90) days from the date of completion within which to file their lien. As such, Manvil's lien dated 12 November 1993 was untimely. We further find that Sumitomo waived its affirmative defense of Manvil's non-compliance with the Guam Land Registration Act. Sumitomo raised it for the first time at its motion for summary judgment, to the prejudice of Appellant Manvil. Despite that determination, our final result remains unchanged. Taking all the facts and inferences which may be drawn

therefrom in the light most favorable to Manvil, we hold that the trial court properly granted partial summary judgment in favor of Sumitomo as a matter of law. The decision of the trial court is AFFIRMED.

JANET HEALY WEEKS
Associate Justice

JOSE I. LEON GUERRERO
Associate Justice

PETER C. SIGUENZA
Chief Justice