IN THE SUPREME COURT OF GUAM

JAMES K. APANA, JR., dba APANA CONSTRUCTION,
Plaintiff-Appellant

vs.

DANIEL B. ROSARIO, dba DAN ROSARIO & ASSOCIATES, CONTINENTAL INSURANCE COMPANY, JOHN Y. SALAS AND ANTONIA SALAS
Defendants-Appellees

OPINION

Supreme Court Case No. CVA97-046
Superior Court Case No. CV1827-92

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Appeal from the Superior Court of Guam
Submitted on the briefs August 15, 1999
Hagåtña, Guam

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BEFORE: RICHARD H. BENSON, Chief Justice (Acting)[1], JOAQUIN C. ARRIOLA, SR., and ANDREW M. GAYLE, Justices Pro Tempore.

PER CURIAM:

[1] Plaintiff-Appellant Apana appeals the trial court's decision which ruled that Plaintiff-Appellant filed an untimely mechanic's lien and precluded Plaintiff-Appellant's claim upon a payment bond. We reverse in part and affirm in part the trial court's decision and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

[2] In October 1991, Guam Housing Corporation approved the application for a mortgage home loan for John and Antonia Salas (collectively hereinafter as "Salas"). On March 4, 1992, Salas executed a contract with Defendant, Daniel B. Rosario dba Dan Rosario & Associates ("Rosario"), to construct a residential home on the Salas property. The contract price for the construction of the home was $75,000, with periodic draws of $15,000. The periodic draws were to be paid in accordance with a schedule of completion for the various stages of the construction.

[3] On March 7, 1992, Rosario subcontracted with Plaintiff-Appellant James K. Apana, Jr. ("Apana") to do the actual construction for $60,000. Rosario signed the contract as the "owner" and Apana as the "contractor." On March 17, 1992, Guam Housing paid $13,500 to Rosario, retaining $1,500 of the first draw. On March 18, 1992, Rosario paid Apana $10,000 of the total $12,000 owed to him. The next payment from Rosario to Apana was due on April 9, 1992, after inspection of the

[1]The full-time Justices, including the Chief Justice, recused themselves from deciding this matter. Justice Benson, as the senior member of the panel was designated as the Acting Chief Justice.

last increment of work performed. Rosario failed to make payment to Apana.

[4] Four (4) days after the scheduled inspection, on April 13, 1992, Apana stopped construction of the home because it learned that Guam Housing would not release further draws until Rosario was bonded. At that time, Rosario owed Apana $15,000 — $2,000 from the first draw, $12,000 for completion of the second draw, and $1,000 from the third draw.

[5] On April 16, 1992, Rosario and Salas entered into a second contract regarding the construction of the home. The contract price under this agreement was $61,500. This reflected the original amount of $75,000 less the value of the work completed, which was $13,500. On April 29, 1992, Continental Insurance Company (Continental) issued a payment bond to Rosario. Since Rosario had not yet paid Apana, Apana brought a claim against the bond in the amount of $15,000. Thereafter, Rosario failed to complete the project, and Continental, as surety, hired Far East Builders Co., Ltd. (Far East) to complete the construction of the home for fifty seven thousand dollars ($57,000).

[6] At this time, Rosario's whereabouts are unknown. Default judgments, which remain unsatisfied, were entered against Rosario in favor of both Apana and Continental. Apana filed a Complaint for Breach of Contract, Claim of Bond, and Foreclosure of Mechanic's Lien on December 9, 1992. Both sides made summary judgment motions in which then Judge, now Justice Siguenza, issued a Decision and Order, and subsequently a Revised Decision and Order, which denied Defendants-Appellees'[2] motion, denied Apana's motion for summary foreclosure and granted Apana's motion as to the liability of Continental as the surety.

[7] On appeal to the District Court of Guam, Appellate Division, the court reversed the summary

[2]Continental, John Y. and Antonia Salas are hereinafter referred to as "Appellees".

judgment in favor of Apana and remanded the case for further proceedings. *Apana v. Rosario,* No. CV1837-92, 1995 WL 604354 *3 (D. Guam App. Div. Sept. 29, 1995). The District Court directed the trial court to determine two issues of fact: (1) whether the default preceded the execution of the surety contract, and (2) if the default occurred after the execution of the surety contract, whether any preexisting obligation made such default more probable. *Id.*

[8] On remand the lower court found that the default occurred before the execution of the surety contract, thus precluding Apana's claim on the payment bond. It also strictly interpreted Guam's mechanic lien statutes, and found that Apana filed an untimely mechanic's lien under 7 GCA section 33302(c)(1994). This appeal follows.

ANALYSIS

[9] This court has jurisdiction under 7 GCA sections 3107, 3108 (1994) and 48 U.S.C. section 1424-3(d) (1984). We review questions of statutory interpretation *de novo. Department of Agriculture v. Remington et. al.,* 1998 Guam 16, ¶ 3. "[F]actual findings as to what the parties said or did are reviewed under the 'clearly erroneous' standard while principles of contract interpretation applied to the facts are reviewed *de novo." L.K. Comstock & Co. v. United Engineers & Constructors, Inc.,* 880 F.2d 219, 221 (9th Cir. 1989) (citations omitted). In this case, the parties accept the factual findings of the trial court; therefore, the standard of review is *de novo*.

A. Mechanic's Lien

[10] Apana first argues that the trial court erred in strictly construing 7 GCA sections 33302 and 33202 (1994). In its Findings of Fact and Conclusions of Law, the trial court stated:

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> The court has previously taken the position of strictly interpreting the applicable statutes which are clear on their face. Although along with such an unbending interpretation seemingly harsh results may occur, the Court may only proceed within the boundaries previously set before it.

Apana v. Rosario, CV1827-92 (Super. Ct. Guam Aug. 20, 1997).

[11] Guam's mechanic lien statutes were adopted from California. Therefore, Apana claims that Guam courts should follow California precedent. *See Roberto v. Aguon,* 519 F.2d 754, 755 (9th Cir. 1975) (California decisions, with regard to identical statues, adopted from California, which predate the enactment of the statutes in Guam, are controlling on the courts of Guam). California has taken a liberal interpretation of mechanic lien statutes. *See Industrial Asphalt, Inc. v. Garrett Corp.,* 180 Cal. App. 3d 1001, 1006-07 (1986) (holding that mechanic's lien legislation, being remedial, should be liberally construed).

[12] 7 GCA section 33302 provides in relevant part:

> **§ 33302. Claim of Lien of Original Contractor or Person Performing Labor or Furnishing Material: Time for Filing: Notice of Completion: Notice of Cessation: Effect on Filing Claim of Lien: Owner Defined: Requisites of Claim of Lien: Forfeiture of Lien.**
>
> (a) Every original contractor claiming the benefit of this Title, after the completion of his contract and within the periods of time as provided in this section, and every person, other than an original contractor, claiming the benefit of this Title, after he has ceased to perform labor or furnish material, or both, for any work of improvement, and **before the expiration of the periods of time as provided in this section, may file for record with the Department of Land Management in which the property is situated, a claim of lien as provided in subdivision (j) of this section.**
>
> (b) **Where the work of improvement is not made pursuant to one original contract for the work of improvement but is made in whole or in part pursuant to two or more original contracts, each covering a particular portion of the work of improvement**, the owner may within ten (10) days after completion of any such contract for a particular portion of the work of improvement, file for record a notice of completion thereof as provided in subdivision (f) of this section. If such

notice be so filed, then the original contractor under the contract covered by such notice must, within sixty (60) days after the date of filing for record such notice, and all other persons claiming the benefit of this Title for work done or materials furnished under such contract, must within thirty (30) days after the date of filing for record such notice, file for record his claim of lien **if such notice be not so filed, then the period for filing claims of lien shall be as provided in subdivision (c) of this section.**

(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 so filed, then, except as to any persons who were required to file a claim of lien as provided in subdivision (b) of this section, every original contractor must within sixty (60) days after the date of filing for record such notice, and every person, other than an original contractor, claiming the benefit of this Title must within thirty (30) days after the date of filing for record such notice, file for record his claim of lien. **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.**

(d) **In all cases, except as provided in subdivision (e) of this section, any of the following shall be deemed equivalent to a completion:** (1) the occupation or use of a work of improvement by the owner, or his agent, accompanied by cessation from labor thereon; (2) the acceptance by the owner, or his agent, of the work of improvement; or **(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 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.

. . .

(f) If, after the commencement of a work of improvement, there shall be a cessation of labor thereon for a continuous period of sixty (60) days, then all persons claiming the benefit of this Title shall within ninety (90) days from the expiration of such sixty (60) day period file for record their claims of lien; provided, that if, after there shall be a cessation of labor thereon for a continuous period of thirty (30) days or more, the owner files for record a notice of cessation as provided in subdivision (h) of this section, every original contractor must within sixty (60) days after the date of filing for record such notice, and every other person

> claiming the benefit of this Title must within thirty (30) days after the date of filing for record such notice, file for record his claim of lien. Nothing contained in this subdivision shall, however, extend the time for the filing for record of a claim of lien required to be filed for record by reason of the filing of record prior to cessation of a notice of completion as provided in subsection (b).

7 GCA § 33302 (1994) (emphasis added) .

[13] 7 GCA section 33202 provides:

> **§ 33202. Work of Improvement: Improvement: Contractor, Deemed Agent**.
>
> (a) For the purposes of this Chapter, *work of improvement* includes, but is not restricted to, the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or wagon road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings.
>
> (b) For the purposes of this Chapter, except as otherwise provided herein, *work of improvement* and *improvement* mean the entire structure or scheme of improvement as a whole.
>
> (c) For the purposes of this Chapter, every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, addition to, or repair, in whole or in part, of any building or other work of improvement shall be held to be the agent of the owner.

7 GCA § 33202 (1994).

[14] Apana argues that the trial court erred in ruling, as a matter of law, that Guam's mechanic's lien statutes require claims to be filed within ninety (90) days after cessation of labor by any persons other than the original contractor when no notice of completion has been recorded by the owner. Specifically, Apana contends that the trial court erred in determining that the filing time of ninety (90) days ran from April 13, 1992, the time Apana ceased work.

[15] Apana agrees that he stopped working on the project on April 13, 1992. However, he argues that the time for filing of the mechanic's lien does not necessarily begin to run on that date. Instead,

the April 13, 1992 date merely indicates the earliest date upon which he could have filed a lien. Apana emphasizes that the important date for purposes of our review is the cut off date. It is Apana's contention that there is a cut off date, or latest filing date, upon which a claimant may file; which, under subsection (c) of section 33302 ends (if no notice of completion is filed) ninety (90) days after completion of the project as a whole.

[16] Title 7 GCA section 33302 (d)(3) states that completion is equivalent to a cessation of labor for a continuous period of sixty (60) days after a work of improvement has begun. In this case, it is undisputed that a cessation of labor occurred on April 13, 1992, and Apana did not do any further work. Looking to the record, there exists several memoranda from Guam Housing Corporation, including the latest, dated July 29, 1992, in which site inspections show that no work was being done. On or about June 12, 1992, some sixty (60) days after cessation of labor, the record reflects that Apana still had not resumed work.

[17] We stated in *Manvil Corp. vs. E.C. Gozum & Co., Inc., et al.,* 1998 Guam 20, ¶ 17 that "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." Applying a "fair and reasonable construction" standard to the facts of this case, we find that the trial court should have applied 7 GCA section 33302, subsections (b) and (d)(3).

[18] Reading section 33302 (d)(3) with subsection (b), a lien would have to be filed within ninety (90) days after the completion of the work of improvement. Such an interpretation would effectively give a claimant filing under a cessation of labor theory one hundred fifty (150) days to record a claim of lien. In this case, the lien was recorded on September 10, 1992, and filed on the one hundred and

fiftieth (150th) day. Had the lower court's analysis included a review of the pertinent subsections, it would have concluded, as we do, that Apana recorded his mechanic's lien in a timely manner.

B. The Payment Bond

[19] Apana next argues that the lower court erred regarding the bond payment issue. The trial court determined that the default between Apana and Rosario occurred on April 9, 1992. The surety was executed on April 29, 1992. Therefore, because the trial court concluded that the default antedated the execution of the bond, Continental, the surety, was found not liable to Apana for Rosario's failure to make payment on the contract between Apana and Rosario. However, Apana claims that the default actually occurred ninety (90) days after the payment was due (on April 9, 1992), which would have been on or about July 9, 1992. Therefore, the claim would have been within the reach of the payment bond, executed on April 29, 1992.

[20] Apana relies on *People v. Great American Ins. Co.*, 222 Cal. App. 2d 552 (1963) for support. In *Great American* the court held that "a surety contract is not retrospective in operation merely because part of the transactions with which the contract is concerned have been consummated earlier when the actual defaults insured against are still prospective." *Id.* at 561. The court in that case held that default had not yet occurred on taxes imposed on certain sales transactions. The default date was specific, that is, due and payable on "the last day of the month next succeeding each quarterly period," and had not yet been reached. *Id.*

[21] Apana also relies upon *S. L. Reed v. Maryland Casualty*, 244 F.2d 857 (5th Cir. 1957), wherein the court found that a surety's liability may be based in part on events that have occurred before the execution of the bond, as long as no default anteceded its execution, or previous

acquisition of material and contracts for subprojects made such default more probable. *Id.* at 861. Both cases that Apana cites for support also recognize the general principle that a surety is not liable for the acts of the principal which occurred prior to the posting of the bond. *Id.; Great American Ins. Co.*, 222 Cal. App. 2d at 552.

[22] We recognize that the determinative issue is when the default occurred -- whether it occurred before or after the execution of the payment bond. The only language in the subcontract between Apana and Rosario which addresses timeliness of payment, states in pertinent part: "[c]ontractor shall pay promptly all valid bills and charges for material, labor or otherwise in connection with or arising out of the construction of said structure . . ." [3] Absent any further language defining default between Apana and Rosario, the default occurred when payment was due, which was on or about April 9, 1992.

[23] Apana urges this court to adopt the terms of the payment bond in defining the default between Rosario and Apana. However, a review of the payment bond fails to show that Continental intended to assume liability for other than prospective defaults. Here, payment was due upon the completed construction of various parts of the house, as defined by the contract between Apana and Rosario. There is nothing in the record to suggest that default occurred or should have occurred after the execution of the bond. The amount of the bond did not include amounts already paid to Apana, suggesting a prospective application. Unless there is an intent to be liable, no liability attaches to sureties for defaults occurring before they enter into the contract. *W.J. Jones & Sons, Inc. v. Columbia Casualty Co.*, 73 F.2d 449, 452 (9th Cir. 1934).

[24] Accordingly, we cannot extend Apana's proffered definition of default to the parties when

[3]Excerpt 1, Building Construction Contract, March 7, 1992, ¶ 5.

nothing in the record indicates an intent for Continental to be liable. Apana has not provided authority to persuade us that the bond applied to work performed before its execution, or that the default occurred ninety (90) days after payment was due. A surety cannot be held liable beyond the precise terms of his contract; and a surety is not liable for acts of the principal which occurred prior to the posting of the bonds. *S. L. Reed v. Maryland Casualty*, 244 F.2d at 862. Indeed, "'[a] contract of suretyship is not retrospective in its operation and no liability attaches to the surety for defaults occurring before it is entered into, unless an intent to be so liable is indicated.'" *Id.* at 862 (citation omitted). Therefore, we find that the lower court was correct in denying Apana's claim on the payment bond.

[25] The Appellees argue that Apana is not a proper claimant or party under the terms of the payment bond because payments were given to Rosario, who is deemed to be an agent or partner of Apana in the construction of the home. Therefore, the matter should not be entertained by this court. As submitted by Apana, this issue was not properly raised as an appellate issue pursuant to Rule 4(a) of the Rules of Appellate Procedure for the Supreme Court of Guam, which provides in relevant part:

> When an appeal is permitted by law from the Superior Court to the Supreme Court, the time within which an appeal may be taken in a civil case shall be thirty (30) days from the date of entry of judgment. . . . Subsequent to a timely notice of appeal, any other party may file a cross-notice of appeal within fourteen (14) days from the filing date of the first notice. . . .

Guam R. App .P. 4. Appellees did not file a cross-notice of appeal regarding this issue. Neither did Appellees bring a motion for extension of time for cross-appeal under Rule 4(c), which provides:

> Upon a showing of excusable neglect, the Superior Court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has

> expired, it shall be made by motion with such notices as the court shall deem appropriate.

Guam R. App .P. 4. Because of these procedural deficiencies, we will not further entertain this issue.[4]

CONCLUSION

[26] Based upon the foregoing, we conclude that Apana's recording of a lien was timely under 7 GCA sections 33302(b) and 33302(d)(3). Under a cessation of labor theory, a project is completed where there is a cessation of labor for sixty (60) continuous days. After completion, a claimant has ninety (90) days to file its claim, which would give a claimant one hundred fifty (150) days in which to record its lien. Apana filed his claim on the 150th day, which would make his claim timely. The trial court failed to incorporate this analysis into its decision. As such, it erred in strictly interpreting 7 GCA section 33302. Therefore, the mechanic's lien against the Salas' property was properly recorded and valid.

[27] We agree with the lower court's decision regarding the payment bond. The payment bond neither contains retroactive provisions, nor do its terms contemplate liability for any work done prior to the execution of the bond. Therefore, the trial court was correct in finding that the bond does not cover any claims Apana may have had prior to the date the bond was executed. Accordingly, Apana's claim against Continental was properly dismissed. The trial court's decision is **REVERSED,** in part, as to the judgment in favor of Salas and **AFFIRMED,** in part, as to the

[4]When the briefs were submitted, Defendants-Appellees were represented by Daniel Del Priore, Esq. Raymond T. Johnson, Esq., was subsequently substituted as counsel. Thereafter, this court allowed the parties the opportunity for supplemental briefing, wherein Defendants-Appellees' counsel did not further address this issue.

judgment in favor of Continental. The case is **REMANDED** to the Superior Court for foreclosure proceedings on the mechanic's lien regarding the outstanding amount due.

ANDREW M. GAYLE
Justice Pro Tempore

JOAQUIN C. ARRIOLA, SR.
Justice Pro Tempore

RICHARD H. BENSON
Chief Justice (Acting)