IN THE SUPREME COURT OF GUAM

GUAM TOP BUILDERS, INC. and
EJONG CONSTRUCTION CO., LTD.,
Plaintiffs-Appellants,

v.

TANOTA PARTNERS, HAFA ADAI PROPERTIES, AES CONSTRUCTION, INC., and JOHN DOES I - V,
Defendants-Appellees.

Supreme Court Case No. CVA03-014
Superior Court Case Nos. CV0558-99 and CV2469-98 (consolidated)

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 18, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

TORRES, J.:

[1] Plaintiff-Appellant Ejong Construction Co., Ltd. supplied steel and other materials in 1997 and 1998 for the construction of the Outrigger Hotel in Tumon, Guam, owned by Defendants-Appellees Tanota Partners and Hafa Adai Properties (collectively "Tanota"). Ejong later filed a mechanic's lien for record with the Department of Land Management upon the Outrigger Hotel for an amount which Ejong asserts remains due for the steel and materials it supplied. Ejong thereafter filed an action in the Superior Court seeking to enforce payment of its claim and for foreclosure of the lien amended in the amount of $1,728,284.67.[1] Tanota moved for summary judgment on the basis that Ejong was paid in full for the materials supplied to the Outrigger Hotel, that the lien amount was not a claim for materials provided but, included a claim for money paid to John K. Sherman, President of AES Construction, Inc. ("AES") and that the claims of lien were ineffective for lack of verification. The trial court granted Tanota's motion for summary judgment in part, invalidating Ejong's claim of mechanics lien against the Outrigger Hotel to the extent it exceeded $5,000.00. Ejong seeks interlocutory appeal of that decision. We reverse the trial court and remand this matter for further proceedings in accordance with this opinion.

I.

[2] In 1996, Tanota hired AES as the prime contractor to construct the Outrigger Hotel. Ejong provided steel and other materials for the project, but did not have a written contract with Tanota, AES or AES' subcontractor, Guam Top Builders ("Guam Top").

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[1] The case below is actually a consolidated action for money loaned and to foreclose on claims of lien filed against the Outrigger. *See Ejong Constr. Co. Ltd. v. Sherman*, Superior Court Civil Case No. CV2469-98 and *Guam Top Builders v. Tanota Partners*, Superior Court Civil Case No. CV0558-99.

[3] Ejong was paid $311,764.71 in cash for its first shipment of materials. Subsequently, between February 21, 1997 and October 6, 1997, payments were made through six documentary letters of credit issued by Hongkong and Shanghai Banking Corporation's ("HSBC") Guam branch upon presentation of invoices and other required documents for each shipment.[2] Ejong submitted ten (10) invoices when negotiating the letters of credit totaling $8,875,468.40[3]. No other payment method was used to pay for any steel or material shipped during this period other than the six letters of credit.

[4] One letter of credit in the amount of $1,500,000.00, for the benefit of Guam Top,[4] was negotiated by Ejong on March 20, 1997, drawn down upon presentation of the required documents to HSBC, including, an invoice in that exact amount for steel shipped to Guam by Ejong. After depositing those funds in its corporate bank account, Ejong disbursed $38,823.53 to Sherman. Ejong negotiated another letter of credit in the amount of $3,500,000.00 on April 24, 1997, again upon proper presentation of required documents which included three separate invoices from Ejong for

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[2] The following six (6) documentary letters of credit totaling $9,175,468.40 were issued by HSBC and negotiated by Ejong:

1. February 21, 1997, Documentary Credit 700 DC Gum No. 970069 for $600,000.00, later increased to $667,088.40.
2. March 20, 1997, Documentary Credit 700 DC Gum No. 970107 for $1,500,000.00.
3. April 24, 1997, Documentary Credit 700 DC Gum No. 970151 for $3,500,000.00.
4. June 23, 1997, Documentary Credit 700 DC Gum No. 970231 for $2,000,000.00, later increased to $2,600,000.00.
5. August 12, 1997, Documentary Credit 700 DC Gum No. 970312 for $258,380.00, $110,000.00 of which expired without payment.
6. October 6, 1997, Documentary Credit 700 DC Gum No. 970401 for $760,000.00.

[3] The record on appeal includes ten invoices from Ejong in the amounts of (1) $367,088.40, (2) $1,500,000.00, (3) $1,777,970.00, (4) $785,000.00, (5) $937,030.00, (6) $920,000.00, (7) $1,680,000.00, (8) $144,680.86, (9) $3,699.14, and (10) $760,000.00. There is also a receipt dated March 7, 1997 from Guam Top Builders in the amount of $300,000.00 acknowledging an "advance which is to be used to purchase and ship the merchandise for which this documentary credit is opened." Appellant's ER, Tab CR6 (Guam Top Receipt). There is no dispute that Ejong negotiated the letters of credit and the cumulative total of the invoices and receipt is $9,175,468.40.

[4] The February 21, 1997 letter of credit in the original amount of $600,000.00 also named Guam Top as the beneficiary.

steel shipped to Guam in the amounts of $937,030.00, $785,000.00 and $1,777,970.00. Those funds were also deposited in Ejong's corporate bank account, and Ejong, during the next several weeks, disbursed $884,589.25 to Sherman. Including the earlier disbursement, Sherman received a total of $923,412.78 from Ejong. Ejong also disbursed $1,234,492.82 to Guam Top from the proceeds of the letters of credit and Guam Top received an additional $188,235.92 in cash. Guam Top therefore received a total of $1,422,728.11. Appellant's Excerpts of Record ("ER"), Tab CR11, at 3 (Park Decl.).[5]

[5] After shipping all of the materials to Guam, Ejong prepared a final accounting for the Outrigger Hotel project that reflected a final reconciliation of the amount owed for materials it supplied. The Grand Total reflected in this Material Cost Breakdown was $8,113,266.80 an amount that was less than the invoices Ejong prepared to negotiate the letters of credit. Since some of the monies Ejong received from the letters of credit had been disbursed to Sherman and Guam Top, Ejong determined that it had not been fully paid the $8,113,266.80 Ejong believed that it was owed for the materials supplied. Ejong then recorded a claim of mechanics lien against the Outrigger Hotel on March 10, 1999 in the amount of $928,620.15.[6] Ejong filed the underlying lawsuit to enforce payment of its claim and foreclose its original lien. On June 29, 1999, Ejong filed another claim of lien increasing its claim by $799,664.52 to $1,728,284.67. Ejong asserted that since AES,

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[5] The declaration of Jae H. Park, the president of Guam Top, indicates the proceeds from the letters of credit totaling $9,030,787.54 were allocated to Ejong ($6,872,881.94), Guam Top ($1,234,492.82) and Sherman ($923,412.78). However, the letters of credit attached to the declaration of Steve Grantham, then HSBC's Senior Vice President Corporate Banking, reflect the total proceeds from the letters of credit were $9,175,468.40. The difference in proceeds of $144,680.86 is attributable to an invoice for that amount negotiated against the August 12, 1997 Documentary Credit 700DCGUM No. 970312. The record on appeal does not reflect how the additional proceeds of $144,680.86 were allocated between Ejong, Guam Top and Sherman.

[6] The amount of the original claim for lien of $928,620.15 was based on the difference between the Grand Total of $8,113,266.80, reflected in Ejong's Material Cost Breakdown, and the $7,184,646.65 Ejong alleges it was paid from the proceeds of the letters of credit ($6,872,881.94) and in cash ($311,764.71).

Tanota, and Guam Top each purportedly denied there was a contract to buy steel and materials from Ejong, Ejong was entitled to $8,912,931.32, the reasonable value of the materials it supplied, rather than the amount reflected in its Material Cost Breakdown of $8,113,266.80. The trial court permitted Ejong to amend its complaint to reflect the amended claim of lien amount.

[6] Tanota moved for summary judgment on Ejong's claim seeking foreclosure of Ejong's amended claim of lien against the Outrigger Hotel in the amount of $1,728,284.67. Tanota argued that Ejong was paid in full for the materials supplied to the Outrigger Hotel, that the lien amount was not a claim for materials provided, as it included a claim for money paid to Sherman and that the claims of lien were ineffective for lack of verification.[7] The trial court issued its Decision and Order denying Tanota's motion for summary judgment with regard to the verification of Ejong's lien. The court found that a mechanics lien claim signed and verified by a claimant's attorney is sufficiently verified; however, the trial court granted Tanota's motion, invalidating Ejong's amended claim of lien to the extent it exceeded $5,000.00. The court determined "that as a matter of law when Ejong negotiated its invoices against the letter of credit, the money it received was payment for the steel it shipped to Guam for the Outrigger." Appellant's ER, Tab CR16 (Decision and Order). The court also ruled that Ejong's attempt to increase the lien amount based on the reasonable value of the materials had no merit and was invalid because Ejong had acquiesced, without objection, to the amounts set forth in the invoices Ejong prepared when it negotiated the letters of credit. The court believed that if Ejong did not agree to sell the materials at the price invoiced, Ejong waived the opportunity to object pursuant to Title 13 GCA § 2208 when it negotiated the letters of credit. Ejong appealed.

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[7] Tanota does not dispute the applicability of Guam's mechanic's lien law to Ejong's supplying of steel for use in the construction of the Outrigger Hotel, or the viability of Ejong's claim seeking foreclosure of its lien if amounts remain due and owing to it for the steel.

II.

[7] This court has jurisdiction over this interlocutory appeal pursuant to Title 7 GCA § 3108(b) (2005), which provides, *inter alia*, that "[o]rders other than final judgments shall be available to immediate appellate review as provided by law . . . ." Furthermore, Title 7 GCA § 25102(e) (2005), specifically allows an appeal in a civil action or proceeding to be taken "[f]rom an order discharging or refusing to discharge an attachment." We find that a mechanic's lien is analogous to an attachment, therefore an interlocutory appeal of the trial court's Decision and Order is a matter of right provided for by law. *See e.g. Buckminster v. Arcadia Vill. Resort, Inc.*, 565 A.2d 313, 315 (Me. 1989); *Amatrudi v. Blake*, 117 So. 2d 416 (Fla. Dist. Ct. App. 1960).

III.

[8] "A trial court's decision granting a motion for summary judgment is reviewed *de novo*." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7. *See Manvil Corp. v. E.C. Gozum & Co.*, 1998 Guam 20 ¶ 6; *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7. "In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party." *Flores*, 2004 Guam 25 ¶ 7 (citing *Edward v. Pac. Fin. Corp.*, 2000 Guam 27). "If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the [pleadings] . . . , but must produce at least some significant probative evidence tending to support the [pleadings] . . . ." *Id.* (quoting *Edwards*, 2000 Guam 27 ¶ 7) (alteration in original). Consequently, this court's "ultimate inquiry is to determine whether the 'specific fact' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *Id.* (quoting *Iizuka Corp.*, 1997 Guam 10 ¶ 8).

[9] The trial court may grant summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at ¶ 8 (quoting Guam R. Civ. P. 56(c)). "A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *Id.* (citing *Edwards*, 2000 Guam 27 ¶ 7).

[10] "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. "There is a genuine issue, if there is 'sufficient evidence' which establishes a factual dispute requiring resolution by a fact-finder." *Iizuka Corp.*,1997 Guam 10 ¶ 7 (citation ommitted).

IV.

[11] Ejong argues that questions of material fact exist regarding whether a contract was formed and whether Ejong received all of the payments due which preclude granting of summary judgment. More specifically, Ejong believes that a question of material fact remains in dispute regarding the amount to be paid for the supplied steel and materials. Ejong argues because there was no express contract or meeting of the minds as to the essential terms, Ejong is entitled to a reasonable value for the steel and other materials. Ejong maintains the reasonable value for the steel is $8,912,931.32

which is the actual cost of the steel including fabrication plus a reasonable allowance for overhead and profit rather than the Grand Total of $8,113,266.80 shown in the Material Cost Breakdown. Ejong further contends that a question of material fact remains in dispute regarding the amount Ejong was paid for the material supplied. Although funds were received by Ejong after it negotiated the letters of credit, Ejong submits not all of such funds were payments for the steel and materials because Ejong disbursed $923,412.78 to Sherman and $1,234,492.82 to Guam Top as part of the entire deal involving construction of the Outrigger Hotel. We first consider Ejong's argument that in the absence of an agreement Ejong is entitled to the reasonable value of the materials furnished and should be permitted to increase its claim of lien by the $799,664.52 reflected in the June 29, 1999 amended Claim of Lien.

A. The Amount of Ejong's Lien

[12] Ejong asserts that a question of material fact exists as to whether there was an agreement on the amount to be paid for the steel Ejong shipped to Guam for the Outrigger Hotel project. Ejong alleges AES, Tanota, and Guam Top each denied the existence of an agreement with Ejong and in the absence of an agreement, Ejong claims it is entitled to the reasonable value of the steel of $8,912,931.32 and not the amount of $8,113,266.80 shown in Ejong's final reconciliation.

[13] Guam's lien statute imposes a limit on the amount a materialman is permitted to claim: "Such liens shall not in any case exceed in amount the reasonable value of the labor done or materials furnished, or both, for which the lien is claimed, nor the price agreed upon for the same between the claimant and the person by whom he was employed." 7 GCA § 33205(a) (2005). Applying that statute in the instant case, Ejong could not properly claim a lien for any amount in excess of the price it agreed upon. Ejong is correct in asserting, however, that in the absence of an agreement it is

permitted to claim the reasonable value of the materials it provided. The amount of Ejong's lien therefore depends on whether there was an agreement for the price of the material Ejong supplied.[8]

[14] It is undisputed that no written contract exists regarding Ejong's sale of materials for use in the Outrigger project. Under Guam law, "[a] contract is either express or implied." 18 GCA § 86101 (2005). As there was no express contract, we must examine the conduct of the parties in order to determine whether there was an agreement on the price to be paid for the material Ejong supplied. *See* 18 GCA § 86103 (2005) ("An implied contract is one, the existence and terms of which are manifested by conduct.").

[15] The trial court invalidated the amount of Ejong's lien to the extent it exceeded $5,000.00. The trial court, relying in part on Title 13 GCA § 2208, found that Ejong negotiated six letters of credit and concluded, "If, as Ejong argues, it did not agree to sell the materials at the price it invoiced, it waived the opportunity to object when it negotiated the letter of credit." Appellant's ER, Tab CR16, at 6 (Decision and Order).

[16] The trial court relied heavily on its findings that Ejong prepared invoices for the materials when it negotiated the letters of credit in invalidating the amount of Ejong's lien. The letters of credit involved in this case are typical, involving three parties and three separate transactions. The parties include, AES (the buyer/applicant), Ejong (the seller/beneficiary), and HSBC (the issuing bank). The three transactions involved are:

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[8] Section 33205(a) states that a lien amount cannot exceed the price agreed upon "between the claimant and the person by whom he was employed." Title 7 GCA § 33205(a). If an agreement existed between Ejong and "the person by whom he was employed" regarding the price of steel, Ejong cannot claim a greater amount. *Id.* Furthermore, Title 7 GCA § 33202(c) states that for the purposes of enforcement of liens "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." Title 7 GCA § 33202(c) (2005). Therefore, if it can be shown that Ejong had an agreement with Guam Top, AES or Tanota regarding the price of the materials it supplied, that agreed upon price would establish a limit on the amount of Ejong's lien.

> 1) the underlying transaction between the buyer and the seller, under which the seller agrees to sell the goods to the buyer and the buyer agrees to pay to the seller the purchase price by way of a letter of credit arrangement;
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> 2) the transaction between the buyer and the bank, under which the bank agrees to issue the letter of credit in favor of the seller and the buyer agrees to reimburse the bank for the payment made under the letter of credit plus a commission; and,
>
> 3) the transaction between the bank and the seller, i.e., the letter of credit itself, under which the bank agrees to take the primary responsibility to honor the seller's draft provided it is accompanied by the required documents specified in the letter of credit.

Gao Xiang & Ross P. Buckley, *The Unique Jurisprudence of Letters of Credit: Its Origin and Sources*, 4 San Diego Int'l L.J. 91, 97 (2003).

[17] Courts have recognized that letters of credit are separate and independent of the contracts which generate them. *See e.g. Demczyk v. Mutual Life Ins. Co. of New York (In re Graham Square, Inc.)*, 126 F.3d 823, 827 (6th Cir. 1997). In *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, the Second Circuit Court of Appeals observed:

> The fundamental principle governing documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy is that the obligation of the issuing bank to honour a draft on a credit when it is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the credit is independent of the performance of the underlying contract for which the credit was issued.

982 F.2d 813, 815 (2d Cir. 1992) (citations omitted); *see also* Gerald T. McLaughlin, *Letters of Credit and Illegal Contracts: The Limits of the Independence Principle*, 49 Ohio St. L.J. 1197, 1197 (1989). The independence principle or doctrine of independence is embodied in the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits ICC Publication No. 500 (rev. 1993) ("UCP")[9], which is relevant to our discussion as HSBC made presentation of

[9] The UCP is a set of standard terms incorporated into the majority of documentary credits issued around the world. Xiang & Buckley, *supra*, at 94.

each of the letters of credit received by Ejong subject to its terms.[10] Appellant's ER, Tab CR6 (Grantham Decl.). *See also Nassar v. Florida Fleet Sales Inc.*, 79 F.Supp.2d 284, 292 (S.D.N.Y. 1999) ("This independence principle is embodied in the UCP."). Specifically, UCP Article 3 provides in part that "[c]redits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based . . . . Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfill any other obligation under the Credit, is not subject to claims or defenses by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary." U.C.P. art. 3, *available at* http://www.ykl.co.kr/eng/logis/ucp.html. UCP Article 4 goes on to state that "[i]n all Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate." U.C.P. art. 4. According to the independence principle, the fact that Ejong negotiated and received proceeds from the letters of credit, while relevant, is not itself determinative of the existence of an agreement to supply materials or the terms of any such agreement.

[18] Turning to the facts of this case, it is undisputed that Ejong shipped the steel and that the steel was accepted and used in the construction of the Outrigger Hotel. The record reflects that Ejong presented ten (10) commercial invoices when negotiating the letters of credit totaling $8,875,468.40. Contrary to statements made by the Appellees, it does not appear that "[e]ach invoice reflected a unit

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[10] Letters of credit are also governed under Guam law by the Uniform Commercial Code (UCC) which is found in Division 5 of Title 13 GCA. Xiang and Buckley explain the applicability of the UCC versus the UCP 500 to documentary letters of credit as follows:

> The only jurisdiction in which credits are virtually ever issued not subject to the UCP is the United States and this only because of Article 5 of the [UCC]. Even then the only credits issued without incorporating the UCP are domestic ones for transactions entirely within the United States. When the UCC and UCP apply to the one credit, § 5-116(c) of the UCC provides that to the extent of any conflict between the two sets of rules, the UCP will prevail unless the term of the UCC is one that cannot be varied by agreement.

Xiang & Buckley, *supra*, at 94 n.5. This provision of the UCC is not found in Guam's version of the UCC, but no particular terms are challenged or in conflict in the present case.

price for every ounce of steel being shipped." Appellees' Br., at 13 (Dec. 26, 2003). In fact, only one invoice in the record provides a detailed breakdown of quantities and unit prices.[11]

[19] Mr. Jong Kwan Lee, Ejong's President, testified during his deposition that the unit prices for the steel was "discussed and decided" with Guam Top representatives ahead of time, and that there was an agreement between Lee and Jae Park, President of Guam Top, about unit prices. Appellant's ER, Tab CR12, at 16, 32, Ex. 1, 2 (Tarpley Decl.). Park, however, has never testified about the existence or terms of such an agreement. Lee further stated that he recorded the agreed upon per-unit figures on a memo pad which disappeared "when they actually was [sic] working together," but that the unit prices for the steel Ejong supplied were "computed" by the unit prices recorded on the memo pad. Appellant's ER, Tab CR12, at 19, Ex. 1, 2 (Tarpley Decl.).

[20] The question before this court is whether there is a genuine issue of material fact regarding the existence and terms of an agreement for the price of steel and other materials Ejong provided. The record indicates a discrepancy exists between the amount Ejong invoiced when it negotiated the letters of credit and the Grand Total reflected in the Material Cost Breakdown prepared by Ejong after all of the materials had been shipped to Guam. The Material Cost Breakdown, which represents a final reconciliation of the amount of material Ejong provided, contains unit prices ("U/P") and identifies a "Grand Total" of $8,113,266.80. Based on this evidence, there is over a $700,000.00 difference between the amount Ejong claims is due and the invoiced amount of $8,875,468.40, not including the $311,764.71 Ejong received in cash for the first shipment of steel and the $300,000.00 referenced in the Guam Top Receipt.

[11] Two invoices make reference to detailed riders which are not contained in the record.

[21] The trial court, citing Title 13 GCA § 2208,[12] reasoned that Ejong was bound by the amount of the invoices based on the course of performance between the parties. The court found that "[e]ach time Ejong prepared an invoice the amount of money it required for payment was obviously calculated by multiplying the unit costs of each item as established through the deposition of Mr. Lee by the quantity of each unit shipped to Guam." Appellant's ER, Tab CR16, at 6 (Decision and Order). However, as the record demonstrates, the total amount Ejong invoiced when negotiating the letters of credit was $8,875,468.40. Ejong concedes it was paid $7,184,646.65. Setting aside any disputed payments, if one were to accept that the agreed contract amount is the invoiced amount based on a course of performance, Ejong's claim of lien would actually increase. Instead of the original lien amount of $928,620.15, Ejong would be entitled to claim, subject to any defenses that may be raised, a lien amount of $1,690,821.75 which represents the difference between the invoiced amount of $8,875,468.40 and the amount Ejong concedes it was paid.

[22] The trial court also cited Title 7 GCA § 33401 as the basis for invalidating all but $5,000.00 of Ejong's lien. This provision states:

> **§ 33401. Lien not Invalidated by Mistakes in Statement: Exceptions.**
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> No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed or of the balance asserted to be due to claimant, or in the description of the property against which the claim is filed, shall invalidate the lien, *unless the court finds that such mistake or error* in the statement of the demand, credits and offsets, or of the balance due, *was made with the intent to defraud*, or the court shall find that an innocent third party, without notice, direct or constructive, has, since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner.

7 GCA § 33401 (2005) (emphasis added). The trial court, however, made no finding regarding any

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[12] Title 13 § 2208 states in part: "Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." 13 GCA § 2208 (2005).

"intent to defraud." In fact, nothing in the court's order refers to fraud at all. The trial court's reliance on Title 7 GCA § 33401 as a basis to invalidate the lien was not supported in its decision.

[23] After examining the evidence in a light most favorable to the non-moving party, we hold that a genuine issue of material fact remains over the existence and terms of an agreement regarding the price of materials Ejong supplied. Ejong is entitled to claim a lien for the price it agreed upon or, in the absence of an agreement, the reasonable value of the material it supplied. *See* 7 GCA § 33205. Ascertaining the existence and terms of a contract price agreed upon is essential to establishing the limit on the amount of the lien Ejong can claim under Guam law, but neither the conduct of the parties nor the evidence in the record adequately resolve this question. Even assuming arguendo that Ejong agreed to unit prices for the materials it provided, a question remains over whether the total contract price agreed upon is the invoiced amount or the amount reflected in the Material Cost Breakdown. As such, summary judgment invalidating the amount of Ejong's lien to the extent it exceeded $5,000.00 was improper. *Flores*, 2004 Guam 25 ¶ 33 (holding that summary judgment is inappropriate where a question of material fact exists).

B. Ejong's Claim that an Agreement Existed Regarding the Allocation of Funds it Received

[24] Ejong does not dispute that it received $500,000.00 in cash, $188,235.29 of which was disbursed to Guam Top, and negotiated $9,030,787.54 from the letters of credit for a total of $9,530,787.54.[13] Appellant's ER, Tab CR11, at 3 (Park Decl.). Ejong concedes that, of this amount, it applied $7,184,646.65 toward payment of the steel and other materials it provided. Ejong disbursed $1,714,107.74 of the balance of the proceeds it received to Guam Top and $923,412.78

[13] This figure does not take into account an invoice in the amount of $144,680.68 discussed *infra*.

to Sherman.[14] Ejong argues that a genuine issue of material fact exists over whether its claim of lien should be offset by the funds disbursed to Sherman since those funds were earmarked for and disbursed to Sherman according to an agreement made by the parties. *See* 7 GCA § 33302(i)(1) (2005) (stating that a party recording a claim of lien must include "a statement of demand after deducting all just credits and offsets").

[25] Materialmen have a statutory right to impose a lien upon property they have furnished materials for under Guam law. *See* 7 GCA § 33201 (2005); *see also Brigham Constr. and Dev., Inc. v. Lucky Dev. Co.*, No. Civ. 95-00051A, 1996 WL 104531, at * 2 (D. Guam App. Div. Mar. 6, 1996) ("Mechanic's liens are statutory remedies, providing a form of *in rem* security, when properly perfected according to the strict requirements of the statute."). Payment or non-payment, is not a statutory requirement that must be alleged by a materialman seeking to enforce a lien.[15] In fact, Rule 8 of the Guam Rules of Civil Procedure provides that payment is an affirmative defense which must be pled. Guam R. Civ. P. 8(c). Furthermore, courts have recognized that payment is an affirmative defense against a party seeking to enforce a materialman's lien: "The defense of payment is affirmative, and is never established by mere proof that the claimant has received money; the proof must go further, and establish that the money so received can be applied in discharge of the debt or obligation sued upon." *Bay Lumber Co. v. Pickering*, 7 P.2d 371, 374 (Cal. Dist. Ct. App. 1932); *see also Livesay v. Lee Hing*, 9 P.2d 133, 134 (Or. 1932); *Robertson Lumber Co. v. State Bank of Edinburg*, 105 N.W. 719, 720 (N.D. 1905) ("A defense of payment is an affirmative defense to be

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[14] Park testified in his declaration that Guam Top paid $291,379.63 to Ejong for job site fabrication. Appellant's ER, Tab CR11, at 3 (Park Decl.).

[15] Title 7 GCA § 33302(i) sets forth what a claim of lien must contain: (1) a statement of demand after deducting all just credits and offsets; (2) the name of the owner or reputed owner if known; (3) a general statement of the kind of . . . materials furnished . . .; (4) the name of the person [to] whom . . . the materials were furnished; and (5) a description of the property sought to be charged with the lien sufficient for identification. *See* 7 GCA § 33302 (i) (2005).

raised by answer."). Moreover, "[w]here the plaintiff has proven the creation of a debt within the period of statute of limitations, the burden is on the defendant to prove payment." *Hollywood Wholesale Electric Co. v. John Baskin, Inc.*, 263 P.2d 665, 669 (Cal. Dist. Ct. App. 1953) (citation omitted) *overruled on other grounds in Jessup Farms v. Baldwin*, 660 P.2d 813 (Cal. 1983). Tanota had the burden of 1) pleading payment as an affirmative defense and 2) of establishing that payment was made to Ejong.

[26] There is no evidence on the record which demonstrates that either Tanota or AES pled payment as an affirmative defense. As that issue was not briefed or raised by any party, we merely point out that, on remand, the trial court may grant Tanota and AES leave to amend their Answers after considering the factors set forth in *Foman v. Davis*, 371 U.S. 178 (1962). *See Arashi & Co. v. Nakashima Enter., Inc.*, 2005 Guam 21 ¶ 16.

[27] Secondly, Tanota argues that Ejong had no right to place a lien on the Outrigger project once it negotiated its invoices against the letters of credit and received the proceeds. The trial court agreed finding "that as a matter of law when Ejong negotiated its invoices against the letter of credit, the money it received was payment for the steel it shipped to Guam for the Outrigger." Appellant's ER, Tab CR16, at 5 (Decision and Order). The trial court further interpreted the $923,412.78 amount as a loan, noting that Ejong had admitted that upon disbursing the money to Sherman, Ejong "understood that it was to loan." *Id.* We disagree.

[28] The fact that each of the letters of credit was properly negotiated by Ejong and honored by HSBC pursuant to Ejong's presentation of complying documents specified in each letter of credit and that cash was properly paid out to Ejong pursuant to the letters of credit is undisputed. However, according to the independence principle discussed *supra*, the obligations of AES, Ejong and HSBC under the letters of credit were separate and independent of the rights and obligations that arose in

the underlying contract. Once Ejong complied with the terms of the letters of credit, HSBC had an obligation to distribute the proceeds of the letters of credit. *See In re Graham Square, Inc.*, 126 F.3d 823 at 827 ("It is well established that once a beneficiary complies with the terms of the letter of credit, an account party may not prevent the issuing bank from distributing the proceeds of the letter of credit, absent fraud in the underlying contract.") (citation omitted). The transaction between Ejong and HSBC did not extinguish Ejong's statutory right to claim a materialman's lien.[16]

[29] Furthermore, the fact that Ejong negotiated and received the proceeds of the letters of credit did not create an irrebuttable legal presumption of payment. The trial court erred in finding that the letters of credit constituted payment as a matter of law.

[30] In the instant case, the burden was ultimately on Tanota and AES to demonstrate that Ejong received the funds and applied them toward payment of the materials. *See Hollywood Wholesale Electric Co.*, 263 P.2d at 669. Ejong prepared ten invoices totaling $8,875,468.40 and received proceeds from the six documentary letters of credit in that amount. In addition, Ejong received cash in the amount of $500,000.00 for its first shipment of steel. By offering the letters of credit and the Payment Register, Tanota and AES presented strong evidence that Ejong had been paid.

[31] In *Post Bros. Constr. v. Yoder*, 569 P.2d 133 (Ca. 1977), the Supreme Court of California articulated the joint check payee rule. Under the joint check rule there is a presumption that "[w]hen a subcontractor and his materialman are joint payess, and no agreement exists with the owner or general contractor as to allocation of proceeds, the materialman by endorsing the check will be deemed to have received the money due him." *Id.* at 135. The court reiterated that "the joint check rule will give way to an express or implied agreement of the maker and payees . . . ." *Id.* at 136-7.

[16] Our holding is not meant to diminish the utility of letters of credit in commercial transactions. Letters of credit, however, were never intended to function as a waiver of materialman's statutory right to claim a lien or to discharge the duties of either buyers or sellers under the contracts which generated them. Other methods exist, such as a waiver of lien, which may appropriately achieve this end. *See* 7 GCA § 33207 (2005).

Although this case is factually distinguishable from the joint check payee scenario, we find the logic of *Post Bros.* persuasive. A materialman's claim of lien should not be offset by money that is allocated to another party if it can be shown that such allocation was done at the owner's or an agent of the owner's request.

[32] Ejong argues that it disbursed funds to Sherman according to a prior agreement reached by the parties. It is undisputed that Ejong disbursed $923,412.78 to Sherman. Ejong's President testified that Ejong disbursed these funds to Sherman at Park's request. Appellant's ER, Tab CR7, at 72, Ex. C (Clark Decl.). Furthermore, in addition to the amount transferred to Sherman, it is undisputed that Ejong disbursed $1,525,872.45 of the funds it received from the letters of credit to Guam Top. Drawing inferences and viewing the evidence in a light most favorable to Ejong, *Flores*, 2004 Guam 25 ¶ 7, we hold that there remains a genuine issue of material fact, namely, whether Ejong allocated the proceeds of the letters of credit and the cash it received according to an agreement made by the parties.

[33] There is an additional question over Ejong's position that it was paid $7,184,646.65. There is evidence that the $7,184,646.65 Ejong admits to being paid fails to take into account an invoice in the amount of $144,680.86 dated August 13, 1997, that it negotiated against a letter of credit. Park provided a breakdown of payments in his declaration that identifies Ejong was paid a total of $7,184,646.65, which is consistent with Ejong's position at the trial court. Park lists a letter of credit in the amount of $3,699.14. However, it appears that Ejong also negotiated a commercial invoice in the amount of $144,680.86 against that letter of credit dated August 12, 1997, in the amount of $258,380.00.[17] There is nothing in the record to indicate whether Ejong was the sole beneficiary of

[17] HSBC's records indicate that $110,000.00 of that letter of credit expired.

the $144,680.86, or how those funds were applied, therefore a genuine issue of material fact remains in dispute.

V.

[34] The existence and terms of an agreement are important to a materialman's right to claim a lien. Such a determination cannot be based solely on the fact that a materialman negotiates and receives the proceeds of a letter of credit. The conditions that must be met in order to receive the proceeds of a letter of credit are separate and independent of the agreements which generate them. We hold that a material fact remains in dispute regarding the existence of an agreement on the price and amount of materials Ejong actually supplied. We further find that the trial court erred in concluding that Ejong was paid as a matter of law once it negotiated its invoices against the letters of credit and received the proceeds. A materialman's claim of lien should not be offset by funds that it receives and then allocates to other parties pursuant to an agreement. We hold that there remains an issue of material fact, namely, whether Ejong allocated the funds it received according to an agreement reached by the parties.

[35] Accordingly, we **REVERSE** the trial court's grant of summary judgment as to the increase in Ejong's claim of lien of $799,664.52 reflected in its amended claim of lien and the trial court's invalidation of Ejong's claim for $928,000.00 to the extent it exceeded $5,000.00. The matter is **REMANDED** for further proceedings consistent with this opinion.