FILED
SUPREME COURT

IN THE SUPREME COURT OF GUAM

CORE TECH INTERNATIONAL CORP.,
Plaintiff-Appellant,

v.

HANIL ENGINEERING & CONSTRUCTION CO., LTD.,
Defendant-Appellee.

Supreme Court Case No.: CVA09-029
Superior Court Case No.: CV0692-09

OPINION

Cite as: 2010 Guam 13

Appeal from the Superior Court of Guam
Argued and Submitted on May 4, 2010
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Plaintiff-Appellant Core Tech International Corporation ("Core Tech") appeals from a grant of a motion to dismiss in favor of Defendant-Appellee Hanil Engineering & Construction Co., LTD. ("Hanil") in relation to a mechanics' lien dispute. Core Tech generally argues that the Superior Court erred when it granted Hanil's motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. Core Tech specifically argues that the Superior Court erred when it ruled: 1) that Core Tech's alleged failure to file its lien claim within the 150-day period prescribed by 7 GCA §§ 33302(c) and (d)(3) divested the court of subject matter jurisdiction; 2) that Core Tech's failure to serve notice of its action upon Hanil within the five-day period prescribed by 7 GCA § 33402(b) divested the court of personal jurisdiction; and 3) that Core Tech's imperfect lien claim divested the court of jurisdiction, which necessarily meant that Core Tech had failed to state a claim for purposes of Hanil's Rule 12(b)(6) motion to dismiss. In addition, Core Tech argues that the Superior Court erred when it failed to consider Core Tech's opposition to Hanil's dismissal motion, which was admittedly late under CVR 7.1(d)(1) of the Local Rules of the Superior Court.

[2] We find that the Superior Court erred in granting Hanil's motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. The Superior Court had subject matter jurisdiction over this matter even if Core Tech's lien claim was untimely under 7 GCA §§ 33302(c) and (d)(3). The Superior Court had personal jurisdiction over Hanil because Core Tech substantially complied with 7 GCA § 33402(b). Core

Tech stated a claim upon which relief could be granted. We also find that the Superior Court erred by not converting Hanil's 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment upon consideration of the Declaration of David Defant, which was extraneous material falling outside the narrow *Newby* exception. Because a genuine dispute as to a material fact exists, i.e., when cessation of labor occurred for purposes of determining whether Core Tech's lien claim was timely under 7 GCA §§ 33302(c) and (d)(3), we find reversal of the grant of Hanil's dismissal motion appropriate.

[3] Accordingly, we reverse the Superior Court's grant of Hanil's dismissal motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] This is a mechanics' lien dispute arising out of a 2008 agreement between Plaintiff-Appellant Core Tech and Kyung Maek C & D LLC ("Kyung Maek") in which Core Tech agreed to perform clearing work on Kyung Maek's Gun Beach Property in Tumon, Guam ("Property"). Defendant-Appellee Hanil is the successor in interest to Kyung Maek and current owner of said property. Core Tech's work on the property consisted of clearing; transplanting; grading; surveying; boring tests; the creation of a temporary access road; and other services benefitting the property. In September 2008, Core Tech performed work on the property allegedly valued at $826,800.00 under the agreement. Core Tech alleges, and Hanil does not deny, that none of this amount has been paid.

[5] On April 22, 2009, Core Tech filed a complaint to foreclose on its mechanics' lien, which it filed with the Department of Land Management on February 13, 2009. This mechanics' lien was referenced in but not attached to the April 22, 2009 complaint. On June 8, 2009, Hanil filed a motion to dismiss the complaint based on a lack of personal jurisdiction; lack of subject matter jurisdiction; and failure to state a claim upon which relief can be granted. In support of its

motion to dismiss, Hanil filed two Declarations: one from Hanil's Guam Manager, K.Y. Nam, and one from David G. Defant, a contract archaeologist hired to perform archaeological monitoring on the property.

[6] The Superior Court originally scheduled to hear Hanil's motion to dismiss on June 30, 2009. However, at Core Tech's request, Core Tech and Hanil stipulated to continue the hearing until July 15, 2009, "or the next available date and time convenient to the Court." Plaintiff-Appellant's Excerpts of Record ("ER"), tab 9, at 1 (Stip. and Order for Continuance of Hr'g, June 29, 2009). The court granted the continuance and set the hearing for July 28, 2009.

[7] On July 15, 2009, Core Tech filed a Notice of Filing Attachment containing a copy of the mechanics' lien it filed with the Department of Land Management on February 13, 2009. This Notice of Filing Attachment indicated that the lien should be attached to Core Tech's April 22, 2009, complaint.

[8] On July 20, 2009, Hanil filed its Motion to Strike Plaintiff's Notice of Filing Attachment & Request for Sanctions. On July 22, 2009, Core Tech filed its Opposition to Motion to Strike Plaintiff's Notice of Filing Attachment & Request for Sanctions, and its own sanctions request.

[9] Also on July 22, 2009, Core Tech filed its opposition to Hanil's motion to dismiss. Attached to its opposition was a declaration of Won Jong, Director of Core Tech's Estimating & Planning Department, and various correspondence and invoices indicating that Core Tech had performed work on the property through September 26, 2008.

[10] On July 24, 2009, Hanil filed its Motion to Strike Opposition to Dismissal & Reply.

[11] At the July 28, 2009 hearing, counsel for both Core Tech and Hanil went through some discussion about whether the Superior Court should accept Core Tech's opposition to Hanil's motion to dismiss, which was admittedly late under CVR 7.1(d)(1) of the Local Rules of the

Superior Court. After this discussion, the court seemed to suggest that it would consider Core Tech's late opposition. In its Decision and Order dated October 30, 2009, however, the court made it clear that it did not accept Core Tech's late opposition. Finding that Core Tech failed to file its opposition within the time prescribed by Local Rule CVR 7.1(d)(1), the court granted Hanil's Motion to Strike Opposition to Dismissal.

[12] In the same Decision and Order, the Superior Court disposed of a number of the parties' motions, essentially finding that: the court lacked subject matter jurisdiction over the matter because Core Tech failed to file its lien claim within the 150-day period prescribed by 7 GCA §§ 33302(c) and (d)(3); the court lacked personal jurisdiction over Hanil because Core Tech failed to serve Hanil with its complaint within the five-day period prescribed by 7 GCA § 33402(b); and Core Tech failed to state a claim for purposes of Rule 12(b)(6) of the Guam Rules of Civil Procedure because its untimely and therefore invalid lien claim deprived the court of jurisdiction over the matter.

[13] The Superior Court also denied Hanil's Motion to Strike Core Tech's Notice of Filing Attachment, finding that Core Tech had an absolute right under Rule 15(a) of the Guam Rules of Civil Procedure to amend its complaint up until the filing of a responsive pleading—and here, Hanil had filed a motion to dismiss, which the court deemed not to be a responsive pleading. In addition, the Superior Court denied Core Tech's request for sanctions because Hanil did not violate Guam Rule of Civil Procedure 12(f) of the Guam Rules of Civil Procedure, and further denied Hanil's request for sanctions because CVR 7.1(k) of the Local Rules of the Superior Court provides that it is within the court's discretion to decide whether or not to impose sanctions and the court chose not to impose sanctions against Core Tech in this case.

[14] Notice of Entry on the Docket was filed that same day. Core Tech timely appealed.

II. JURISDICTION

[15] This court has jurisdiction over this appeal pursuant to 7 GCA § 25102(e), which allows an appeal in a civil action or proceeding to be taken "[f]rom an order discharging or refusing to discharge an attachment." 7 GCA § 25102(e) (2005). Because this court has found that a mechanics' lien is analogous to an attachment, *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3 ¶ 7, an appeal of the Superior Court's October 30, 2009 Decision and Order is a matter of right provided for by law. *Id.* (citations omitted).

III. STANDARD OF REVIEW

[16] Review of a dismissal for failure to state a claim is *de novo*. *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 6 (citing *Kelson v. City of Springfield*, 767 F.2d 651, 653 (9th Cir. 1985)). Pursuant to this court's power on appeal to convert a Rule 12(b)(6) motion to dismiss into a summary judgment motion, the appropriate standard to review the grant of a motion for summary judgment is also *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7 (citing *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996)); *Wasson v. Berg*, 2007 Guam 16 ¶ 9 (citing *Nat'l Union Fire Ins. Co. v. Guam Hous. & Urban Renewal Auth.*, 2003 Guam 19 ¶ 12). We review *de novo* decisions to dismiss for lack of subject matter jurisdiction. *Amerault v. Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 9 (citing *Perez v. Guam Hous. & Urban Renewal Auth.*, 2000 Guam 33 ¶ 9). We review *de novo* decisions to dismiss for lack of personal jurisdiction. *PCI Comms., Inc. v. GST Pacwest Telecom Haw., Inc.*, 1999 Guam 17 ¶ 15 (citing *People v. Quichocho*, 1997 Guam 13 ¶ 3). We also review *de novo* issues of statutory interpretation. *Quichocho v. Macy's Dept. Stores, Inc.*, 2008 Guam 9 ¶ 13 (citing *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 16).

IV. DISCUSSION

[17] Core Tech argues that the Superior Court erred by granting Hanil's motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. First, Core Tech argues that the Superior Court erred when it ruled that Core Tech's alleged failure to file its lien claim within the 150-day period prescribed by 7 GCA §§ 33302(c) and (d)(3) divested the court of subject matter jurisdiction.[1] Second, Core Tech argues that the Superior Court erred when it ruled that Core Tech's failure to serve notice of its action upon Hanil within the five-day period prescribed by 7 GCA § 33402(b) divested the court of personal jurisdiction over Hanil. Third, Core Tech argues that the Superior Court erred when it ruled that an imperfect lien claim necessarily divests a court of jurisdiction and means that the lien claimant has failed to state a claim for purposes of a Rule 12(b)(6) motion to dismiss.

[18] Each of these arguments is addressed in turn.

A. Subject Matter Jurisdiction

1. Timeliness of Core Tech's Lien Claim Under 7 GCA §§ 33302(c) and (d)(3)

[19] Guam has its own statutory construction analysis for determining whether a lien claimant bringing an action under our mechanics' lien statute has complied with the statute. This analysis is set out in *Castino v. G.C. Corp.*, 2010 Guam 3. Where the statute is clear on its face, i.e., "where the statute lays out specific requirements and indicates exactly what is necessary for compliance without ambiguous terms," we apply a plain reading construction. *Id.* ¶ 29-30. Where the statute is not clear on its face, i.e., "[w]here the statute does not prescribe specifically

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[1] During the May 4, 2010 oral argument, counsel for Hanil conceded that under *Castino v. G.C. Corp.*, 2010 Guam 3, an imperfect lien claim does not divest the Superior Court of subject matter jurisdiction. We choose, however, to expound upon this issue.

what is required . . . [,]" we apply a "fair and reasonable" construction. *Id.* ¶ 38. In applying the "fair and reasonable" construction, the court must determine whether the lien claimant or property owner "complied to some extent with the statutory requirements and whether such compliance is sufficient to constitute substantial compliance." *Id.* ¶ 30. This "substantial compliance" test requires examination of the underlying policy of the statutory requirement, the relevant statutory language as a whole and evaluation of the degree of non-compliance, and the prejudice suffered by the property owner or third parties from non-compliance. *Id.* ¶ 58.

[20] The statutory section at issue with respect to the Superior Court's purported lack of subject matter jurisdiction is 7 GCA § 33302. Section 33302(a) provides that all contractors and other persons claiming the benefit of the statute, after having performed any work of improvement on real property in Guam, may file for record with the Department of Land Management, a claim of lien, provided said claim is timely. 7 GCA § 33302(a) (2005). Section 33302(c) instructs owners of real property to file for record a notice of completion within 10 days after the completion of the work of improvement. 7 GCA § 33302(c) (2005). If no such notice is filed, section 33302(c) goes on to state that any person claiming the benefit of the statute shall have 90 days after the completion of such work of improvement within which to file their claims of lien. *Id.* Section 33302(d)(3) then instructs that completion is equivalent to a cessation of labor for a continuous period of 60 days after a work of improvement has begun. 7 GCA § 33302(d)(3) (2005). Section 33302(f) further instructs that "[i]f, 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[.] . . . " 7 GCA § 33302(f) (2005).

[21] Construed together, these sections provide that any claimant filing his claim of lien under a cessation of labor theory has 150 days from the day he stops working on the property to record his lien claim. This court approved this conclusion in *Apana v. Rosario,* 2000 Guam 7 ¶ 18, and again in *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 27.

[22] The plaintiff in *Apana* was a subcontractor who had contracted with a general contractor who himself contracted with a married couple to construct a residential home on their property. *Apana*, 2000 Guam 7 ¶¶ 2-4. The contract price for the construction of the home was $75,000.00 with periodic draws of $15,000.00, which were to be paid out in accordance with a schedule of completion for the various stages of construction. *Id.* ¶ 2. After learning that the bank that had approved the couple's application for the mortgage home loan would not release further draws until the general contractor was bonded, the subcontractor, Apana, stopped construction on the house. *Id.* ¶ 4. Apana stopped working on the property on April 13, 1992, and filed his claim of lien exactly 150 days later. *Id.* ¶ 18. Construing 7 GCA §§ 33302(b) and (d)(3) to provide that a claimant has 150 days after cessation of labor to file his claim of lien, this court deemed Apana's lien claim timely and reversed that part of the trial court's decision to the contrary. *Id.* ¶ 26; *see also Manvil Corp. v. E.C. Gozum & Co. Inc.*, 1998 Guam 20 ¶ 8 ("Under [a] 'cessation of labor' theory, Manvil would be entitled to file its lien 150 days (60 plus 90 days) after the cessation of labor.").

[23] In *Castino*, we revisited our decision in *Apana*, clarifying that the time requirements set out in 7 GCA §§ 33302(b), (c), and (d)(3), were "clear on their face." *Castino*, 2010 Guam 3 ¶ 27. We validated our holding in *Apana* and denominated as plain these sections' prescription that a lien claimant under a cessation of labor theory has 150 days to record his lien claim. *Id.*

(citing *Apana*, 2000 Guam 7 ¶¶ 16-18). We reasoned that because this timely filing requirement was so "clearly and specifically laid out," a plain reading construction was appropriate. *Id.* ¶ 29.

[24] Although we need not look to California case law construing the same statutory sections here at issue,[2] even a cursory examination reveals that a lien claimant under a cessation of labor theory has 150 days to file its lien claim. In *Gensler v. Larry Barrett, Inc.*, a general contractor and an architect brought against a building owner an action to foreclose mechanics' liens in connection with services they had performed in remodeling portions of the owner's building for its lessee. 499 P.2d 503, 506 (Cal. 1972). In *Gensler*, the plaintiffs argued that they were entitled to a period of 150 days within which to file their notice of lien; the defendant building owner refuted that they were entitled only to 90 days. *Id.* at 508. The California Supreme Court agreed with the plaintiffs, finding that sections 1193.1(c) and (d)(3) of the California Code of Civil Procedure provided a plaintiff 150 days after cessation of labor to file his claim of lien. *Id.* at 510. Because sections 1193.1(c) and (d)(3) of California's Code of Civil Procedure are the statutory progenitors of 7 GCA §§ 33302(c) and (d)(3), Core Tech had 150 days after cessation of labor to file its lien claim.

[25] The legally significant question is: When did cessation of labor occur?

[26] Core Tech asserts that cessation of labor occurred on September 26, 2008.[3] In support of

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[2] Guam adopted its mechanics' lien statutes from California. *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 22. Therefore, California case law interpreting those mechanics' lien statutes is persuasive authority. *Id.* ¶ 22; *see also People v. Aguado*, 948 F.2d 1116, 1118 (9th Cir. 1991) ("[D]ecisions of California courts are persuasive on issues of statutory construction and the effect of laws which predate the enactment of the territorial laws of Guam and which precisely follow California statutes."). Sections 1193.1(c) and (d)(3) of the California Code of Civil Procedure are the statutory progenitors of 7 GCA §§ 33302(c) and (d)(3) (2005).

[3] It should be noted that Core Tech's actual lien claim, which was filed with the Department of Land Management on February 13, 2009, indicates that cessation of labor occurred "on or about September 20, 2008." ER, tab 10 at 2 (Not. of Filing Attachment, July 15, 2009). This is legally insignificant because even if cessation of labor occurred as early as September 20, 2008, Core Tech's lien claim would still be timely under 7 GCA §§ 33302(c) and (d)(3); that is, it would have been filed within 150 days after cessation of labor.

this assertion, Core Tech attached to its opposition a declaration of Won Jong, Director of Core Tech's Estimating & Planning Department, and various correspondence and invoices indicating that Core Tech had performed work on the property through September 26, 2008.[4] In its Decision and Order, the Superior Court summarily concluded that cessation of labor occurred on August 15, 2008. This conclusion was based on a single statement made in a single declaration. This statement was that of David G. Defant, made upon information and belief, in a declaration filed by Hanil in support of its dismissal motion. Defant is a contract archaeologist who was originally hired by Kyung Maek to carry out an "archaeological mitigation plan" in conjunction with construction work on the property. The sole statement cited by the Superior Court to support its conclusion that cessation of labor occurred on August 15, 2008, reads as follows: "Upon information and belief, PHRI halted archaeological monitoring of the construction activity at the Gun Beach Development Property on August 15, 2008[.]" ER, tab 6, at 1 ¶ 4 (Decl. of David G. Defant, June 8, 2009). However, the date PHRI halted archaeological monitoring is not necessarily determinative of when Core Tech halted work on the project.

[27] In order to determine whether Core Tech's lien claim was timely filed, i.e., within the prescribed 150-day period, we must determine when cessation of labor actually occurred. As explained above, because there is a genuine dispute as to this material fact, reversal of the grant of Hanil's dismissal motion is proper.

[28] Indeed, reversal is warranted nonetheless in light of our recent decision in *Newby v. Gov't of Guam*, 2010 Guam 4.

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[4] The Jong Declaration and other documents should have been considered by the trial court. The trial court should have converted Hanil's motion to one for summary judgment. *See* discussion of Conversion of Hanil's Rule 12(b)(6) Motion Into a Rule 56 Motion at page 12 herein. Under Rules 12(c) and 56(c), evidence from the adverse party may be filed the day before the hearing. Thus, these papers were timely filed.

2. Conversion of Hanil's Rule 12(b)(6) Motion Into a Rule 56 Motion

[29] In *Newby*, we held that a trial court, in ruling on a Rule 12(b)(6) motion to dismiss, must convert the dismissal motion into a summary judgment motion whenever it considers extraneous material outside the pleadings. *Id.* ¶ 18. Our holding in *Newby* accords with the general rule that a Rule 12(b)(6) motion to dismiss must be converted into a Rule 56 motion for summary judgment whenever "matters outside the pleadings" are presented to and considered by the court:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Guam R. Civ. P. 12(b); *See Carter v. Stanton*, 405 U.S. 669, 671 (1972) (finding that the consideration of matters outside the pleadings, on a hearing for a motion to dismiss, required converting the motion into one for summary judgment and disposing of it as provided by Rule 56); *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (reciting the general rule that a court may not consider any material outside the pleadings in ruling on a Rule 12(b)(6) motion). In ruling on a 12(b)(6) motion, a court's consideration is limited to the complaint, written instruments attached to the complaint as exhibits, statements or documents incorporated in the complaint by reference, and documents on which the complaint heavily relies. *Mercado Arocho v. United States,* 455 F. Supp. 2d 15, 19 (D.P.R. 2006) (quotation omitted).

[30] In *Newby*, we stated that a possible exception to the general rule is where the extraneous material is so "integral" to the plaintiff's complaint that it is dispositive of the issue, and the plaintiff can be said to have "necessarily" relied upon it. *Newby*, 2010 Guam 4 ¶ 15 (quoting *Hotel Employees & Rest. Employees Local 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 979 (N.D. Cal. 2005)); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (finding that

in ruling on a 12(b)(6) motion to dismiss, a court may consider outside documents upon which the plaintiff's complaint "necessarily relies"), *superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006). In this exceptional circumstance, a trial court may consider extraneous material in ruling on a 12(b)(6) dismissal motion without converting the motion into one for summary judgment; otherwise, the failure to so convert the motion is error. *Newby*, 2010 Guam 4 ¶ 18.

[31] The only extraneous material outside the pleadings that the trial court considered and cited to in support of its conclusion that cessation of labor occurred on August 15, 2008, was the Defant Declaration. Core Tech did not prepare or submit this Declaration and cannot be said to have necessarily relied upon the terms or effects of the Defant declaration in preparing its complaint. Accordingly, the Superior Court erred in not converting Hanil's 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment.

[32] Upon conversion, the requirements of Rule 56 become operable and the matter proceeds as would any motion made directly under that rule. *Id.* ¶ 19 (citing *S & S Lodging Co., Inc. v. Barker*, 366 F.2d 617, 623 (9th Cir. 1966)). Nevertheless, in *Newby*, we heeded the United States Supreme Court and deemed it "contrary to the interests of judicial economy and ultimately unhelpful" to remand the matter back to the trial court. *Id.* ¶ 19 & n.1 (citing *Sec. & Exch. Comm'n. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."); *accord S & S Lodging Co., Inc. v. Barker*, 366 F.2d 617, 623 (9th Cir. 1966) (finding that because the whole case was before the appellate court and because no counter

showing was made contradicting the record at the trial level, it would be "wasteful" to remand for the consideration of the summary judgment motion).

[33] Our decision not to remand in *Newby*, however, was chiefly informed by the fact that the determination of governmental liability at issue was a question of law; therefore, the production by the parties of supplemental additional materials would not have helped. *Newby*, 2010 Guam 4 ¶ 19 n.1. This is not the case here. As Core Tech rightly argues, the question of when cessation of labor occurred is a question of fact. Accordingly, remand for purposes of determining when cessation of labor occurred is proper, and reversal of the grant of Hanil's dismissal motion is warranted.

[34] Reversal is further appropriate in light of our recent decision in *Castino v. G.C. Corp.*, 2010 Guam 3.

3. The Effect of an Imperfect Lien Claim on Subject Matter Jurisdiction

[35] *Castino* unequivocally instructs that an imperfect lien claim does not divest a trial court of subject matter jurisdiction. *Id.* ¶ 19. In *Castino*, G.C. Corp. ("GC") signed an agreement with Guam Resorts, Inc. to be the prime contractor on a construction project on property owned by Guam Resorts, Inc. *Id.* ¶ 3. Later, GC subcontracted with a variety of businesses to provide labor and/or materials for the project. *Id.* Eventually, all of these subcontractor businesses filed lien claims as well as foreclosure actions stemming from the project, which were consolidated at the trial court level and again on appeal. *Id.* ¶ 1. At issue in *Castino* was whether or not each party's lien claim complied with the requirements of 7 GCA § 33301(a) or 7 GCA § 33302(i), or both. *Id.* ¶ 11. Title 7 GCA § 33301(a) provides that lien claimants must give written notice to the property owner and original contractor at least fifteen days prior to filing his lien; failure to do so invalidates the lien. *Id.* ¶ 53-56. Title 7 GCA § 33302(i) provides that lien claims must be

signed and verified and must also contain five enumerated things, none of which are relevant here. *Id.* ¶ 31 n.2. There, what was specifically at issue was the verification requirement.

[36] In *Castino*, the trial court dismissed all of the foreclosure actions, *sua sponte*, for lack of subject matter jurisdiction because each party's lien claim failed to meet the requirements of 7 GCA § 33301(a) or 7 GCA § 33302(i), or both, thus invalidating the liens. *Id.* ¶ 11. The trial court held that because there was a defect in the requirements for a claim of lien under the mechanics' lien statute, 7 GCA § 33302, the court lacked subject matter jurisdiction to hear the claims, thereby making the statute's requirements jurisdictional. *Id.* ¶ 15. Finding that Guam's mechanics' lien statute "does not refer to any element of the lien claim as being a jurisdictional requirement," *id.* ¶ 19, and finding further that "the Guam Legislature did not clearly express any intent to make the elements of a mechanics' lien claim jurisdictional," *id.*, this court reversed the trial court's *sua sponte* dismissal of the actions, *id.* ¶ 60, declaring said dismissal a "drive-by jurisdictional ruling." *Id.* ¶ 19.

[37] As relied upon and cited to in *Castino*, the United States Supreme Court addressed the specific issue of statutory compliance and subject matter jurisdiction in *Arbaugh v. Y. & H. Corp.*, 546 U.S. 500 (2006). There, Ms. Arbaugh, a waitress/bartender, sued her former employer, Y & H, for sexual harassment under Title VII. *Id.* at 503-04. Y & H moved to dismiss for lack of subject matter jurisdiction, arguing that it had fewer than 15 employees, which was a prerequisite to Title VII's application. *Id.* at 504. Y & H argued that since the court had no jurisdiction, Y & H was not amenable to suit under Title VII. *Id.* The trial court agreed that the 15-or-more employee requirement was jurisdictional. *Id.* The Circuit Court of Appeals affirmed. *Id.* at 509. The Supreme Court reversed, holding that while the employee requirement related to the substantive adequacy of Arbaugh's claim, it did not divest the federal court of

subject matter of jurisdiction. *Id.* at 504. Rather, it was a defect in the plaintiff's claim that, if not timely asserted before the conclusion of the trial on the merits, was deemed waived. *Id.*

[38] The Supreme Court went on to bemoan that it is often the case that judicial opinions "obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Id.* at 511 (citations omitted).

[39] Finding that Core Tech failed to comply with the 150-day requirement prescribed by 7 GCA §§ 33302(c) and (d)(3), the Superior Court in the instant case held that this non-compliance necessarily divested the court of subject matter jurisdiction. As in *Castino* and *Arbaugh*, this ruling was erroneous.

[40] Whether the Superior Court had personal jurisdiction over Hanil is addressed next.

B. Personal Jurisdiction

1. Notice Under 7 GCA § 33402(b)

[41] The section of our mechanics' lien statute at issue with respect to the Superior Court's purported lack of personal jurisdiction provides:

> Notice of *such proceedings* shall be given or filed within five (5) days after the commencement thereof to the same persons and in the same manner as provided in *Article 2 of this Chapter* with respect to notice of claim.

7 GCA § 33402(b) (2005) (emphases added).

[42] It is this court's considered position that 7 GCA § 33402(b) is ambiguous inasmuch as it references "such proceedings" and "Article 2 of this Chapter." Each ambiguity is addressed in turn.

[43] In order to determine to what "such proceedings" refers, section 33402(b) must be read in conjunction with the preceding section of the statute, section 33402(a), which provides in pertinent part:

> (a) Time for commencing *action*: limitation of time for withholding *money or bond*: dismissal for want of prosecution: effect. No *action* to enforce the payment of *any* claim, notice of which may be given pursuant to Article 2, shall be commenced against the owner prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by this Chapter, nor shall *any* such suit be commenced later than ninety (90) days following the expiration of such period. No *money or bond* shall be withheld by reason of any such notice as is prescribed by this Chapter longer than said ninety (90) days following the expiration of such period, unless proceedings be commenced in a proper court within that time by the claimant to enforce his claim[.]"

7 GCA § 33402(a) (2005) (emphases added). On the one hand, the five-day notice requirement set out in subsection (b) could be said to apply not only to stop-notices, as Core Tech suggests, but rather to any and all actions to enforce the payment of any claim. This construction is supported by the use of the word "any" in "any claim" and "any such suit." If this is the case, then the five-day requirement set out in 7 GCA § 33402(b) would apply to any action, including an action to foreclose a mechanics' lien. On the other hand, the five-day notice requirement set out in subsection (b) could be said to apply only to stop-notices, not mechanics' liens. The repeated references in subsection (a) to "money or bond," may indicate that the five-day requirement set out in 7 GCA § 33402(b) applies to stop-notices, as opposed to mechanics' liens. This construction is supported by the fact that the primary difference between a stop-notice and a mechanics' lien is that the former attaches a lien to moneys while the latter attaches a lien to land. *See Mech. Wholesale Corp. v. Fuji Bank, Ltd.*, 50 Cal. Rptr. 2d 466, (Ct. App. 1996) (citing *Connolly Dev., Inc. v. Super. Ct.*, 553 P.2d 637, 642 (Cal. 1976)).

[44] Accordingly, the reference to "such proceedings" in 7 GCA § 33402(b) is not clear on its face under a *Castino* analysis, i.e., it does not "indicate[] exactly what is necessary for compliance without ambiguous terms." *Castino*, 2010 Guam 3 ¶ 26.

[45] The reference to "Article 2 of this Chapter" in 7 GCA § 33402(b) is similarly ambiguous. The former California Code of Civil Procedure, from which our mechanics' lien statute originates, contained an entire article devoted to stop notices, Article 2, titled "Stop Notices." *See* Appellant's Br. at Addendum 4 (Feb. 22, 2010). The Guam Legislature, in adopting the Guam statute, omitted this article in its entirety. Appellee's Br. at 25 (Mar. 23, 2010). As Hanil points out in its brief, Guam's Article 2 is titled "Liens of Mechanics and Others Upon Real Property." *Id.* at 27. Core Tech essentially argues that the Guam Legislature inadvertently failed to adopt the stop-notice remedy from Guam's mechanics' lien statute. Appellant's Br. at 23. Hanil counters that the Guam Legislature intentionally omitted the stop-notice remedy from our mechanics' lien statutory framework. Both propositions are at least plausible and because this court cannot ascertain with certainty the legislative intent as to this particular point, the more principled construction is that the reference to "Article 2 of this Chapter" is ambiguous. *See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2328 (2008) (reasoning that the better of two credible interpretations of a statute is the one that least strains the statutory text). To presume that the legislature more or less inadvertently failed to adopt the stop-notice remedy from our mechanics' lien statute would place more strain on the statutory text than to presume that the legislature intentionally omitted the remedy from our statutory framework. *See, e.g., Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (reasoning that the omission of certain language in the statutory scheme is evidence of legislative intent to leave such language out); *Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 613 (1991) (same).

[46] Under *Castino*, we apply the fair and reasonable construction when the statute is ambiguous. *Castino*, 2010 Guam 3 ¶ 38. In applying the "fair and reasonable" construction, we must determine whether the lien claimant or property owner "complied to some extent with the statutory requirements and whether such compliance is sufficient to constitute substantial compliance." *Id.* ¶ 30. This "substantial compliance" test requires examination of the underlying policy of the statutory requirement, the relevant statutory language as a whole and evaluation of the degree of non-compliance, and the prejudice suffered by the property owner or third parties from non-compliance. *Id.* ¶ 58.

2. Substantial Compliance

a. Underlying policy behind the five-day notice requirement

[47] One California case specifically addresses the underlying policy behind this five-day notice requirement. In *Sunlight Elec. Supply Co. v. McKee*, a stop-notice proceeding was brought by an unpaid supplier of a subcontractor on a school construction project. 37 Cal. Rptr. 782, 783 (Dist. Ct. App. 1964). At issue on appeal was whether compliance with the five-day requirement of section 1197.1(b)[5] of the California Code of Civil Procedure was a necessary prerequisite to the rendition of a judgment in favor of the materialman in a stop-notice proceeding. *Id.* at 784. There, the trial court found substantial compliance with the statute in the supplier's service of notice fourteen days after commencement of the action, which was nine days after the prescribed statutory notice requirement. *Id.* The court stated that "[t]he various steps and time requirements as to filings and services of notice are for the purpose of providing protective measures and a necessary warning to those to whom notice is to be given or upon

[5] California Code of Civil Procedure § 1197.1(b) is the progenitor of 7 GCA § 33402(b). *See* 7 GCA § 33402 (2005).

whom service is to be made." *Id.* The court went on to say that "if no right of the servicee or any person or entity who could legally claim under the servicee is adversely affected by failure to comply with the time for service requirement, then the requirement unless made so by specific mandate, is not a jurisdictional factor requiring the collapse of any remedy of which such notice or service forms a part." *Id.* (citing *Patten-Blinn Lumber Co. v. Francis*, 333 P.2d 255, 258 (Cal. Dist. Ct. App. 1958)). Although California courts use substantial compliance in determining whether a mechanics' lien claim is valid, whereas we have adopted a "fair and reasonable" construction, this case expounds upon the policy behind the notice requirement, explaining that said requirement is met even where notice is given after the prescribed period of time, unless the other party is adversely affected by the non-compliance.

b. Degree of Core Tech's non-compliance and prejudice suffered by Hanil

[48] The degree of non-compliance is probably minimal because although Core Tech was 22 days late in serving Hanil, *McKee* seems to suggest that a late notice is acceptable. Without more, this court would be hard pressed to find a legally significant distinction between notice served 14 days late (as in *McKee*) and notice served 22 days late (as in the instant case). Moreover, the prejudice suffered by Hanil seems to be slight, if any, because Hanil, as the undisputed property owner in this case, was aware of the labor performed by Core Tech on its property. Moreover, to reason to the contrary would subvert the entire purpose of the mechanics' lien statute, which is "to afford materialmen and laborers the security intended by the legislation's remedial purpose." *Castino*, 2010 Guam 3 ¶ 25 (quoting *Manvil Corp. v. E.C. Gozum & Co., Inc.*, 1998 Guam 20 ¶ 17). As we declared in *Castino*, "[t]he unifying thread that is found throughout California case law is the principle that where the purpose of the requirement of the statute is achieved and no one is prejudiced, technical requirements shall not

stand in the way of achieving the purpose of the mechanics' lien law." *Id.* ¶ 46 (citing *Wand Corp. v. San Gabriel Valley Lumber Co.*, 46 Cal. Rptr. 486, 490 (Dist. Ct. App. 1965)). Under a *Castino* fair and reasonable construction, Core Tech substantially complied with the requirements of 7 GCA § 33402(b), thus making valid the untimely notice.

c. Detriment

[49] Regardless of whether Core Tech gave timely notice to Hanil, *McKee* held that the lower court there had personal jurisdiction over the property owners despite an untimely notice filed by the supplier. *McKee*, 37 Cal. Rptr. 782, 784-85. The court addressed the question of whether a statutory requirement that a notice of pendency be served on the owners of the property within five days of the commencement of the action was a jurisdictional prerequisite to suit. *Id.* The appellate court answered in the negative, noting the prime contractor suffered no prejudice. *Id.* As stated above, the plaintiff supplier failed to serve notice of his stop-notice action within five days after commencement of the action. *Id.* The court held that unless some detriment could be shown to have resulted to the complaining litigant from the nine-day-late notice, the plaintiff's failure to comply with the statutory requirement to serve notice within five days after commencement of the stop-notice proceeding was "not mandatory but merely directory" and did "not result in divestiture of jurisdiction." *Id.* at 785.

[50] Core Tech, like the plaintiff supplier in *McKee*, failed to serve Hanil notice within five days after commencement of the action, i.e., by April 27, 2009. Core Tech served Hanil with the complaint and summons on May 19, 2009, or 22 days late. Similarly, Hanil has shown no detriment because of the late notice. Therefore, it stands to reason that Core Tech, like the plaintiff in *McKee*, substantially complied with 7 GCA § 33402(b) despite the 22-day-late notice;

the theory being that failure to comply with the five-day requirement is not mandatory and does not work a divestiture of personal jurisdiction.

C. Failure to State a Claim

[51] The Superior Court granted Hanil's 12(b)(6) motion to dismiss for failure to state a claim because it erroneously reasoned that Core Tech's failure to file its lien claim within the 150-day period prescribed by 7 GCA §§ 33302(c) and (d)(3) divested the court of jurisdiction, which in turn meant that Core Tech was unable to state a claim for purposes of Rule 12(b)(6). As articulated above, reversal of the grant of Hanil's motion to dismiss for lack of subject matter and personal jurisdiction is warranted. The third and final dispositive issue is whether the court erred in granting Hanil's 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted.

[52] While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint should not be dismissed for failure to state a claim unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Taitano v. Calvo Finance Corp.*, 2009 Guam 9 ¶ 6 (quotation omitted). In an action to foreclose a mechanics' lien, a complaint or an attached copy of the notice of lien "must show a substantial compliance with the statute as to the contents and filing of the notice of lien." *Clements v. T.R. Bechtel Co.*, 273 P.2d 5, 12 (Cal. 1954). It must show that the claim of lien was filed within the prescribed period, *id.*, and must also show "the kind of work done, or materials furnished." *Id.* at 13.

[53] Reading Core Tech's complaint and mechanics' lien together,[6] Core Tech has set forth sufficient facts showing that it is entitled to relief. Core Tech alleges that it entered into a construction contract with Kyung Maek C&D LLC for work on property Hanil now incontestably owns. This work is allegedly valued at $826,800.00. This work consisted of clearing; transplanting; grading; surveying; boring tests; the creation of a temporary access road; and other services benefitting the property. Core Tech alleges, and Hanil does not deny, that none of this amount has been paid. Due to Hanil's non-payment, Core Tech stopped work on the property on or about September 20, 2008. Core Tech further alleges that it recorded its lien claim with the Department of Land Management on February 13, 2009, under Instrument No. 786058. ER, tab 1 ¶ 8 (Compl., Apr. 22, 2009). Taking these allegations as true, *Twombly*, 550 U.S. 544, 555, Core Tech has set forth the kind of factual allegations that "raise a right to relief above the speculative level." *Id.* Put plainly, Core Tech has stated a claim.

D. Core Tech's Opposition to Hanil's Dismissal Motion

[54] CVR 7.1 of the Local Rules of the Superior Court governs motion practice in the Superior Court. Under Local Rule CVR 7.1(d)(1), any opposition to a motion must be served upon all parties and filed with the clerk "not less than fourteen (14) days preceding the noticed date of oral argument." CVR 7.1(d)(1). Local Rule CVR 7.1(f) instructs that "[p]apers not timely filed by a party including any memoranda or other papers required to be filed under this Rule shall not be considered without leave of court." CVR 7.1(f). Local Rule CVR 7.1(k)

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[6] Although Core Tech's complaint referenced Core Tech's lien claim, the lien claim was not attached to the complaint. Guam Rule of Civil Procedure 15(a) provides, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . " Guam R. Civ. P. 15(a) (2008). Because a motion to dismiss is not a responsive pleading within the meaning of Rule 15(a), *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1158 n.5 (9th Cir. 2007) (citing *Miles v. Dep't of Army*, 881 F.2d 771, 781 (9th Cir. 1989)), Core Tech had a right, as a matter of law, to amend its complaint by attaching its lien claim to it.

further provides that the court "need not consider motions, oppositions to motions or briefs or memoranda that do not comply with this Rule." CVR 7.1(k).

[55] The Superior Court ultimately scheduled to hear Hanil's dismissal motion on July 28, 2009. In order to comply with Local Rule CVR 7.1(d)(1), Core Tech had to have filed its opposition memorandum to Hanil's dismissal motion no later than July 14, 2009, or 14 days preceding the noticed date of oral argument. Core Tech did not file its opposition until July 22, 2009. Thus, under the rule, Core Tech's opposition was nine days late. At the July 28, 2009 hearing, counsel for both Core Tech and Hanil went through some discussion about whether the Superior Court should accept Core Tech's untimely opposition to Hanil's motion to dismiss. After this discussion, the court seemed to suggest that it would consider Core Tech's opposition. In its Decision and Order, however, the court made it clear that it did not accept Core Tech's opposition. Finding that Core Tech failed to file its opposition within the time prescribed by Local Rule CVR 7.1(d)(1), the court granted Hanil's Motion to Strike Opposition to Dismissal. *Id.*

[56] Core Tech's untimely opposition is legally insignificant for purposes of the instant appeal because reversal of the grant of Hanil's dismissal motion is warranted all the same. As articulated above, the Superior Court's order granting Hanil's dismissal motion was problematic on a number of grounds. Accordingly, whether or not the Superior Court specifically erred by not considering Core Tech's untimely opposition is not dispositive in this matter and we need not address it.[7]

[7] Furthermore, the trial court's consideration of declarations under Rules 12(c) and 56(c) should be viewed differently than the untimely pleading consideration under Rule 7.1(d)(1). See n.4 above.

V. CONCLUSION

[57] We find that the Superior Court erred in granting Hanil's motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. The Superior Court had subject matter jurisdiction over this matter even if Core Tech's lien claim was untimely under 7 GCA §§ 33302(c) and (d)(3). The Superior Court had personal jurisdiction over Hanil because Core Tech substantially complied with 7 GCA § 33402(b). Core Tech stated a claim upon which relief could be granted. We also find that the Superior Court erred by not converting Hanil's 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment upon consideration of the Declaration of David G. Defant, which was extraneous material falling outside the narrow *Newby* exception. Because a genuine dispute as to a material fact exists, i.e., when cessation of labor occurred for purposes of determining whether Core Tech's lien claim was timely under 7 GCA §§ 33302(c) and (d)(3), we find reversal of the grant of Hanil's dismissal motion appropriate.

[58] Accordingly, the Superior Court's grant of Hanil's dismissal motion is **REVERSED**.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice