IN THE SUPREME COURT OF GUAM

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

v.

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

OPINION

Cite as: 2011 Guam 30

Supreme Court Case No.: CVA09-013
Superior Court Case Nos.: CV0558-99 and CV2469-98

Appeal from the Superior Court of Guam
Argued and submitted on June 3, 2010
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.[1]

TORRES, C.J.:

[1] Defendants-Appellants/Cross-Appellees Tanota Partners and Hafa Adai Properties appeal the Judgment and Decree of Foreclosure of Mechanic's Liens. Plaintiffs-Appellees/Cross-Appellants Guam Top Builders, Inc. and Ejong Construction Co., Ltd. also filed a cross-appeal of the same judgment and decree. For the reasons discussed below we affirm in part and reverse in part the Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Many of the facts relevant to this appeal are contained in our earlier opinion, *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3, as a result we will set forth only those facts necessary to explain our decision. This case involves mechanic's lien claims arising out of the construction of the Outrigger Hotel ("Hotel") in Tumon, Guam, owned by Defendants-Appellants/Cross-Appellees Tanota Partners and Hafa Adai Properties (collectively, "Tanota"). Plaintiff-Appellee/Cross-Appellant, supplier Ejong Construction Co., Ltd. ("Ejong"), did not execute a written contract with Tanota or any of its agents but nevertheless indisputably supplied steel and other materials for the Hotel's construction, filed with the Department of Land Management a mechanic's lien for record on the Hotel for the steel and materials supplied. *Id.* ¶ 1. Subsequently, Ejong filed a complaint in the Superior Court to enforce payment of its claim and to foreclose on the amended lien in the amount of $1,728,284.67.

[1] On January 18, 2011, Justice F. Philip Carbullido was sworn in as Chief Justice of the Supreme Court of Guam. The signatures in this Opinion reflect the titles of the justices at the time this matter was considered and determined.

[3] Tanota moved for summary judgment on the basis that Ejong was paid in full for the materials supplied to the Hotel project, that the lien amount was not a claim for materials provided but included a claim for money paid to John K. Sherman ("Sherman"), President of AES Construction, Inc. ("AES"), and that the claims of lien were ineffective for lack of verification. The trial court granted summary judgment, and Ejong appealed.

[4] On appeal, we held that because a genuine issue of material fact remained over the existence and terms of an agreement regarding the price of materials Ejong supplied, summary judgment invalidating the amount of Ejong's lien to the extent it exceeded $5,000.00 was improper. *Id.* ¶ 23. On remand, the case proceeded to a jury trial. At the pre-trial conference the parties disputed the issues that would proceed to trial. Transcripts ("Tr.") at 3-5 (Pre-Trial Conf., Jan. 12, 2007). Tanota asserted that Plaintiffs-Appellees/Cross-Appellants Guam Top Builders, Inc. ("GTB") and Ejong made no demand for a jury trial, and as a result were not entitled to have their claims tried by the jury. *Id.* at 5. The trial judge requested the parties brief the issues and continued the hearing. At the continued hearing, the trial court decided it would determine all issues relating to the validity of the mechanic's liens, and that all other triable issues would be sent to the jury. Tr. at 10–13, 25-26 (Status Conf., Jan. 17, 2007). At trial, the parties filed proposed jury instructions for the court's consideration. Tanota requested the trial court instruct the jury on its affirmative defenses. Specifically, Tanota proposed the following: (1) an instruction on the validity of a mechanic's lien when made with intent to defraud; (2) an instruction defining fraud; (3) an unclean hands instruction; (4) an instruction for payment of materials and labor provided; (5) an agency instruction; and (6) instructions on the mechanic's lien statutory requirements. Appellants' Excerpts of Record ("ER"), vol. 1, tab 34 at 2-4, 5-6, 8-9 (Am. Proposed Instr., Feb. 13, 2007). The trial court denied Tanota's requested instructions.

[5] Following a 16-day jury trial, the jury returned a special verdict in favor of Ejong for the sum of $1,491,658.17. Record on Appeal ("RA"), tab 248 at 2 (Special Verdict, Feb. 16, 2007). In the special verdict form, the jury found there was an agreement with Ejong regarding the price of the materials supplied. *Id.* The jury also determined that GTB did not fulfill its obligations under the Memorandum of Understanding ("MOU") between AES and GTB, and after deducting the costs incurred by AES to complete the project, the jury awarded GTB $180,000.00. *Id.* at 3. The trial court requested that the parties file post-trial memoranda on how the case should next proceed. Tr. at 44 (Jury Trial, Feb. 16, 2007). The trial court subsequently issued a Decision and Order concluding that it would proceed with determining the issues concerning the statutory requirements of the mechanic's liens. RA, tab 253 at 13 (Dec. & Order, June 12, 2007). The court also found that "the jury's finding that an agreement existed for the purchase price of steel was inconsistent with its determination as to the amount owing under such agreement because the jury's award of $1,491,658.17 to Plaintiff Ejong more closely reflect[ed] the market value of materials . . . , and not $928,620.00, the amount Ejong claimed as the balance under the agreement." *Id.* at 9-10. As a result of the inconsistent verdict, the court held that Ejong was owed $928,620.00. *Id.* at 11.

[6] The trial court proceeded to determine the issues related to the validity of the mechanic's liens. GTB and Ejong filed post-trial motions for summary judgment which the court granted in part. RA, tab 258 (Pls.' Post-Trial Mots. Summ. J., Aug. 3, 2007); RA, tab 272 (Dec. & Order, Sept. 8, 2008). Thereafter, Tanota filed a motion for reconsideration and also renewed its motion for a judgment as a matter of law or in the alternative for a new trial. RA, tab 293 (Defs.' Mem., Nov. 10, 2008). The motions were denied. In its Decision and Order denying the motions, the court reconsidered its earlier decision of the inconsistent verdict and agreed with GTB and

Ejong's explanation of the jury's verdict, that is, that the jury decided to add to the actual cost of materials a 10% markup to account for overhead and profit. RA, tab 304 at 12 (Dec. & Order, Mar. 19, 2009). On May 1, 2009, judgment was entered for Ejong in the amount of $1,491,658.17 and for GTB in the amount of $180,000.00, which included an award of pre-judgment and post-judgment interest. RA, tab 309 at 2 (Judgment & Decree of Foreclosure, May 1, 2009). Tanota timely appealed. RA, tab 314 (Not. of Appeal, May 19, 2009). Ejong and GTB filed a cross-appeal. RA tab 330 (Not. of Cross Appeals, June 11, 2009).

II. JURISDICTION

[7] This court has jurisdiction over this appeal and cross-appeal from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-44 (2011)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[8] We review a jury's verdict to determine whether it is supported by substantial evidence or is against the clear weight of the evidence. *Park v. Mobil Oil Guam, Inc.*, 2004 Guam 20 ¶ 11 (citing *O'Mara v. Hechanova*, 2001 Guam 13 ¶ 6). "Substantial evidence is such relevant evidence which reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* (quoting *O'Mara*, 2001 Guam 13 ¶ 6). A ruling on a motion for judgment notwithstanding the verdict is reviewed *de novo*. *Id.* (citing *Leon Guerrero v. DLB Constr. Co.*, 1999 Guam 9 ¶ 11). A denial of a motion for a new trial is reviewed for an abuse of discretion. *Fenwick v. Watabe Guam, Inc.*, 2009 Guam 1 ¶ 6 (citing *B.M. Co. v. Avery*, 2002 Guam 19 ¶ 10). "When reviewing the denial of a motion for a new trial, the inquiry is whether the verdict is either supported by substantial

evidence or 'whether the jury's decision is against the clear weight of the evidence.'" *Id.* (quoting *Avery*, 2002 Guam 19 ¶ 10).

[9] A trial court's refusal to give a requested instruction is reviewed for an abuse of discretion. *Id.* (citing *Avery*, 2002 Guam 19 ¶ 10). While we generally review the trial court's formulation of jury instructions for abuse of discretion, we review jury instructions *de novo* when they are challenged as a misstatement of the law. *See People v. Songeni*, 2010 Guam 20 ¶ 9 & n.1 (citations omitted); *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001) (citations omitted). Since the trial judge is in the best position to determine if a jury's answers are inconsistent, we review the decision for abuse of discretion. *See Kerman v. City of New York*, 261 F.3d 229, 244 (2d Cir. 2001).

[10] Although a trial court's award of interest generally is reviewed for an abuse of discretion, *Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20 ¶ 22, whether prejudgment interest for an implied contract to pay the reasonable value of services or materials provided is permitted under 20 GCA § 2110 is a question of law warranting *de novo* review. *Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 81. Finally, we review the denial of a motion for summary judgment *de novo*. *Quichocho v. Macy's Dep't Stores, Inc.*, 2008 Guam 9 ¶ 13 (citing *Villanueva ex rel. United States v. Commercial Sanitation Sys., Inc.*, 2005 Guam 8 ¶ 9).

IV. ANALYSIS

[11] In this opinion, we first examine the issues raised in Tanota's appeal and then address GTB and Ejong's cross-appeal issues.

A. Tanota's Appeal

1. Trial Court's Refusal to Provide Proposed Instructions

a. Standard of Review

[12] The parties dispute the applicable standard of review for the trial court's failure to instruct the jury with Tanota's proposed instructions. Tanota asserts the standard of review "depends on the nature of the claimed error." Appellants' Br. at 11 (Feb. 9, 2010) (quoting *Navellier v. Sletten*, 262 F.3d 923, 944 (9th Cir. 2001)). Specifically, Tanota contends that the abuse of discretion standard applies generally to claims of instructional error; however, where the claim of error is based on a misstatement of the law or failure to instruct on a party's theory of a case, the standard of review is *de novo. Id.* Relying on *B.M. Co. v. Avery*, 2002 Guam 19, GTB and Ejong claim that a denial of a proposed instruction is reviewed for an abuse of discretion. Appellees' Br. at 10 (Mar. 12, 2010).

[13] In *Avery* we stated that the denial of a proposed jury instruction is reviewed for an abuse of discretion. 2002 Guam 19 ¶ 10. We said that a refusal to give an instruction on a cognizable issue for which there was supporting evidence may be an abuse of discretion, and "a trial court's decision to reject a requested instruction will be upheld even where the court could have given an instruction that was of more assistance to the jury, if the instruction actually given accurately and sufficiently instructed the jury of the law to be applied." *Id.* ¶¶ 34, 36 (citations omitted). "[If] the instructions advise the jury as to the law it should apply, the court has the discretion to decline to give other instructions even though they may properly state the law to be applied." *Id.* ¶ 34 (citation and internal quotation marks omitted). Thus, *Avery* provides that the trial court's denial of a jury instruction will be upheld so long as the instructions actually given adequately apprise the jury as to the law it is to apply.

[14] Most federal courts apply the *de novo* standard where the alleged error is based on a misstatement of the law. *Voohries-Larson*, 241 F.3d at 713 (citing *Mockler v. Multnomah Cnty.*,

140 F.3d 808, 812 (9th Cir. 1998)). Alleged errors based on the formulation of the instruction and particular language used are also reviewed for an abuse of discretion. *Id.* (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999)); *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1118 (9th Cir. 2008).

[15] Tanota argues the trial court erred in failing to instruct the jury with its proffered instructions related to its affirmative defenses. Specifically, Tanota proposed the following instructions: (1) the mechanic's lien amount was overstated and made with intent to defraud; (2) definition of fraud; (3) an unclean hands instruction; (4) materials and labor instruction; (5) an instruction on agency; and (6) instructions on the mechanic's lien statutory requirements.. ER, vol. 1, tab 34 at 2-4, 5-6, 8-9 (Am. Proposed Jury Inst.). We examine each alleged jury instruction error below.

b. Fraud Instructions

[16] Tanota proposed the following instruction[2]:

Mechanic's Liens – Invalidation of Lien Because of Fraud

> Under Guam law, an overstatement in the amount of a mechanic's lien made with the intent to defraud shall invalidate the lien.
>
> If you find that Ejong overstated the amount of its mechanic's lien with the intent to defraud, you must find that Ejong's lien is invalidated.

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[2] Tanota also proposed an instruction on the definition of fraud which read:

The elements of fraud include:

1. a misrepresentation;
2. knowledge of falsity (or scienter);
3. intent to defraud to induce reliance;
4. justifiable reliance;
5. resulting damages.

RA, tab 245 at 29 (Am. Proposed Jury Inst.).

> If you find that Guam Top Builders overstated the amount of its mechanic's lien with the intent to defraud, you must find that Guam Top Builder's lien is invalidated.
>
> Source: 7 G.C.A. § 33401; *Henley v. Pacific Fruit Cooling & Vaporizing Co.*, 127 P. 800 (Cal. Ct. App. 1912).

RA, tab 245 at 21 (Am. Proposed Jury Inst.).

[17] In its Answer, Tanota pleaded as affirmative defenses:

> 6. Both Plaintiffs GTB and Ejong have willfully and intentionally filed claims of lien in excess of the amounts permitted by their respective contracts and by law.[3]
>
> . . . .
>
> 8. The lien claims of both Plaintiff[s] GTB and Ejong are false and fraudulent.
>
> . . . .

RA, tab 71 at 5 (Answer, Feb. 9, 2001).

[18] Although a trial court has broad discretion in formulating jury instructions, "a party is entitled to have the jury instructed on its theories if the proposed instructions are correct statements of the law and supported by the evidence." *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1180 (8th Cir. 1997) (citing *Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1063 (8th Cir. 1995)); *see also People v. Jones*, 2006 Guam 13 ¶ 35. Conversely, a party is not entitled to an instruction if the issue is not properly before the court. *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1287 (11th Cir. 2008). A party is entitled to an instruction when the instruction accurately states the law and is supported by the evidence.

[3] GTB and Ejong contend that Defense # 6 alleges fraud that is a statutory defense under 7 GCA § 33401 to a mechanic's lien foreclosure action, but that as the case developed, factually there was little support for this defense. Appellees' Br. at 11. In particular, Tanota failed to rebut their Trial Exhibit 86, demonstrating their actual costs, and consequently, there was no showing that the lien amounts claimed by Tanota were made with any "intent to defraud." *Id.*

[19] In *Avery*, this court determined that the trial court erred in rejecting a proposed instruction, where the proposed instruction "adequately encapsulate[d] the law" relating to the crux of a parties' claim, "recited a legally cognizable theory of recovery," and the principle set forth in the proposed instruction was not "substantially covered by any other given instruction," and consequently, the failure to instruct was prejudicial. 2002 Guam 19 ¶¶ 35-36 (relying on cases from disparate jurisdictions).

[20] Tanota suggests we evaluate instructional error by applying three factors articulated in *Goldsmith*, wherein the Eleventh Circuit held that "[a] refusal to give a requested instruction is erroneous only if '(1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party.'" 513 F.3rd at 1287 (quoting *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1295 (11th Cir. 1998)); *see also* Appellants' Br. at 11 (citations omitted).

[21] We adopt the test in *Goldsmith* and examine first, the second factor that the fraud instructions dealt with an issue properly before the jury. The parties dispute whether the trial court bifurcated the trial, separating the factual issues from the primarily legal issues related to the liens' validity.

[22] GTB and Ejong contend that the trial court indicated at the continued pre-trial status hearing that the court was considering bifurcating the trial, whereby the jury would determine the factual issues of whether there was a contract, with whom, and whether there was money owed and how much, but the trial judge would determine the issues regarding the mechanic's lien enforcement. Appellees' Br. at 2 (citing Tr. at 9-10 (Status Hrg., Jan. 17, 2007)). GTB and Ejong submit the bifurcation was confirmed the following day. *Id.* (citing Tr. at 12-14 (Status

Conf., Jan. 18, 2007)). Tanota, on the other hand, contends that the trial was not bifurcated and that the trial court determined that all issues would proceed to the jury. Appellants' Reply & Resp. Br. at 9-10 (Apr. 12, 2010).

[23] Discussion on the scope of the jury trial initially ensued at the pre-trial conference. Tr. at 3-5 (Pre-trial Conf., Jan. 12, 2007). The trial court informed the parties to file memoranda on their positions, and the matter was continued. *Id.* at 5. At the continued hearing, after oral argument from the parties, the trial court stated that the jury would decide the factual issues related to the lien claims if the case was to proceed to trial. Tr. at 25 (Status Hrg.). The court informed the parties it would issue a decision the following day. *Id.* at 25-26. The next day, the trial court declined to find that GTB and Ejong had a right to a jury trial on the equitable claim, here the validity of the mechanic's liens, when the claim was infused with legal issues. Tr. at 12-14 (Status Conf.); RA, tab 253 at 5-6 (Dec. & Order). The court decided to proceed to a jury trial on all triable issues in the matter, on the grounds that Tanota made a jury demand and did not specify issues it wished to be tried before a jury, and in failing to specify the issues, the demand made was only a demand for all triable issues pursuant to Rule 38(c)[4] of the Guam Rules of Civil Procedure . Tr. at 12-14 (Status Conf.).

[24] The trial was clearly bifurcated and legal issues relating to the validity and perfection of the mechanic's liens were reserved by the trial court. The issue of the invalidation of the mechanic's liens including the lien perfection,[5] were not properly before the jury, and therefore it was not proper for the trial court to instruct the jury on Tanota's proposed instructions on the

[4] Rule 38(c) states that "[i]n the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable." Guam R. Civ. P. ("GRCP") 38(c).

[5] Tanota also claimed it was error for the trial court to refuse to instruct the jury on its proposed instructions on whether GTB and Ejong perfected the liens under Guam's mechanic's lien laws. Because we find that the trial was bifurcated, the trial court did not abuse its discretion in rejecting Tanota's proposed instructions on this issue.

invalidation of the lien due to fraud, or whether the liens were perfected, as well as the other requested fraud instructions. Tanota's proposed fraud instructions were not based on the fraud argued at trial. Rather, at trial Tanota argued that GTB, Ejong and AES intended to defraud the bank by increasing the dummy invoices, which is not the same type of fraud as that in the proposed instruction. The "intent to defraud" in the proposed instruction and the cited statute relates to an overstatement in the amount of a mechanic's lien, not to the overstatement of amounts invoiced to a bank. Here, there were two lien claims in the amounts of $928,000.00 and $1.7 million. GTB and Ejong did not file liens in excess of the amounts permitted by their respective contracts or by law. Moreover, Tanota was not a party to the dummy invoices created between GTB & Ejong and AES, and the fact that Tanota was harmed because of the dummy invoices was not an affirmative defense pled by Tanota. Therefore, we find no abuse of discretion by the trial court in refusing to instruct the jury on Tanota's proffered fraud instructions. Because the issues were not properly before the jury, we need not reach the other *Goldsmith* factors for evaluating instructional error outlined above.

c. Unclean Hands Instruction

[25] Tanota next argues that the trial court erred in rejecting its proposed instruction based on the "unclean hands" doctrine. Tanota submits that it properly raised the affirmative defense in its answer and was therefore entitled to an instruction on this issue. GTB and Ejong claim that Tanota's defense of unclean hands involved bank fraud and therefore was not properly pleaded with particularity as required under Rule 9(b) of the Guam Rules of Civil Procedure. In considering the alleged error, the trial court stated that Tanota failed to explain how the "proposed instruction would have altered the outcome" of the case. RA, tab 304 at 14 (Dec. &

Order, Mar. 19, 2009). Further, after reviewing the evidence, the court found that even if the proposed instruction was given, the jury's verdict would not have changed. *Id.*

Tanota's proposed instruction read:

Unclean Hands

> If you find that Guam Top Builders intended to defraud Tanota Partners and/or HSBC, the law requires that the doctrine of unclean hands be applied and that you leave the parties as you found them.
>
> If you find that [Ejong Construction, Inc.] intended to defraud Tanota Partners and/or HSBC, the law requires that the doctrine of unclean hands be applied and that you leave the parties as you found them.

RA, tab 245 at 28 (Am. Proposed Jury Inst.).

[26] The doctrine of unclean hands is an affirmative defense invoked by defendants to prevent a plaintiff from obtaining relief. *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 393 (Ct. App. 2008) (citing *Kendall-Jackson Winery, Ltd. v. Super. Ct.*, 90 Cal. Rptr. 2d 743, 746 (Ct. App. 1999)). "Traditionally, the doctrine of unclean hands is invoked when one seeking relief in equity has violated conscience, good faith or other equitable principles in his prior conduct." *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, Local 1304*, 39 Cal. Rptr. 64, 96 (Dist. Ct. App. 1964) (citations omitted). "Any unconscientious conduct in the transaction may give rise to the defense." *Burton v. Sosinsky*, 250 Cal. Rptr. 33, 41 (Ct. App. 1988) (citations omitted). Whether the defense of unclean hands should bar a remedy otherwise available depends upon an analysis of "the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries." *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 256 (Ct. App. 1990).

[27] Tanota argued at trial that GTB and Ejong engaged in a scheme to defraud Hong Kong Shanghai Bank Corporation ("HSBC") and Tanota. "A party has the right to have [its] theory of

the case presented to the jury by instructions, if there is evidence to support it." *Alley v. Praschak Mach. Co.*, 366 So. 2d 661 (Miss. 1979) (citations omitted). As discussed above, the affirmative defense of fraud pleaded by Tanota was based on the alleged overstatement of GTB and Ejong's lien claims with the intent to defraud, and not on the alleged bank fraud. There was no evidence presented at trial which showed that the dummy invoices to HSBC were somehow related to the inflation of the lien claims. Again, the fraud claims pleaded by Tanota as affirmative defenses were that the lien claims were contractually and unlawfully excessive as well as false and fraudulent. RA, tab 71 at 5 (Answer). Tanota has failed to show how the dummy invoices relate to the increase in the lien claims. The unclean hands instruction did not deal with an issue properly before the jury and therefore we find that the trial court did not abuse its discretion in refusing to instruct the jury with this instruction.

d. Instruction on Mechanic's Liens -- Materials and Labor Only[6]

[28] Tanota also argues error in the trial court's refusal to instruct the jury that loans are not recoverable under a mechanic's lien. The proposed instruction read:

Mechanic's Liens – Materials and Labor Only

> A mechanic's lien may be filed for the value of labor and materials only. If you find that Ejong was paid in full for the materials it provided to the Outrigger project, and thereafter made a loan or transferred money to John Sherman or AES Construction, Inc., you must find that Ejong is not entitled to a mechanic's lien for the amount loaned or transferred.

RA, tab 245 at 20 (Am. Proposed Jury Inst.).

[29] GTB and Ejong assert it was not error to refuse this instruction because the issue of whether GTB and Ejong were entitled to a mechanic's lien was not before the jury. GTB and

[6] Tanota objected at trial to the trial court's refusal to instruct the jury as proposed, but this claimed error was not raised in its renewed motion for a judgment as a matter of law or alternatively for a new trial.

Ejong also submit that Tanota abandoned the loan defense and failed to submit a proposed instruction with acceptable wording. Appellees' Br. at 14. Finally, GTB and Ejong submit no evidence was presented at trial of a loan to Sherman. At trial, Jae Park, President of GTB, testified that it was understood the $923,000.00 was John Sherman's money and that the theory of the loan to Sherman was a theory suggested by prior counsel. Tr. at 31-32 (Jury Trial, Jan. 25, 2007). John Sherman denied the existence of a loan. Tr. at 38-39 (Jury Trial, Feb, 9, 2007). Jong Kwan Lee, President of Ejong Construction, testified and also denied it was a loan. On cross-examination, Lee stated:

> Q. You testified yesterday that you recalled in 1998 and 1999 that you originally said Ejong had loaned Nine Hundred and Twenty-three Thousand Dollars ($923,000) to John Sherman; correct?
>
> IA. Yes.
>
> Q. Okay. And you said you did it because your lawyer told you to call it a loan?
>
> IA. Yes.
>
> . . . .
>
> Q. Okay.
>
> So, are you telling me, then, that when you said in 1999 that you loaned money to John Sherman, that that was a lie?
>
> IA. I . . . I would not con-- I would not call it – I will not see it as a lie.
>
> In . . . in truth, because I don't know American law . . .
>
> . . . as I stated yesterday, with Ejong's provisions of the steel and not getting paid, after consultation with an American attorney, it was stated that in order to resolve the issue, it would be less complicated to deal with it as . . . or treat it as a loan; and, as such, the claim was stated as a loan.
>
> Q. Okay.

Tr. at 11, 16 (Jury Trial, Feb. 2, 2007).

[30] Neither party presented any evidence of a loan agreement. The testimony of the witnesses at trial did not establish that Ejong made a loan to Sherman; instead, as the trial court concluded, the testimony about a loan was a legal theory devised by Ejong's former counsel.[7] Tanota urged that the instruction was proper because there was evidence of a loan and the instruction was necessary in order to allow the jury to determine whether Ejong was paid for the materials supplied. As we have previously held, a trial court's denial of a jury instruction will be upheld so long as the instructions actually given adequately apprise the jury as to the law it is to apply. *See Avery*, 2002 Guam 19 ¶¶ 34, 36. Here, the proposed instruction would have allowed the jury to determine whether to invalidate the lien if it found there was evidence of a loan. GTB and Ejong abandoned the loan theory, and Tanota also abandoned the loan theory when it moved for a directed verdict. Tanota maintained at trial that GTB and Ejong were fully paid for the labor and materials it supplied for the project, and the jury was instructed on this defense. Tr. at 14 (Jury Trial, Feb. 16, 2007). The trial court instructed the jury on a loan definition[8] and also provided the following instructions:

> In this case you are presented evidence that Letters of Credit were issued and drawn down. If after reviewing the Letters of Credit you find that the Letters of Credit were intended by the parties to the Letter of Credit to service [sic] payment for the steel, you may find that *Ejong received the money and that the money was to be applied toward the payment of steel.*
>
> You have received evidence that Plaintiff, Guam Top Builders and Ejong, each recorded liens against the Outrigger Hotel. Under Guam [l]aw any person or corporation who furnishes labors [sic] or materials used in the construction of any building on Guam is entitled to record a lien against the property to secure

[7] Although not an issue on appeal, after trial, the trial court granted a directed verdict in Sherman's favor on the claim of unjust enrichment filed by Ejong and found that only "contradictory evidence was presented on [Ejong's] claim of debt" and the witnesses' testimony revealed that Ejong did not loan Sherman any money. RA, tab 253 at 12-13 (Dec. & Order).

[8] The instruction read: "A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrowed." Tr. at 31 (Jury Trial, Feb. 16, 2007).

> payment for such labor and materials. These liens are called mechanic's liens. *Such liens shall not exceed in the amount the reasonable value of the labor done or materials furnished or both* or for which the lien is claimed, nor the price agreed upon between the claimant and the person by whom he was employed.

Tr. at 29-31 (Jury Trial, Feb. 16, 2007) (emphases added).

[31] The jury had to determine whether any sums were owed to GTB and Ejong, not whether they were entitled to a lien. By providing these instructions, the jury was properly apprised of what a loan was and that under Guam's lien laws, GTB and Ejong's lien claims were limited to payment for materials and labor supplied. The jury was also instructed that if it determined the Letters of Credit served as payment, the jury should find that Ejong received the money and that the money was to be applied to the payment of the steel. It was therefore proper for the trial court not to instruct the jury on Tanota's proposed instruction for materials and labor provided because the instruction did not deal with an issue properly before the jury.

e. Instruction on Whether Tanota or its Agent was a Party to an Agreement to Allocate Funds to Sherman

[32] Tanota also argues it was entitled to a jury instruction on whether Tanota was a party to an agreement authorizing Ejong's allocation of funds to Sherman. Tanota contends that it was error for the trial court to refuse its requested jury instructions on the principles of agency and consent under Guam's mechanic's lien laws. Appellants' Br. at 14-15. Tanota submits that without the requested instructions, "the jury had no way of knowing that there are such limitations on the scope of an owner's responsibilities under the mechanics' lien law." Appellants' Br. at 14. In response, GTB and Ejong point out that while Tanota argues instructional error, Tanota did not identify the requested instructions or indicate when the instructions were requested. Appellees' Br. at 17-18. In reply, Tanota confirmed its argument was not based on any specific requested jury instruction but instead that it was entitled to

judgment as a matter of law because GTB and Ejong failed to prove "agency" as an element of its lien claims. Appellants' Reply & Resp. Br. at 2-3. The record is devoid of any proposed instructions by Tanota on the agency principle or any indication that Tanota objected with respect to any of the instructions on agency approved by the court.

[33] Tanota's argument of instructional error on the agency theory is intertwined with the argument that GTB and Ejong failed to produce evidence that the lien claims were within the scope of Tanota's agency consent. Specifically, Tanota argues, Ejong had the burden of establishing that the funds were allocated pursuant to an agreement by the parties. Appellants' Reply & Resp. Br. at 2. Tanota contends that Ejong did not present competent evidence to make the required showing, and the trial court failed to instruct the jury that such failure would bar GTB and Ejong's recovery. *Id.* Tanota submits it is irrelevant that it did not request a jury instruction on whether Tanota was a party to an agreement relating to the diversion of funds because Ejong failed to meet its burden of presenting evidence that the allocated funds received were a result of an agreement among the parties. *Id.* The jury was instructed as follows:

> A 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 by the owner's or an agent of the owner's request. Under Guam lien law, every contractor, sub-contractor, designer, builder, or other person having chartered the construction in whole or in part of any building, is the agent of the owner.

Tr. at 51 (Jury Trial, Feb. 16, 2007). The prior Rule 51 of the Guam Rules of Civil Procedure, which was in effect at the time of the trial, states:

> **Rule 51. Instructions to Jury: Objections.**
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless he

> objects thereto before the jury retires to consider the verdict, stating distinctly the matter objected to and the ground of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Guam R. Civ. P. ("GRCP") 51 (1997).

[34] "Normally, to 'preserve for appeal a challenge to a jury instruction, the challenging party must have clearly stated to the trial court the matter to which the party objects and the grounds for that objection.'" *Fenwick*, 2009 Guam 1 ¶ 10 (quoting *Avery*, 2002 Guam 19 ¶ 27); *see also Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1156-57 (7th Cir. 1989) (holding that in order to assign error for a lower court's failure to give an instruction, a party "must have objected thereto before the jury retired to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." (citing Fed. R. Civ. P. 51 (1987)). Tanota asserts that the trial court failed to provide an instruction on whether Tanota or its agent was a party to an agreement authorizing Ejong to allocate funds to Sherman, but the record is devoid of any objection by Tanota. Tanota therefore failed to preserve its objection on appeal.

[35] Prior to the amendment of Rule 51 of the Federal Rules of Civil Procedure in 2003, most federal circuit courts of appeal refused to review for plain error the trial court's giving or failure to give a jury instruction when no objection thereto was made at trial unless it was an exceptional case involving error so fundamental as to result in a miscarriage of justice. *See, e.g.*, *Patton v. Archer*, 590 F.2d 1319, 1322-23 (5th Cir. 1979) ("It is true that even absent [a Rule 51] objection an appellate court will notice error so fundamental as to result in a miscarriage of justice, but that power will only be exercised in exceptional cases . . . ." (citation and internal quotation marks omitted)); *Mazer v. Lipschutz*, 327 F.2d 42, 52 (3d Cir. 1963) ("'An appellate court may, in its discretion, disregard Rule 51 when the error claimed is plain and may result in a miscarriage of justice * * *.' This power should be exercised sparingly . . . ." (quoting *McNamara v. Dionne*,

298 F.2d 352, 355 (2d Cir. 1962))). *But see Deppe v. Tripp*, 863 F.2d 1356, 1361-62 (7th Cir. 1988) ("[W]e now hold that in civil cases a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial."). This is because the federal rules in existence prior to 2003,[9] like the 1997 version of the Guam Rules of Civil Procedure in effect at the time of trial, did not have an express provision generally allowing for plain error review, and the language in Rule 51 indicated that such review was prohibited, as it precluded an assignment of error where there was no objection and grounds given for the objection before the jury retired to consider the verdict. *See Higbee v. Sentry Ins. Co.*, 440 F.3d 408, 409 (7th Cir. 2006). Thus, "the plain error doctrine, at best, has an extremely limited application" to the alleged jury instruction error at issue here. *Deppe*, 863 F.2d at 1361.

[36] Here, Tanota claims GTB and Ejong had the burden of showing the funds were allocated pursuant to an agreement reached by the parties and that the diversion of funds was at the request of Tanota as the owner or of an agent of Tanota. Tanota argues that not only was there insufficient evidence to prove this claim, the failure to instruct the jury on this issue was plain error. Appellants' Reply & Resp. Br. at 5. Even applying a plain error analysis, there was no error because the jury was instructed that the lien claims could not be offset by money allocated to another party if there was evidence that the allocation was done at Tanota's request or at the request of its agent, in this case AES. It is undisputed that Ejong disbursed funds to Sherman

[9] Prior to December 1, 2003, the relevant portion of Federal Rules of Civil Procedure ("FRCP") Rule 51 stated: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." *Higbee v. Sentry Ins. Co.*, 440 F.3d 408, 409 & n.1 (7th Cir. 2006) (quoting Fed. R. Civ. P. 51 (1987)). But for a few minor differences, this language is verbatim the language in the 1997 version of GRCP 51. Since the changes to the FRCP in 2003 and the GRCP on June 1, 2007, Rule 51 now explicitly allows for plain error review of jury instructions in a civil case. *See* Fed. R. Civ. P. 51(d)(2) (2003) ("A court may consider a plain error in the instructions affecting substantial rights that has not been preserved . . . ."); GRCP 51(d)(2) (2007) (same). FRCP 51 was further amended in 2007 for style and clarity, but the substance remains the same. Fed. R. Civ. P. 51 advisory committee's note (2007).

and GTB. There was also testimony that Ejong disbursed the funds to Sherman at Park's request. Park testified that several payments were disbursed to other third parties as directed by Sherman. Notwithstanding that the trial court may have erred in not instructing the jury to decide whether Tanota or its agent was a party to an agreement on the disbursement of funds, the jury was instructed on whether to offset the lien claims when funds are allocated to another party. As such, the trial court did not err in not instructing the jury on whether Tanota or its agent was a party to an agreement to allocate funds to Sherman.

2. Whether the Trial Court Erred in Taking Issues Away from the Jury

[37] Tanota also argues that the trial court erred by taking issues away from the jury after the trial had concluded. Specifically, Tanota asserts that the trial court elected to resolve certain factual issues post-trial by applying the "sufficient evidence" standard. Appellants' Br. at 19. In doing so, Tanota submits, the trial court erred because once the court determined the jury would decide all the claims, it was precluded from later treating the jury's verdict as advisory. Tanota further argues that the jury, as the trier of fact, should have applied the preponderance of the evidence standard. Finally, Tanota contends, the trial court erred in concluding that the failure to instruct the jury on its equitable defenses would not have altered the outcome of the case. Appellants' Br. at 19.

[38] In response, GTB and Ejong assert that the trial court did not take away equitable defenses from the jury and that Tanota failed to object to this alleged error at trial. GTB and Ejong argue that while Tanota asserts it was error, Tanota did not allege the specific facts or issues taken away from the jury. Appellees' Br. at 19.

[39] Tanota claims "the jury was rendered powerless to make findings" on Tanota's principal defenses of fraud, a loan, unclean hands, and compliance under Guam's mechanic's lien statutes

because the trial court failed to instruct the jury on these defenses. Appellants' Reply & Resp. Br. at 20. We addressed earlier in this opinion Tanota's alleged instructional error on its affirmative defenses and because we find that the trial was bifurcated and the issues were not properly before the jury, we cannot conclude that the trial court erred by taking issues away from the jury when it failed to instruct the jury on Tanota's defenses. Moreover, there is nothing in the record to suggest that the jury did not apply the preponderance of the evidence standard. The court instructed the jury as follows: "Preponderance of the evidence means that evidence has more convincing force, than that opposed to it . . . . You should consider all of the evidence bearing upon every issue regardless of who produced it." Tr. at 14 (Jury Trial, Feb. 16, 2007). The jury was also instructed that "Plaintiffs have the burden of proving by a preponderance of the evidence, all the facts necessary to establish the essential elements of their claims." Tr. at 13 (Jury Trial, Feb. 16, 2007). Tanota urges that the trial court applied the wrong standard; however, the sufficient evidence standard was used to explain the trial court's decision on the motion for judgment as a matter of law. In its Decision the court stated,

> To prevail on a renewed motion for judgment as a matter of law, Defendants must show record evidence that the motion was preserved and that the verdict cannot be supported by substantial evidence, not whether overwhelming evidence supports a contrary assertion. Substantial evidence is defined as, "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions."

RA, tab 304 at 4-5 (Dec. & Order, Mar. 19, 2009) (citations and internal quotation marks omitted).

[40] For the court to conclude that there is not sufficient evidence, the court must examine if the evidence would have led a rational man to the conclusion reached by the jury on the basis of the evidence presented at trial. *Cohen v. Hallmark Cards, Inc.*, 382 N.E.2d 1145, 1147-48 (N.Y.

1978). The criteria used in making this determination are essentially the same criteria used by a trial judge when asked to direct a verdict. *Id.* at 499. In this case, the trial court concluded there was sufficient evidence for the jury to find that Ejong's activities were not equitably unclean and that Ejong did not act improperly. RA, tab 304 at 5 (Dec. & Order). The trial court's finding was based on its examination of the evidence presented at trial and the witnesses testimony; therefore, we conclude the trial court did not apply the wrong standard.

3. Whether the Jury's Special Verdict was Inconsistent and if so, Whether the Trial Court Erred in Reconciling the Verdict and Entering Judgment in the Amount of $1,491,658.17

[41] We next examine the alleged inconsistency in the jury's special verdict. Tanota characterizes the jury verdict as inconsistent because the jury found there was an agreement by the parties on the price of the steel supplied by Ejong, and yet the jury awarded damages in the amount of $1,491,658.17. This amount, Tanota claims, was inconsistent with the evidence presented at trial of the agreed upon unit price of the steel. Because of this inconsistency, Tanota argues, a new trial was warranted. Appellants' Br. at 22. Tanota contends that in denying its motion for a new trial and entering judgment, the trial court erred because this court previously stated, "[I]f 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." Appellants' Br. at 20 (quoting *Guam Top Builders*, 2006 Guam 3 ¶ 13 n.8.). Tanota submits the evidence established that there was an agreement as to the unit price, which would bring Ejong's claim to $928,000.00 and not $1,491,658.17 as the jury found.

[42] Ejong's defense is that the judgment was entered properly and in accordance with the jury's verdict. Ejong submits that the jury awarded Ejong "its actual costs of labor and material for fabricating the steel plus 10% for overhead and profit." Appellees' Br. at 20. Ejong states

that the apparent inconsistency was that the jury awarded Ejong a "cost-plus amount after finding that Tanota Partners, AES Construction, Inc., or Guam Top Builders had an 'agreement' with Ejong 'regarding the price of the materials' Ejong supplied to the Outrigger project." *Id.* (quoting ER, vol. 1, tab 7 at 2 (Special Verdict)) (emphases omitted). Ejong maintains that the jury was not instructed to find an express agreement for unit prices but rather was instructed that the agreement may be expressed or implied. Ejong concludes, therefore, that the jury followed the court's instructions and found an implied agreement to pay a reasonable value of the steel supplied, which would make the verdict consistent.[10]

[43] After the jury returned its verdict, neither party objected to the verdict before the jury was discharged. Before addressing the merits of the claimed inconsistent verdict, we must decide whether the failure to object to the verdict as being inconsistent constitutes a waiver. GRCP 49 was adopted from Federal Rules of Civil Procedure Rule 49. In *Johnson v. ABLT Trucking Co.*, the Tenth Circuit, in construing the Rule 49 waiver issue, stated that "[w]hen the jury returns a special verdict,[11] . . . a party is not required to object to inconsistencies in the verdict before the

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[10] The jury returned a special verdict in accordance with GRCP 49(a), which states:

> **Rule 49. Special Verdicts and Interrogatories.**
>
> (a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon such issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall [be] deemed to have made a finding in accord with the judgment on the special verdict.

GRCP 49(a) (1997). Minor stylistic changes to the rule were made in 2007; the substance, however, remains the same. *See* GRCP 49(a) (2007).

[11] Neither party disputes that the verdict entered here was a special verdict. In a special verdict, the jury is

jury is discharged in order to preserve the issue." 412 F.3d 1138, 1141 (10th Cir. 2005); *see also Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 851 (10th Cir. 2000) ("Although a party waives a claim of inconsistent verdicts based on a general jury verdict under Fed.R.Civ.P. 49(b), if not timely raised, this rule does not apply to special verdicts under Fed.R.Civ.P. 49(a)"). The court in *Johnson* justified the no-waiver rule by referencing the text of Rule 49(a), "which, unlike Rule 49(b),[12] does not direct the court to resubmit an inconsistent verdict to the jury for further deliberation." *Johnson*, 412 F.3d at 1141. Absent any express language in Rule 49(a) for resubmission to the jury of an inconsistent special verdict, we find *Johnson* persuasive and similarly conclude that a party is not required to object to an inconsistent verdict before the jury is discharged.

[44] Turning to the merits of Tanota's argument on the inconsistent verdict, we next address whether the jury's verdict was inconsistent, and if so, whether the trial court erred in reconciling what it believed was an inconsistent verdict. Generally, a trial court has a duty to harmonize, if reasonably possible, a jury's responses in a special verdict. *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963). "'Where there is a view of the case that makes the jury's answers . . .

presented with specific questions of fact. *Johnson*, 412 F.3d at 1142. "After the jury returns its verdict, the court applies the law to the facts found by the jury and enters judgment accordingly." *Id.* (citing *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003)). The verdict form in this case required the jury to answer specific questions of fact regarding damages. The judgment required the trial court to apply the law to the facts found by the jury, and therefore the verdict here was a special verdict pursuant to GRCP Rule 49(a).

[12] Federal Rules of Civil Procedure Rule 49(b), which is identical to GRCP 49(b), states in pertinent part:

> When the [special interrogatory] answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. R. Civ. P. 49(b) (1987); *see also* GRCP 49(b) (1997).

consistent, they must be resolved that way.'" *Id.* (quoting *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 335, 364 (1962)). A verdict will be set aside only where it is so logically and legally inconsistent that it cannot be reconciled. *Granger v. Fruehauf Corp.*, 412 N.W.2d 199, 203 (Mich. 1987).

[45] "A court may not strike down jury answers on the ground of conflict if there is any reasonable basis upon which they may be reconciled." *Luna v. S. Pac. Transp. Co.*, 724 S.W.2d 383, 384 (Tex. 1987) (quoting *Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980)). When reviewing the jury's answers, the reviewing court does not ascertain whether the findings may be viewed as conflicting, but rather, the court must determine if there is any reasonably possible basis upon which the answers may be reconciled. *Id.* (quoting *Bender*, 600 S.W.2d at 260). Moreover, "[a] jury's verdict may not be overturned merely because the reviewing court finds the jury's resolution of different questions in the case difficult, though not impossible, to square." *Johnson*, 412 F.3d at 1144. Where there is an interpretation of the evidence that provides a logical explanation for the jury's findings, the verdict is not inconsistent. *Lagalo v. Allied Corp.*, 577 N.W.2d 462, 463, 465-66 (Mich. 1998) (quoting *Granger*, 412 N.W.2d at 202).

[46] In the present case, the jury answered the following questions on the special verdict form:

1. Did Tanota Partners, AES Construction, Inc., or Guam Top Builders have an agreement with Ejong regarding the price of the materials Ejong supplied to the Outrigger project?

   Yes ___X____ No_________

   *IF YOU ANSWERED NO, PROCEED TO QUESTION 4.

2. If you answered yes to Question 1, was the agreed upon price paid in full?

   Yes_________ No____X____

*IF YOU ANSWERED YES, PROCEED TO QUESTION 7.

3. If you answered no to Question 2, please state the balance owing under the agreement:

<u>$1,491,658.17</u>

*PROCEED TO QUESTION 7.

RA, tab 248 at 2 (Special Verdict). Questions 4, 5, and 6, which the jury did not answer, involved a determination by the jury of the reasonable value of the materials supplied if no agreement was found.

[47] During the post-verdict proceedings, the trial court concluded that the special verdict was internally inconsistent on the agreed price of steel supplied by Ejong. Specifically, the court stated that the "jury's finding that an agreement existed for the purchase price of steel was inconsistent with its determination as to the amount owing under such agreement because the jury's award of $1,491,658.17 to Plaintiff Ejong more closely reflects the market value of materials as testified by Plaintiffs' expert, and not $928,620.00, the amount Ejong claimed as the balance under the agreement." RA, tab 253 at 10 (Dec. & Order). The court further stated, "As a result, the two particular findings are internally inconsistent because a finding of fair market value contradicts a finding that there was an agreement for a fixed purchase price." *Id.* Although the court found the special verdict was internally inconsistent, the court recognized its duty to attempt to harmonize the inconsistent responses in the special verdict, where possible.

[48] As a result, the court found that the amount owing under the agreement should reflect $928,620.00 and not the amount determined by the jury of $1,491,658.17. *Id.* at 11. The trial court later determined that GTB and Ejong substantially complied with the mechanic's lien requirements and entered judgment in the amount of $928,620.00. Thereafter, Tanota renewed its motion for a judgment as a matter of law or in the alternative for a new trial. Ejong

subsequently presented another theory for the jury's award. Ejong stated that in the court's earlier decision, the court essentially found, based on the jury's answers on the special verdict form that Ejong had an agreement for a fixed purchase price and therefore the jury's award was inconsistent. In attempting to understand the jury's award, Ejong explained that the only reasonable conclusion for the award was that the jury determined that Ejong was owed the amount under an agreement to pay a reasonable value for the steel, which the jury determined was the actual cost plus a 10% markup for overhead and profit. Supplemental Excerpts of Record ("SER") at 39-42 (Pls.' Post-Trial Mot. Summ. J., Aug. 9, 2007). Ejong further explained that the evidence at trial established that both Park and Lee testified on Ejong's actual costs, and the total direct cost provided to the jury was $7,887,549.84. *Id.* The 10% markup to the actual costs resulted in an amount of $8,676,304.82, and after deducting the amount already paid to Ejong, the balance owing was $1,491,658.17, the exact amount awarded by the jury.[13] Ejong further clarified that the jury was not instructed to determine whether there was an express agreement to pay the unit price of the steel; however, the trial court and counsel assumed that the jury's finding of an agreement for the price of the steel meant there was an express agreement to pay Ejong a unit price. In arguing that the verdict was not inconsistent, Ejong contended that it was reasonable to conclude that the jury followed the court's instructions and found there was an implied agreement to pay a reasonable amount for the steel supplied. *Id.* The trial court agreed with Ejong's explanation of the jury award and entered judgment in the amount of $1,491,658.17. RA, tab 304 at 11-12 (Dec. & Order).

[13] At trial, Park and Lee testified that they arrived at both the unit price figure of $928,620.15 and the reasonable value figure of $1,728,284.67 by adding a 13% markup for overhead and profit. Tr. at 12 (Jury Trial, Jan. 24, 2007) (testimony of Jae Park); Tr. at 120, 124 (Jury Trial, Feb. 1, 2007) (testimony of Jong Kwan Lee); *see also* Tr. at 50, 56 (Jury Trial, Feb. 15, 2007) (closing argument).

[49] Tanota, however, asserts this explanation is inconsistent with the jury's verdict because the evidence established there was an agreement between the parties on the unit price of the steel supplied. First, Tanota claims that while Sherman disputed the unit price claimed, he agreed that there was a specific price for the steel as outlined in the proposal submitted by Jae Park. Although Sherman testified that he later signed the proposal, the proposal mentions the contract amount for the supply and installation of steel, but does not indicate a specific unit price. ER, vol. 1, tab 13 at 1 (Proposal, Jan. 29, 1997). Additionally, the reference to the trial testimony of Sherman cited in Tanota's briefs does not support the proposition that Sherman agreed to the unit prices.[14] On cross-examination when asked about the contract amount in the proposal, Park testified that he had some discussion with Sherman about GTB installing the steel at $330 per ton.[15] Park's testimony also confirmed that there was an agreed upon unit price which was based on the publication of prices in Korea. Tr. at 100 (Jury Trial, Jan. 23, 2007); Tr. at 95-96 (Jury

[14] Sherman testified about receiving the proposal and later signing the proposal, but not about whether he agreed to the unit price of the steel. Tr. at 85-87 (Jury Trial, Feb. 8, 2007).

[15] Park's testimony at trial was:

Q. (By Mr. Clark) Okay. So I divide six three five zero zero zero, -- I divide that by 5,000. So you estimated the material supply would be 1,270 at that time; correct?

A. As I said that this amount was told to me by John Sherman. I just agreed and I put the numbers there. But this document shows that the material supply, if you calculate the unit price, that's correct, it'll come out to be $1,270 per ton.

. . . .

Q. Okay. Well, let's say sometime in February or March then, 1997, did you reach an agreement with Mr. Park – I'm sorry, Mr. Park – you reached an agreement with Mr. Sherman of AES Construction that Guam Top Builders would do the installation at $330 per ton; correct?

A. If you call it an agreement, I will say, yeah, I believe so. As I said that he said he will make the design simple enough so installation costs could come down from my first proposal of something like $480 to $330. So if you make the design simple enough, then I'll agree with you. So if you say that as a . . . as a reaching an agreement, then I will say yes.

Q. Okay.

Tr. at 67-68 (Jury Trial, Jan. 24, 2007).

Trial, Jan. 24, 2007). Lee testified that because there was no contract between GTB and Sherman, it was his understanding Ejong would be paid based on the unit price for steel which was agreed upon with Park. Tr. at 112-114 (Jury Trial, Feb. 6, 2007); Tr. at 14-15 (Jury Trial, Feb. 7, 2007). Both Park and Lee testified that the unit price for the steel did not remain the same throughout the project. Tr. at 94-97 (Jury Trial, Jan 24, 2007); Tr. at 113-114 (Jury Trial, Feb. 6, 2007). Park and Lee also testified that the unit prices listed on the commercial invoices presented to HSBC did not accurately reflect the actual unit prices, but that this was done in order to arrive at the amount of the requested Letters of Credit as directed by Sherman. Tr. at 144 (Jury Trial, Jan. 24, 2007); Tr. at 133-135 (Jury Trial, Feb. 1, 2007).

[50] In the first appeal of this case, we addressed whether there was a genuine issue of material fact regarding the existence and terms of an agreement for the price of steel and other materials supplied by Ejong. *Guam Top Builders*, 2006 Guam 3 ¶ 20. Based on the record at the time, we observed that there was a discrepancy 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. *Id.* We further stated that while Lee's deposition showed that he had discussions with Park on the unit price for the steel, Park had never testified to the existence or terms of such an agreement. *Id.* ¶ 19. As a result, we concluded that a genuine issue of material fact remained over the existence and terms of an agreement as to the price of materials Ejong supplied. *Id.* ¶ 23. We explained that under Guam's mechanic's lien laws, Ejong was "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. *Id.* We further stated that even assuming Ejong had an agreement for the unit price, there was a dispute as to whether the total contract price agreed upon was the invoiced amount or the amount reflected in the Material Cost breakdown. *Id.*

[51] At trial, both Park and Lee testified that there was an agreed upon unit price for the steel which was determined by the publications list in Korea. Their testimony also revealed that the amounts of the unit price were not consistent throughout the time Ejong supplied the steel.[16] Additionally, both Park and Lee testified that the unit prices on the commercial invoices were adjusted to match the total price of the negotiation, which amount was given by Sherman each time a letter of credit was issued. Tr. at 154 (Jury Trial, Jan 24, 2007). As we have previously stated, under Guam law, a contract may be either express or implied. *Guam Top Builders,* 2006 Guam 3 ¶ 14 (quoting 18 GCA § 86101 (2005)). The jury was instructed on this issue. Tr. at 26-27 (Jury Trial, Feb. 16, 2007). Accordingly, it was reasonable for the trial court to conclude that the jury followed the court's instructions and found there was an implied agreement between the parties to pay the reasonable value of steel supplied. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). The trial court had a duty to attempt to harmonize the verdict, which it did. Because there is an interpretation of the evidence that provides a logical explanation for the jury's findings, the verdict is not inconsistent. *See Lagalo*, 577 N.W.2d at 463, 465-66. The evidence at trial established a logical explanation for the jury's verdict, that is, that there was an implied agreement for AES to pay the reasonable value of the steel provided by Ejong, plus a 10% markup. The trial court did not abuse its discretion in harmonizing the verdict and in finding that the verdict was not inconsistent.

4. Whether the Trial Court Erred when it Awarded Prejudgment Interest to GTB and Ejong.

[52] Tanota also challenges the trial court's award of prejudgment interest to GTB and Ejong. Although a trial court's award of interest is reviewed for an abuse of discretion, *DeWitt*, 2003

[16] Park testified at trial that the same unit price was applied from February to June 1997 and then increased by about nine percent thereafter. Tr. at 96-97 (Jury Trial, Jan. 24, 2007).

Guam 20 ¶ 22 (citing *Sumitomo Constr. Co., Inc. v. Gov't of Guam*, 2001 Guam 23 ¶ 7; *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1136 (10th Cir. 2000)), whether prejudgment interest for an implied contract to pay the reasonable value of services or materials provided is permitted under 20 GCA § 2110 is a question of law warranting *de novo* review. *Tanaguchi-Ruth*, 2005 Guam 7 ¶ 81 ("[R]egarding the prejudgment interest awarded . . . and whether . . . damages were liquidated, our scope of review is de novo." (quoting *Folgers Architects Ltd. v. Kerns*, 633 N.W.2d 114, 128 (Neb. 2001))); *see also Bangert Bros. Constr. Co., Inc. v. Kiewit Western Co.*, 310 F.3d 1278, 1297 (10th Cir. 2002) ("Although an award of prejudgment interest generally is subject to review for abuse of discretion, any statutory interpretation or legal analysis is reviewed de novo." (citing *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1156 (10th Cir. 2000))); *McCarthy v. Estate of Krohn*, 16 So. 3d 193, 195 (Fla. Dist. Ct. App. 2009) ("A trial court's decision concerning a litigant's entitlement to prejudgment interest is reviewed de novo." (citing *Berloni S.P.A. v. Della Casa, LLC*, 972 So. 2d 1007, 1011 (Fla. Dist. Ct. App. 2008))); *see generally Quan Xing He v. Gov't of Guam*, 2009 Guam 20 ¶¶ 22-23 (citing *Mendiola v. Bell*, 2009 Guam 15 ¶¶ 11, 17) (reviewing questions of law *de novo*).

[53] Title 20 GCA § 2110 authorizes the award of prejudgment interest under specific circumstances:

> Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

20 GCA § 2110 (2005). "[T]he policy underlying authorization of an award of prejudgment interest is to compensate the injured party—to make that party whole for the accrual of wealth which could have been produced during the period of loss." *Wisper Corp. N.V. v. Cal.*

Commerce Bank, 57 Cal. Rptr. 2d 141, 147 (Ct. App. 1996) (quoting *Cassinos v. Union Oil Co.*, 18 Cal. Rptr. 2d 574, (Ct. App. 1993)).

[54] Title 20 GCA § 2110 was modeled after the 1950 version of California Civil Code § 3287. *See* 20 GCA § 2110, SOURCE. Section 3287 was amended in 1967 to add a subsection (b). Section 3287 now provides:

> (a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.
>
> (b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

Cal. Civ. Code § 3287 (Westlaw 1997). The Guam Legislature has not adopted an equivalent of subsection (b).

[55] In determining whether damages are "certain, or capable of being made certain" under section 3287(a), the California appellate courts generally agree that:

> Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage. Thus, the test for recovery of prejudgment interest under Civil Code section 3287, subdivision (a) is whether *defendant* actually knows the amount owed or from reasonably available information could the defendant have computed that amount. The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor. Thus, *where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate.*

Duale v. Mercedes-Benz USA, LLC, 56 Cal. Rptr. 3d 19, 26-27 (Ct. App. 2007) (citations and internal quotation marks omitted); *see also Wisper Corp.*, 57 Cal. Rptr. 2d at 147; *Leaf v. Phil Rauch, Inc.*, 120 Cal. Rptr. 749, 752 (Ct. App. 1975) (holding that prejudgment interest is not allowable where the amount of damages depends upon a judicial determination based upon conflicting evidence).

[56] In *Great W. Drywall, Inc. v. Roel Constr. Co.*, the court held that "[u]nder [section 3287(a)], prejudgment interest is allowable where the amount due plaintiff is fixed by the terms of the contract, or is readily ascertainable by reference to well-established market values. On the other hand, interest is not allowable where the amount of the damages depends upon a judicial determination based on conflicting evidence." 83 Cal. Rptr. 3d 235, 238 (Ct. App. 2008) (citations omitted)); *see also Marine Terminals Corp. v. Paceco, Inc.*, 193 Cal. Rptr. 687, 689-90 (Ct. App. 1983) ("Damages will be deemed 'capable of being made certain by calculation' if the amount due can be determined by reference to a fixed standard: e.g., a payment schedule . . . ; a readily ascertainable market value . . . ; or data supplied by plaintiff to defendant." (citations omitted)).

[57] In interpreting 20 GCA § 2110, we follow the reasoning in *Duale* and hold that the test for recovery of prejudgment interest is whether the defendant actually knows the amount owed or from reasonably available information could the defendant have computed that amount. Thus, prejudgment interest is allowable where the amount due under the plaintiff's claim for damages is fixed by the terms of the contract or is readily ascertainable by reference to well-established market values. However, where there is a dispute between the parties concerning the basis of computation of damages so that the amount of damages depends upon a judicial determination based on conflicting evidence, prejudgment interest is not allowable.

[58] Turning to the facts of this case, we find that as to Ejong, the trial court erred in awarding prejudgment interest because Ejong's damages were neither certain nor capable of being made certain, but rather it required a judicial determination of the actual amount due.

[59] In Ejong's original complaint, it sought to recover $928,620.15, plus interest, as the amount remaining unpaid for the structural steel and other materials it furnished for the construction of the Hotel. ER, vol. 1, tab 2 at 5 (Compl., Mar. 19, 1999). Ejong's Claim of Lien recorded on March 10, 1999, sought recovery of this same amount. *Id.* Ejong subsequently filed an amended complaint wherein it continued to allege that it was owed $928,620.15. *See* ER, vol. 1, tab 3 at 5 (First Am. Compl., Apr. 7, 1999). However, in its next amended complaint, Ejong alleged that it was owed $1,728,284.67, plus interest, and explained that it had mistakenly calculated the amount claimed in its March 10, 1999 Claim of Lien as $928,620.15, "which had been a cost estimate made prior to shipment of the steel and before changes to the quantities required for the project had been ordered." ER, tab 4 at 7 (Second Am. Compl., Sept. 22, 1999); *see also* ER, vol. 1, tab 5 at 5 (Third Am. Compl., Mar. 28, 2000) (continuing to allege that Ejong was owed $1,728,284.67). Ejong recorded a Claim of Lien for the new amount. ER, vol. 1, tab 4 at 8 (Second Am. Compl.); ER, vol. 1, tab 5 at 5 (Third Am. Compl.).

[60] At trial, there was an ongoing dispute as to whether there was an agreed upon unit price for the steel. Ejong requested that the jury award it either the "unit price" total of $928,620.15, or the reasonable value of the steel plus a 13% markup, which it alleged totaled $1,728,284.67. Tr. at 55-56, 69-70 (Jury Trial, Feb. 15, 2007). This fact along with the wide disparity between Ejong's original claim and its subsequent claim leads us to conclude that Ejong's damages were neither certain nor capable of being made certain, as it was likely unclear to Tanota what was

actually owed. Thus, a judicial determination of Ejong's damages was necessary to resolve the issue.

[61] Furthermore, while Ejong's expert witness, Alan Turner of Taniguchi-Ruth, opined that the amount alleged by Ejong to be its total cost for the materials provided for the project was a fair and reasonable market value for those materials, Tr., at 67-68 (Jury Trial, Feb. 7, 2007), on re-cross-examination, Turner admitted that he "look[ed] at what would reasonably be thought of as a fair market value on Guam," *id.* at 74. Although Turner gave his opinion as to the difference between acquiring steel from Korea as opposed to the United States, he only gave his "gut estimate" that steel from Korea is cheaper by "somewhere between 20 and 35 percent. Somewhere in there." *Id.* at 71. Without more, we are hard-pressed to find that the amount due Ejong was readily ascertainable by reference to well-established market values.

[62] Ejong argues that "Ejong's damages were made certain by calculation down to the penny," Appellees' Br. at 23, alluding to the jury's verdict awarding Ejong the reasonable value of the steel plus a markup of ten percent. However, in determining whether prejudgment interest is mandated under 20 GCA § 2110, we "look[] to the certainty of the damages suffered by the plaintiff, rather than to a defendant's ultimate liability . . . ." *Wisper Corp.*, 57 Cal. Rptr. at 147. Thus, the fact that the jury ultimately decided that Tanota owed Ejong the reasonable value of the steel is not itself dispositive of whether Ejong's damages were certain or capable of being made certain.

[63] Because of the underlying dispute as to the basis of the computation of Ejong's damages, these damages were neither certain nor capable of being made certain without judicial determination. Accordingly, the trial court erred in awarding prejudgment interest to Ejong.

[64] As to GTB, however, prejudgment interest was allowed. GTB's damages were certain by computation on the face of the Addendum to the MOU. The Addendum provided that AES would pay GTB fixed increments of $250,000.00 for completion of the remaining steel structure of the Hotel. ER, vol. 2, tab 41 at 1 (Addendum to Mem. of Understanding, Jan. 22, 1998). While AES paid GTB the first scheduled increment, it failed to pay GTB the second increment. The central dispute at trial was whether AES was liable to GTB for any amount of damages given GTB's failure to fully complete the structure. Although there was some dispute as to the validity of the Addendum, and although GTB also argued for the reasonable value of its services, it was clear that the basis for computing GTB's damages lied in either the Addendum or the MOU. The jury ultimately found that the Addendum modified the MOU, and awarded GTB $180,000.00 after offsetting the amount expended by AES to complete the remainder of the steel structure. RA, tab 248 at 3, 5 (Special Verdict).

[65] Because either AES or Tanota could have calculated the amount owed to GTB according to the terms of the Addendum, GTB's damages were certain or capable or being made certain by computation, and prejudgment interest was allowable.

5. Whether the Numerous Procedural Errors Alleged by Tanota Warrant a New Trial

[66] We next address the numerous procedural errors raised in Tanota's Opening Brief. Tanota asserts a new trial is warranted because: (1) the trial court initially determined the jury would decide the main issues in the case but later stated the jury verdict was merely advisory and it would determine the questions of fact regarding the amount of the lien; (2) the verdict was inconsistent; (3) the trial court applied the 1962 mechanic's lien law before trial and post-trial applied the 1998 mechanic's lien law; (4) there was a fatal variance in the pleadings; and (5) the

trial court failed to instruct the jury on instructions regarding the perfection of the mechanic's liens. Appellants' Br. at 28-29.

[67] Under Rule 13 of the Guam Rules of Appellate Procedure ("GRAP"), the failure to adequately brief an issue may be treated as a waiver of the issue on appeal. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 8 n.3; *see also Rinehart v. Rinehart*, 2000 Guam 14 ¶ 23 ("[I]f a party mentions a matter but then fails to make a complete legal argument on the issue, then we will refuse to analyze the matter."). We decline to address Tanota's argument on the applicable mechanic's lien law because Tanota failed to adequately brief the matter in its Opening Brief and in its Reply and Response Brief.[17] Tanota fails to explain how the alleged error by the trial court warrants a new trial and thus, this issue is deemed waived on appeal.

[68] Tanota's alleged errors regarding the scope of the jury trial, the failure to instruct the jury on the mechanic's lien statutory requirements, and perfection of the lien claims are addressed in our discussion of the bifurcation of the trial. We also addressed Tanota's arguments on the inconsistent verdict and need not examine the alleged error of fatal variance from the pleadings because, as we explained, the evidence at trial established a logical explanation for the jury's verdict, that there was an implied agreement for AES to pay the reasonable value of the steel provided by Ejong.

B. GTB and Ejong's Cross-Appeal

[69] Because we find that Ejong was not entitled to prejudgment interest, we need not address the cross-appeal issues that are premised on that award, namely, whether Ejong is entitled to

[17] In its Opening Brief, Tanota states that because of the page limitations in GRAP 13.2(e)(1), Tanota was precluded from making "a plenary discussion of the numerous procedural errors committed . . ." and could only briefly discuss the alleged errors. Appellants' Br. at 28. Although GRAP 13.2(e)(1) sets the page limitations, under GRAP 16(a)(7)(C) a party may move the court to exceed the page limitations. Here, Tanota filed a motion to exceed the page limitations in its Reply and Response Brief, which this court granted; however, Tanota did not move to exceed the page limitations in its Opening Brief. *See* Order, Mar. 19, 2010. In addition, Tanota did not brief the issue on the applicable mechanic's lien law in its Reply and Response Brief.

prejudgment interest from the date of final delivery of the steel as opposed to the date its mechanic's lien was recorded, and whether Ejong is entitled to post-judgment interest on its prejudgment interest award. Additionally, because we otherwise uphold the Judgment in favor of GTB and Ejong, we will not address the issue of whether the trial court erred in denying their Motion For Leave Of Court To File Plaintiffs' Fourth Amended Complaint, Adding a Claim Against Tanota Partners Based Upon An Undisclosed Agency, as this issue would have no bearing on Ejong's entitlement to prejudgment interest or GTB's entitlement to an additional $250,000.00 under the terms of the MOU. We turn now to the remaining issues on cross-appeal.

1. Whether GTB is Entitled to Post-Judgment Interest on its Prejudgment Interest Award.

[70] On cross-appeal, GTB argues that it is entitled to post-judgment interest on its prejudgment interest award.

[71] Tanota argues that this court already spoke on this issue in *Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20. In that case, this court stated that "[a]s a general rule compound interest is not favored by the law and is generally allowed only in the presence of a statute or an agreement between the parties allowing for compound interest." *Id.* ¶ 36 (quoting *Campbell v. Lake Terrace, Inc.*, 905 P.2d 163, 165 (Nev. 1995), *overruled on other grounds by Aviation Ventures, Inc. v. Joan Morris, Inc.*, 110 P.3d 59 (Nev. 2005)) (citing *Nation v. W.D.E. Elec. Co.*, 563 N.W.2d 233, 235 (Mich. 1997); *Norman v. Norman*, 506 N.W.2d 254, 255 (Mich. Ct. App. 1993)). The court stated further that "[t]he common law has long favored simple interest and disfavored compound interest, which it has characterized as interest on accrued interest." *Id.* (quoting *W.D.E. Elec. Co.*, 563 N.W.2d at 235). The court

found that because 18 GCA § 47106,[18] the statute which governs the rate of interest on judgments, is silent as to the issue of compound interest, interest shall be calculated based on simple interest rather than compound interest. *Id.* ¶ 38 (quoting *Norman*, 506 N.W.2d at 256).

[72] In reply, GTB argues that *DeWitt* is inapplicable to the instant case because there, the issue had to do with whether prejudgment interest should be simple or compounded, not with whether prejudgment interest merges into a final judgment on which statutory interest thereafter accrues. Cross-Appellants' Reply Br. at 3 (Apr. 27, 2010). GTB asks that this court clarify its ruling in *DeWitt* so that it could not be interpreted as disallowing merger of the prejudgment interest into the judgment for purposes of calculating post-judgment interest. *Id.*

[73] GTB urges this court to adopt the holding in *Big Bear Properties, Inc. v. Gherman*, 157 Cal. Rptr. 443 (Ct. App. 1979). There, the court held:

> Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest . . . . As a consequence, compound interest may in effect be recovered on a judgment whereby the aggregate amount of principal and interest is turned into a new principal . . . .

Big Bear Props., Inc. v. Gherman, 157 Cal. Rptr. 443, 446 (Ct. App. 1979) (quoting 45 Am. Jur. 2d *Interest and Usury* § 78) (omissions in original). The court in *Big Bear* distinguished the cases relied upon by the plaintiffs to support their contention that the judgment improperly allowed compound interest. The court found that the cases relied upon by plaintiffs were inapposite because those cases dealt with prejudgment interest being compounded annually, rather than a situation in which simple prejudgment interest was awarded, and post-judgment interest was then awarded on the new principal (which consists of the old principal plus the prejudgment interest). *Id.* at 448. This same distinction can be made as to this court's decision

[18] Title 18 GCA § 47106 provides that "[t]he rate of interest upon . . . judgment rendered in any court of the territory, shall be six percent (6%) per annum . . . ." 18 GCA § 47106 (2005).

in *DeWitt*. In *DeWitt*, the issue was not whether the trial court should have merged the prejudgment interest into the judgment and award post-judgment interest on the new amount. Instead, the question in that case was whether the trial court should have awarded prejudgment interest at a compound interest rate rather than a simple interest rate. *DeWitt*, 2003 Guam 20 ¶ 36. Thus, *DeWitt* is not dispositive of the issue in this case.

[74] We agree with the reasoning in *Big Bear* and similar cases. *See Nakoff v. Fairview Gen. Hosp.*, 694 N.E.2d 107 (Ohio Ct. App. 1997) (holding that post-judgment interest calculated on prejudgment interest on damage award is not compounded interest; if interest is in fact part of debt owed, awarding interest upon interest that is part of the debt is not compounded interest); *Meskimen v. Larry Angell Salvage Co.*, 592 P.2d 1014, 1021 (Or. 1979) ("Where pre-judgment interest is awarded, it should be made a part of the judgment so that post-judgment interest will apply to it."). We hold that prejudgment interest becomes part of the single total sum adjudged to be due, with post-judgment interest accruing on the merged total. It is unclear from the judgment in this case whether the trial court intended to award post-judgment interest on GTB's prejudgment interest award. However, in accordance with our holding today, GTB is entitled to post-judgment interest on the sum of its damage award and the interest on this amount that accrued prior to judgment.

2. Whether GTB is Entitled to an Additional $250,000.00 as a Matter of Law.

[75] GTB argues that the trial court erred in denying GTB's post-trial motion for summary judgment asking the court to increase GTB's award by $250,000.00 as a matter of law, notwithstanding the jury's verdict. Appellees' Br. at 33; *see also* RA, tab 258 at 14-16 (Pls.' Post-Trial Mots. Summ. J.); RA, tab 272 at 4, 11 (Dec. & Order, Sept. 8, 2008). We review the denial of a motion for summary judgment *de novo*. *Quichocho v. Macy's Dep't Stores, Inc.*,

2008 Guam 9 ¶ 13 (citing *Villanueva ex rel. United States v. Commercial Sanitation Sys., Inc.*, 2005 Guam 8 ¶ 9). Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c). A genuine issue of fact exists if there is "'sufficient evidence' which establishes a factual dispute requiring resolution by a fact-finder." *Quichocho*, 2008 Guam 9 ¶ 15 (quoting *Villalon v. Hawaiian Rock Prods., Inc.*, 2001 Guam 5 ¶ 7). A fact is material if it is relevant to a claim or defense and its existence might affect the outcome of the suit. *Id.* (quoting *Wilkinson v. Jones*, 2004 Guam 14 ¶ 7). The underlying facts regarding the instant issue are as follows:

[76] GTB and AES entered into an MOU, dated January 20, 1998, in which AES agreed to pay GTB certain sums of money according to a payment schedule set in the MOU in exchange for GTB's completion of the steel frame erection for the Outrigger. ER, tab 40 at 1-2 (Mem. of Understanding, Jan. 20, 1998). According to the MOU, the agreement was a result of months-long discussions between GTB and AES regarding GTB's ability to complete the steel frame erection. *Id.* at 1. Concluding that GTB had overspent for the purchase of the steel frame system and that "the remaining contract sum is insufficient to complete the erection," AES "agreed to share the 'loss' and . . . assist [GTB] in meeting their shortfall." *Id.* A payment schedule was established "to help [GTB] in meeting their payroll and miscellaneous expenses for the remaining duration of the work period." *Id.*

[77] The MOU also provided that these additional payments would fully compensate for "all ambiguous contract scope" and "all loose items of contract" work claimed to have been performed or that will be performed by GTB toward completing the project. *Id.* The MOU further stated that while "there were discussions pertaining to GTB's interpretation of the scope

of responsibilities and agreement which is different than AES's," the payments under the MOU would resolve the issue. *Id.* The MOU concluded:

> As a part of goodwill and to maintain current level of relationship, AES agrees to pay Guam Top Builder in the following manner:
>
> 1. First Increment of $250,000 in three payments to assist GTB in meeting their operational needs such as payroll, and expendable materials. First $100,000.00 to be paid on or about January 20, 1998; Second payment of $75,000.00 on or about the first week of February 1998; Third payment of $75,000.00 on or about the first week of March 1998.
>
> 2. Second Increment of $250,000.00 payable with in [sic] 30 days after completion of GTB's work including all necessary corrective work.
>
> 3. Third Increment of $250,000.00 to be payable within 90 days after completion of AES's completion of the whole project. This payment of this may be substituted with mutually agreeable of additional contract or by follow-on work.

Id. at 2. The MOU was signed by Jae Park on behalf of GTB, and by John Sherman on behalf of AES Inc. *Id.*

[78] Park and Sherman later signed an Addendum to the MOU, dated January 22, 1998, in which they agreed to delete paragraph 3 of the MOU's payment schedule (regarding the third increment of $250,000.00) and replace it with a new paragraph 3, which read:

> 3. Third Increment of $250,000.00 will be considered for payment at the end of AES's Structural contract with Tanota Partners. In as much as these payments are a result of negotiations to "share the burden" of loss by Guam Top Builder by participating in construction of the Outrigger Resort Hotel as a subcontractor to AES and that AES has already agreed to pay additional $500,000.00, AES is not responsible for this additional $250,000.00. However, should AES turn profit, amount of this payment will be reevaluated.

ER, vol. 2, tab 41 at 1 (Addendum to Mem. of Understanding, Jan. 22, 1998).

[79] During pre-trial depositions and at trial, Sherman and Park gave conflicting accounts as to the motivation behind the MOU and Addendum. According to Sherman, the MOU was

created in order to prevent GTB from walking from the project before completion. Tr. at 56-57 (Jury Trial, Feb. 6, 2007) (reading of Sherman's pre-trial deposition testimony into record). Sherman alleged that Park had run over budget and had threatened to abandon the project if he did not receive more money. *Id.* at 57. At the time, the steel frame erection had reached around the sixteenth or eighteenth floor of the hotel. *Id.* Sherman testified that he was "behind the eight ball" because he would have to stop construction for several months in order to mobilize a new crew to complete GTB's work. *Id.* at 58 (reading of Sherman's pre-trial deposition testimony into record). He met with his project managers, Tanota Partners, and they suggested to him that it would be cheaper to pay Park a certain amount of money to complete the steel frame, and then fight the issue later. *Id.* at 57-58 (reading of Sherman's pre-trial deposition testimony into record). The MOU, according to Sherman, was

> above and beyond all contract terms, just so that [Park] can finish the contract, and to clean up, and to put an end to, quote, unquote, all this ambiguous loose items that he said, 'Oh, it's a change order.' 'No, it's not.' 'You should have done this.' 'No, I -- Nothing.' So we agreed, and I says [sic], 'No more. We're going to -- We're not going to argue anymore. This is it. Okay?' And then we agreed that this is the closure that we're going to bring about, and have amicable completion.

Id. at 58-59 (reading of Sherman's pre-trial deposition testimony into record).

[80] When asked by opposing counsel, "What do you call [the MOU], if not a commitment to $750,000?", Sherman answered:

> Well, see, we were still negotiating during the time, and then I said, 'I will give you, if you would finish the project. Just finish the project.' I just wanted him to finish the project.
>
> . . . .
>
> And I agreed to pay 750, and then later on we decided 750 may be too much, because I cannot turn a profit. If I go under, he goes under. So in due consideration, I said, 'Look, if I give additional projects, would you reduce? And this is what the result is.

Id. at 37 (reading of Sherman's pre-trial deposition testimony into record). During direct examination, Sherman was asked the purpose of the Addendum, to which he replied:

> At the first signing of the MOU, I feel -- I felt very, very cheated and I just didn't think it was the right thing to do. So, I was thinking about it, going back, and I -- I thought there was still room for negotiating and I -- I didn't think I needed to pay additional 250,000 for it. However, we had initially agreed to -- to 750,000. There was another form of a payment that could have been considered so we talked about him using some of my equipment for future projects at free of charge, some follow-on projects. We talked about various ways -- other ways of compensating because certainly there was no budgeted $750,000.00 in my budget to pay him extra and we certainly weren't making money and so that clause was substituted.

Tr. at 144-45 (Jury Trial, Feb. 8, 2007).

[81] Park, on the other hand, testified that the reason GTB was having difficulty paying its employees was that AES owed GTB over $1 million for work it had already performed under the original contract. Park alleged it was Sherman who had run out of money and had slowed down in making payments to Park for his work. Tr. at 111 (Jury Trial, Jan. 23, 2007). Park testified that he requested a meeting with Sherman in January 1998, where:

> I told John Sherman, "Okay, I'm entitled to over a million dollars at this time according to our budget. Why don't you pay me a million dollars?" He said he was running out of money, budget is no more there, and I suggested to him, I said, "Why don't you pay at least $750,000?" and he was suggesting about $500,000 instead. So meeting was at least about three, four hours and … and we couldn't conclude on the amount. So this is more much like the settlement amount that I was trying to get, and I was suggesting 750, he was suggesting 500 and that meeting was . . . The meeting was concluded without coming to an agreement.

Tr. at 113-14 (Jury Trial, Jan. 23, 2007); *see also* SER at 32 (Letter from Jae Park to John Sherman, Jan. 19, 1998) (memorializing details of January 13, 1998 meeting). Park testified that although he did not agree with the language in the MOU stating that AES was sharing the loss with GTB, Park signed the MOU in order to get the payments under the agreement.

[82] Park also testified that he only signed the Addendum in order to get an increment check that was being "held hostage" by Sherman. Tr. at 131-32 (Jury Trial, Jan. 23, 2007). According to Park:

> Well, the first $100,000 payment was made, but when it was time to pay for the second payment of $75,000, he called me and said that I need to sign another document, and that was addendum to the -- this MOU. He was holding the check of $75,000. I was in a very -- Financially, I was in a very difficult situation and he was saying, if you -- unless you sign this addendum, I'm not gonna release the $75,000 check, and that addendum was basically saying that you have to give up the last 20- -- $250,000. And I felt I was held hostage in the situation. The $75,000 check is there to stop the suppliers -- close my account, and payroll was … was in a very difficult situation, and he was holding $75,000 check, and I had to sign the addendum.

Id. Sherman denied that he held a check hostage in order to induce Park to sign the Addendum. Tr. at 130-31 (Jury Trial, Feb. 8, 2007).

[83] The facts surrounding the actual signing of the two documents were in dispute as well. Although the signatures on the MOU and the Addendum were dated January 20, 1998, and January 22, 1998, respectively, evidence at trial suggested that the parties may have signed both documents on the same day. During cross-examination, Park was asked to identify a copy of the MOU on which he had handwritten a note stating, "Signed on . . . February 10, '98 after signing the . . . addendum on the same day for the release of 75,000." Tr. at 56 (Jury Trial, Jan. 25, 2007). When confronted with this note at trial, however, Park denied its accuracy and claimed that the note must have been a mistake. *Id.* at 61-62.[19]

[19] After the return of the jury's special verdict, the trial court, in keeping with its earlier decision to bifurcate the trial, allowed the parties to file post-trial motions and memoranda on the issues to be decided by the court. On August 3, 2007, GTB and Ejong filed their Post-Trial Motions for Summary Judgment, wherein GTB requested that the trial court increase the jury's award to GTB by $250,000.00 on the grounds that the Addendum to the MOU lacked consideration and therefore GTB was entitled to the third increment of $250,000.00 provided in the MOU. RA, tab 258 at 14-16 (Pls.' Post-Trial Mots. Summ. J.). The trial court denied GTB's request, awarding it instead the amount reached by the jury, $180.000.00. RA, tab 272 at 4, 11 (Dec. & Order).

[84] It is clear from the testimony at trial that there was a dispute as to whether there was any consideration for the Addendum. This was a genuine issue of fact that required resolution by the finder of fact, and GTB was not entitled to summary judgment on the issue. Although the verdict form did not specifically question the jurors as to whether there was proper consideration for the Addendum, it did ask the jurors whether the Addendum modified the MOU, to which the jurors answered that it did. RA, tab 248 at 3 (Special Verdict). We presume that the jurors followed the court's instructions. *See Weeks*, 528 U.S. at 234. The jurors were instructed on the requirements of a contract, which included the element of consideration. Tr. at 25-26 (Jury Trial Verdict, Feb. 16, 2007). Thus, we can presume that in finding that the Addendum modified the MOU, the jurors first determined that the Addendum satisfied the requirements of a valid contract, including the requirement of consideration.

[85] Accordingly, we affirm the trial court's denial of GTB's post-trial motion to increase GTB's award by $250,000.00 as a matter of law.

V. CONCLUSION

[86] In sum, we find that as to the alleged instructional errors, the trial was bifurcated and the legal issues relating to the validity and perfection of the mechanic's liens were reserved by the trial court. Therefore, the trial court did not abuse its discretion in rejecting Tanota's proposed fraud instructions on the validity of the lien, lien perfection instructions, and the instruction on unclean hands because the affirmative defenses pleaded were based on the intent to defraud on the claimed lien amount, which was not an issue before the jury. As to the claimed error on the loan instruction, we find no error because the parties abandoned the loan theory at trial. The agency instruction was not properly preserved, and in applying the plain error standard of review

we find no error. Reviewing the instructions as a whole, we find no abuse of discretion by the trial court.

[87] We further find as discussed above that the trial court did not take any matters from the jury. The trial court also did not abuse its discretion in reconciling the verdict and in finding that the verdict was not inconsistent.

[88] Because of the underlying dispute as to the basis of the computation of Ejong's damages, we find that as to Ejong, the trial court erred in awarding prejudgment interest because Ejong's damages were neither certain nor capable of being made certain, rather requiring a judicial determination of the actual amount due. As to GTB, however, prejudgment interest was allowed because GTB's damages were certain or capable of being made certain by computation on the face of the Addendum to the MOU.

[89] As to whether GTB is entitled to post-judgment interest on its entire judgment including its award for prejudgment interest, we hold that prejudgment interest becomes part of the single total sum adjudged to be due, with post-judgment interest accruing on the merged total. Accordingly, GTB is entitled to post-judgment interest on the sum of its damage award and the interest on this amount that accrued prior to judgment.

[90] Finally, we affirm the trial court's denial of GTB's post-trial motion for summary judgment on the issue of whether GTB is entitled to $250,000.00 as a matter of law under the terms of the MOU because there was a genuine issue of material fact as to whether there was any consideration for the Addendum.

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[91] For the foregoing reasons, the Judgment is **AFFIRMED** in part and **REVERSED** in part and the matter is remanded for further proceedings consistent with this opinion.

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