IN THE SUPREME COURT OF GUAM

FLETCHER PACIFIC CONSTRUCTION CO., LTD. (GUAM)
Plaintiff-Appellee,

vs.

SHERWOOD LTD., dba SHERWOOD HOTEL and FIRST COMMERCIAL BANK, LTD.,
Defendant-Appellant.

Supreme Court Case No.: CVA04-020
Superior Court Case No.: CV1858-98

OPINION

Filed: November 7, 2005

Cite as: 2005 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted on March 9, 2005
Hagåtña, Guam

Appearing for the Plaintiff-Appellee:
Francis M. McKeown, *Esq.*
McKeown & Associates
2550 9th St., Ste. 202
Berkeley, CA 94710

Appearing for the Defendant-Appellant:
Thomas C. Sterling, *Esq.*
Klemm, Blair, Sterling & Johnson, P.C.
Suite 1008 Pacific News Bldg.
238 Archbishop Flores St.
Hagåtña, GU 96910

BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice[1]; F. PHILIP CARBULLIDO, Chief Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] Plaintiff-Appellee Fletcher Pacific Construction Co., Ltd., (Guam), ("Fletcher") bid for and won a contract to build the Sherwood Hotel ("Sherwood") on Guam. Construction disputes concerning the defective installation of the Exterior Insulated Finishing System, among other things, plagued the contract. Fletcher filed a mechanic's lien to protect its interests and the case went to arbitration, where Fletcher won an award that was subsequently confirmed by the Superior Court. Under Guam law, defective work costs and nonconstruction costs may not be included in the amount of a mechanic's lien. As the trial court did not include the cost of installing and removing the faulty Exterior Insulated Finishing System, the judgment was correct. Consequently, we affirm.

I.

[2] Fletcher filed suit in the Superior Court on July 31, 1998, seeking foreclosure on the mechanic's lien that arose in the course of the dispute between Fletcher and Defendant-Appellee Sherwood Ltd. ("Sherwood") over the construction of the Sherwood Hotel. After this suit was filed, the case went to binding arbitration as provided in the contract. The arbitration was presented to a San Francisco Arbitration panel (hereinafter referred to as "the Panel"). The Panel made a detailed determination of what Sherwood owed Fletcher. Appellant's Excerpts of Record ("ER") pp. 12-40 (Arbitration Award). In essence, the Panel ruled that Sherwood had to pay Fletcher for all of the construction work except for a portion of the hotel construction known as the "Exterior Insulated Finishing System," referred to throughout the litigation as the "EIFS." Therefore, Sherwood had to pay Fletcher for all the construction work except for the cost of the EIFS. The specific findings

[1] Associate Justice Tydingco-Gatewood, as senior member of the panel at the time of the Status and Disqualification Conference, was designated as the Presiding Justice.

of the Panel are found in the Arbitration Award. Appellant's ER, pp. 12-40 (Arbitration Award).

[3] The gross amount of the Panel's initial award due from Sherwood to Fletcher under the construction contract was $1,731,009.00, but the Panel simultaneously awarded $560,725.00 to Sherwood for the defective EIFS and a separate item to replace the sliding glass sill screws. Therefore, the net amount of the initial award to Fletcher was $1,170,284.00, plus attorney fees and arbitration expenses which were to be decided in another arbitration.[2] That second arbitration took place, and Fletcher was awarded a second award for fees and costs in the additional amount of $1,365,334.06. This second award is known as the "second arbitration award." Fletcher has never contended that this second arbitration award is secured by the mechanic's lien.[3]

[4] With the Panel's awards accruing interest at 12% per annum, Sherwood petitioned the Superior Court to confirm the awards. The court confirmed the awards on December 20, 2000, *nunc pro tunc* to February 7, 2000 ("the Superior Court Order"). The total award amount confirmed was $2,644,762.49. Appellant's ER, p. 44 (Decision & Order). This award did not address the mechanic's lien. It merely confirmed the monetary amounts awarded by the Panel.

[5] The parties agree on appeal that Fletcher had a valid mechanic's lien on the Sherwood Hotel property. After the arbitration, the issue arose whether Fletcher's mechanic's lien should include the amount for the faulty workmanship on the EIFS. Since Fletcher has never claimed that the second arbitration award is lienable, the issue is how much of the initial $1,170,284.00 arbitration net award is subject to the mechanic's lien.

[6] The parties agreed that this issue would be resolved by way of cross-motions for summary judgment. In their motions, both parties agreed to a partial list of lienable items, which in the Superior Court Order totaled $995,250.31. Appellant's ER, pp. 44-45 (Decision & Order).

---

[2] Added to the initial Fletcher award was a 4.17% Guam gross receipts tax which amounted to $48,801.00.

[3] Footnote 4 in the Appellant's Opening Brief indicates that there are allegations in the complaint where Fletcher may contend that this second award is secured by the mechanic's lien. However, Fletcher does not so contend in this appeal.

[7] The Superior Court ruled that the confirmation of the arbitrator's award already took out Sherwood's $560,725.00 and therefore Sherwood was not entitled to another offset of $560,725.00. This resulted in a "Judgment Foreclosing Mechanic's Lien" in the amount of $1,006,835.42 plus 6% interest, totaling $1,227,127.23.[4] Appellant's ER, pp. 49-50 (Judgment Foreclosing Mechanic's Lien). Sherwood then filed this appeal.

II.

[8] We have jurisdiction over this appeal from a final judgment pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 109-20 (2005)), and Title 7 GCA § 3107(b) and § 3108(b) (Westlaw through Guam Pub. L. 28-037 (2005)).

III.

[9] A trial court's decision granting a motion for summary judgment is reviewed *de novo*. *Bank of Guam v. Flores*, 2004 Guam 25, ¶ 7.

IV.

[10] The sole issue on appeal is whether the $560,725.00 that the Panel said represents the EIFS system is included in the mechanic's lien.[5]

---

[4] Although the parties agree to the partial list of lienable items that added together total $995,250.31 (Appellant's ER, pp. 44-45), when the court reduced the figure to judgment in the Judgment Foreclosing Mechanic's Lien, it appeared as $1,006,835.42 (Appellant's ER, pp. 49-50). There is a difference between these two figures of $11,585.10. There is no explanation for this, but the parties do not object and it does not impact the issue before this court, namely, whether the cost of the defective EIFS should be included in the mechanic's lien.

[5] The trial court was also asked to grant 54(b) certification because there is a co-defendant, First Commercial Bank, Ltd. The claim between Fletcher and the Bank arises out of the Bank's mortgage; as second mortgagor on the hotel property, the Bank must wait until Fletcher forecloses on their mechanic's lien to be paid. Therefore, the Bank is not a part of this appeal, and simply awaits a determination of this issue. Therefore, the granting of the 54(b) certification is not on appeal. First Commercial Bank, Ltd. has not appeared in this appeal.

[11] Sherwood argues to this court that when it presented its motion for summary judgment as to the amount of the mechanic's lien to the Superior Court, it began with the gross amount of $1,731,009.00. Sherwood then deducted two figures: first, the items that may not be included in a mechanic's lien to begin with, which included "fees, costs, unused materials, delay damages, and the like." Appellant's Opening Brief, p. 10 (Oct. 25, 2004). Sherwood worked from figures presented in the Revised Lien Amount Calculation. Appellant's ER, p. 42 (*see* Appendix A to this Opinion), and from the items awarded by the Panel. Second, Sherwood deducted the faulty work for the EIFS. With the addition of the pro-rated interest, Sherwood calculated that the total amount of the lien was $470,409.88. Appellant's Opening Brief, p. 11 (Oct. 25, 2004); *see also* Appellant's ER, p. 42 (Judgment Confirming Arbitration Award, Appendix 1 "Revised Lien Amount Calculation").

[12] Fletcher, on the other hand, argued that its mechanic's lien should be adjudicated at $1,219,085.00 (actually, $1,006,835.42 plus interest), representing the "work which the arbitrators awarded Fletcher, a net amount . . . all properly carried out and non-defective." Appellant's ER, p. 46 (Decision & Order).

[13] Sherwood insists that this amount ($993,013.66, found in the Revised Lien Amount Calculation, Appellant's ER, p. 42 (Appendix A)) must be reduced by $560,725.00 to be fair to the other creditors. Sherwood states that the trial court made a simple error – it failed to recognize that $1,731,009.00 is the *gross* amount of the award, not the *net* amount of the award. Appellant's Opening Brief, p. 6 n.3 (Oct. 25, 2004). Fletcher argues that reducing the mechanic's lien by $560,725.00 is not compelled. The lien amount is correct because the law allows a contractor a mechanic's lien for all amounts spent for non-defective work and the arbitrators had already reduced the award by the value of the defective work. Appellee's Brief, p. 6 (Nov. 24, 2004).

[14] The starting point of our analysis is with the Guam statute on mechanic's liens, which provides that a contractor may place a lien on real estate "for the value of such labor done or

materials furnished." Title 7 GCA § 33201 (Westlaw through Guam Pub. L. 28-037 (2005)).[6] Sherwood argues that the amount of the mechanic's lien should be labor or materials actually incorporated into the improvement. Fletcher argues that the lien amount should be all materials done, even if the workmanship is later found to be defective and there were costs in demolishing the defective workmanship.

[15] The Superior Court ruled that "the judgment entered by this Court already credited Sherwood the amount of its EIFS claim . . . Therefore, this Court finds that Sherwood is not entitled to an offset against the net arbitrator[']s award and the judgment entered by this Court." Appellant's ER, p. 47 (Decision & Order). We agree.

[16] The judgment entered confirming the arbitration award of $2,644,762.49 excluded $560,725.00, which was the setoff in favor of Sherwood against Fletcher's $1,731,009.00. The figure of $2,644,762.49 may be explained by adding the following amounts which were presented to the Superior Court for confirmation:

1. The *net* award of the Panel: $1,170,284.00 [7]
2. Gross receipts tax on the net award: $48,801.00
3. Interest on the award since the time of entry: $52,326.00

---

[6] Guam's statute allowing for mechanic's liens states, in its entirety:

Title 7 GCA § 33201. Mechanics, to have Lien for Value of Labor.

> Mechanics, materialmen, contractors, subcontractors, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials to be used or consumed in, or furnishing appliances, teams, or power contributing to, the construction, alteration, addition to, or repair, either in whole or in part, of any building, structure, or other work of improvement shall have a lien upon the property upon which they have bestowed labor or furnished materials or appliances for the value of such labor done or material furnished, and for the value of the use of such appliances, teams, or power, whether done or furnished at the instance of the owner or of any person acting by his authority or under him, as contractor or otherwise.

[7] Note this figure does not include the $560,725.00 (see Appellant's ER, p. 31, where the Panel found that Fletcher's gross award was $1,731,009.00, but after deducting the $560,725.00 for the defective EIFS, the new award was $1,170,284.00).

4. GRT on the interest: $2,181.99

5. The second arbitration award (for attorney fees and costs): $1,365,334.06

6. Interest on the award of fees and costs: $5,835.44

Record on Appeal ("RA"), tab 67 (Def. Sherwood Ltd.'s Opp'n to Pl. Dick Pac. Constr. Co., Ltd. (Guam)'s Cross Mot. for Summ. J., Ex. B, p. 2). These items total the amount that was entered by the Superior Court as the confirmed arbitration award of $2,644,762.49. Thus, when the court confirmed the award, it did not include $560,725.00 in the award.

[17] In ruling on the cross-motions for summary judgment, the Superior Court used figures that had already deducted the cost of the EIFS. The Superior Court apparently concluded that Sherwood was not entitled to deduct another $560,725.00 from the award. This court agrees. The figures shown above in paragraph 16 begin by taking out the $560,725.00 for the defective EIFS. There is no legal or logical basis on which Sherwood can reduce Fletcher's lien by subtracting $560,725.00 yet again because the $2,644,762.49 figure does not include the cost of the EIFS.

[18] Sherwood nonetheless argues that Fletcher is getting too big of a mechanic's lien ($995,250.24). Sherwood argues this analogy: "[A] contractor owed a $100,000 retention under a construction contract which left behind $200,000 of defective work would be entitled to a mechanic's lien of $100,000 if the owner owed the contractor $200,000 on an unrelated transaction." Appellant's Opening Brief, p. 12 (Oct. 25, 2004). The court does not see how this analogy applies to this case. In this case, the contractor is owed $2.6 million, and included in this amount is $995,250.31[8] of non-defective labor and materials and related costs. Therefore, the contractor has a $995,250.31 mechanic's lien. The value of the defective workmanship was not included in the calculations long before the $995,250.24 figure was reached.

[8] This figure, as explained in paragraph 6, is the total agreed upon by the parties as reflected in the Appellant's ER, pp.44-45 (Decision and Order).

[19] California cases[9] support Sherwood's position that costs for defective work is not included in a mechanic's lien. *See Hampton v. Christensen*, 84 P. 200 (Cal. 1906); *Fontaine v. Storrie*, 45 P.2d 361 (Cal. Dist. Ct. App. 1935). Other states confirm that non-construction costs are not to be included in a mechanic's and materialman's lien. *Buckner v. Alpha Lumber & Supply Co., Inc*., 628 So. 2d 450 (Ala. 1993). Similarly, defects in construction are not included in mechanic's liens. *Indus. Roofing Co. v. Meek*, 39 N.E.2d 57 (Ill. App. Ct. 1941).

[20] We agree, and adopt the holding of these cases that costs for defective work are not included in a mechanic's lien.

[21] Having determined that the value of the defective work ($560,725.00) was never included in the mechanic's lien amount to begin with, we next consider the issue what goes into the mechanic's lien. First, we consider whether labor may be included in the mechanic's lien. Normally, all expenses for the value of labor provided and materials furnished incurred by the contractor as a result of the owner's wrongful breach may be recovered by the contractor by use of a mechanic's lien. Therefore, the starting point, before subtracting the $560,725.00, is what expenses were incurred by Fletcher, and as a result awarded to Fletcher.

[22] The Panel awarded a net total of $1,170,284.00 to Fletcher (without gross receipts tax). Appellant's ER, p. 31 (Arbitration Award). Fletcher concedes that the Panel awarded this amount, but declines to insist that the entire amount is lienable. Fletcher conceded in its motion below that it would not be entitled to a mechanic's lien for the $403,481.00, which the Panel called "Wasted Area Public Resources." Appellant's ER, pp. 27-29 (Arbitration Award). Had Fletcher not conceded that the "Wasted Area Public Resources" were not lienable, then the amount of the lien could conceivably be higher. But the parties agreed to the list of items that were properly lienable,

[9] Guam's mechanic's lien statute, Title 7 GCA § 33201, is derived from the Guam Code of Civil Procedure § 1181, which is derived from the California Code of Civil Procedure § 1181. Citing Sutherland's Stat. Const. § 52.01 (5th ed), this court has stated that "[g]enerally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction." *Sumitomo Const., Co., Ltd. v. Zhong Ye, Inc*, 1997 Guam 8, ¶ 7.

and the $403,481.00 for "Wasted Area Public Resources" was not among them. RA, tabs 50, 51, 53, 54, 55 & 56 (various Memo of Pts. & Auth. In Support of Mot. For Summ. J. and for Rule 54(b) Certification). At oral argument, Fletcher indicated that to the extent that the amount for "Wasted Area Public Resources" was waived, such waiver was done so in a good faith tactical decision to decline proceeding on costs that Fletcher may have been able to salvage or use in another project. Because Fletcher relinquished this point, this court is not in a position to rule whether it would have been appropriate to include the $403,481.00 "Wasted Public Area Resources" in the mechanic's lien.

[23] Moreover, Fletcher also relinquished the claim for the $266,760.00 for materials for public areas. Appellant's ER, p. 27 (Arbitration Award). Similar to its position on the "Wasted Public Area Resources," Fletcher's failure to pursue the costs of materials for public areas is related to its potential ability to salvage or re-use those materials. Because Fletcher declines to pursue these items as part of its mechanic's lien, this court will not address those costs.

[24] In conclusion, Title 7 GCA § 33201 provides that a lien may be placed upon real property for "labor [bestowed] or materials [furnished] or appliances for the value of such labor done or material furnished, and for the value of the use of such appliances, teams, or power." Title 7 GCA § 33201 (Westlaw through Guam Pub. L. 38-037 (2005)). In this case, the Panel found that Fletcher did not provide the Sherwood with a non-defective EIFS system. The Panel stated, "[t]he evidence demonstrated that the only reasonable method for correcting the design deficiency in the EIFS is to remove and replace the entire system." Appellant's ER, p. 21 (Arbitration Award). Therefore, there was no value bestowed upon Sherwood.

[25] Under the "plain meaning" rule, "[a]bsent clear legislative intent to the contrary, the plain meaning prevails," *Sumitomo Const., Co., Ltd. v. Gov't of Guam*, 2001 Guam 23, ¶ 17 (citations omitted). Since Sherwood received no value for the EIFS, there is no reason to include the EIFS in the mechanic's lien, and in fact, it was never included. There is no sound legal theory under which the EIFS could be deducted a second time.

V.

[26] The Superior Court recognized that the defective EIFS work does not form any part of the award of the arbitrators in Fletcher's favor. The Superior Court's confirmation award did not include the cost of the defective EIFS. We agree and therefore, **AFFIRM** the decision of the trial court.

REVISED
LIEN AMOUNT CALCULATION
(INCLUDES ALL LABOR IN PUBLIC AREAS)

Applications 6, 17, 18	685,438.00
Interest Thereon	180,429.00
Interest on Late Payments	34,284.00
Labor in Public Areas	71,531.00
Coiling Door	2,000.00
.217 (73,531÷ 338,291) of Public Area Interest (89,086)	19,331.66
TOTAL – Unpaid Labor & Materials incorporated in Project	$993,013.66

Lienable Amount	993,013.66
Defective Work	(560,725.00)
	$432,288.66

Total Award: $1,170,284

$$\frac{432,288.66}{1,170,284.00} = .369$$

Interest in Judgment	.369 x 52,326.00*	=	19,308.29
GRT in Judgment	.369 x 48,801.00*	=	18,007.57
GRT on Interest	.0417 x 19,308.29	=	805.16
			$38,121.02

$432,288.66
38,121.02
$470,409.68 = Amount of Judgment Secured by Lien

* Amounts calculated and included in Judgment as per Tom Sterling's letter to Frank McKeown dated February 1, 2000.

E62\70580-05
G:\WORD97\OFFICE\WORDDOC\DOC\TCS\022C-REVISED LIEN AMOUNT CALCS RE FLETCHER V SHERWOOD.DOC

EXHIBIT "A"

42