IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

v.

Brahma Group, Inc.,
Respondent

Appeal
Fifth Judicial District Court
The Honorable Steven P. Elliott
Case No. CV 39348

APPELLANT'S APPENDIX
VOLUME 4

D. LEE ROBERTS, JR., ESQ.
Nevada Bar No. 8877
COLBY L. BALKENBUSH, ESQ.
Nevada Bar No. 13066
RYAN T. GORMLEY, ESQ.
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
rgormley@wwhgd.com

Attorneys for Appellant
Tonopah Solar Energy, LLC

CHRONOLOGICAL INDEX

Date Filed	Description	Bates Number	Volume(s)
06/11/2018	**TSE's Motion to Expunge**	**AA0001-0013**	**1**
	Exhibit 1 – Services Agreement	AA0014-0035	1
	Exhibit 2 – Notice of Lien	AA0036-0043	1
	Exhibit 3 – Notice of First Amended and Restated Lien	AA0044-0047	1
	Exhibit 4 – Notice of First Amended and Restated Lien	AA0048-0057	1
	Exhibit 5 – Notice of Second Amended and Restated Lien	AA0058-0067	1
	Exhibit 6 – Notice of Voluntary Dismissal Without Prejudice	AA0068-0078	1
	Exhibit 7 – Affidavit of Justin Pugh	AA0079-0083	1
07/24/2018	**Brahma Group, Inc.'s Opposition to TSE's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien**	**AA0084-0104**	**1**
	Exhibit 1 – Grant, Bargain and Sale Deed	AA0105-0110	2
	Exhibit 2 – Nye County Parcel Detail	AA0111-0112	2
	Exhibit 3 – Right-Of-Way Grant	AA0113-0136	2
	Exhibit 4 – Deed of Trust	AA0137-0167	2
	Exhibit 5 – Services Agreement	AA0168-0189	2
	Exhibit 6 – Original Lien	AA0190-00197	2
	Exhibit 7 – First Amended Lien	AA0198-0201	2
	Exhibit 8 – Re-recorded First Amended Lien	AA0202-0211	2

CHRONOLOGICAL INDEX

CHRONOLOGICAL INDEX

CHRONOLOGICAL INDEX

CHRONOLOGICAL INDEX

CHRONOLOGICAL INDEX

ALPHBETICAL INDEX

ALPHBETICAL INDEX

ALPHBETICAL INDEX

ALPHBETICAL INDEX

ALPHBETICAL INDEX

ALPHBETICAL INDEX

SUPP
RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	CASE NO. : CV 39348 DEPT. NO. : 2 **BRAHMA GROUP, INC.'S STATEMENT OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN**

BRAHMA GROUP, INC. ("Brahma"), by and through its counsel of record, Peel Brimley LLP, hereby submits the following Statement of Supplemental Authorities in Support of its Opposition to Tonopah Solar Energy, LLC's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien as follows:

SUPPLEMENTAL AUTHORITIES

I. Nevada Authorities:

A. *Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 298 P.2d 810, 59 A.L.R.2d 457 (1956):[1]

- Upheld foreclosure of mechanic's lien on leasehold interest on property owned by the United States.

[1] See **Appendix A**.

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

- Governmental immunity did not extend to the leasehold interest for purpose of preventing such interest from being subject to mechanics' lien arising from the construction work.

- Citing and approving of: *Crutcher v. Block*, 19 Okl. 246, 91 P. 895, 14 Ann.Cas. 1029 ("it is immaterial that the legal title to the land in question is in the United States").

- [Former] Nevada Mechanic's Lien Statute provides for foreclosure of lessee's interest and "all the authorities hold that the lien merely attaches to the lessee's interest subject to the paramount title of the owner in fee."

B. *Schultz v. King*, 68 Nev. 207, 228 P.2d 401 (1951):[2]

- Lien extends to "a convenient space about the same, or so much as may be required for the convenient use and occupation thereof."

- "[The term] 'improvement' as used in the [former Nevada Mechanic's Lien Statute] is defined to mean the entire structure or scheme of improvement as a whole becomes manifest."

- A determination of the scope of the "improvement" must be made "primarily by the trial court."

C. *Byrd Underground, L.L.C. v. Angaur, L.L.C.*, 130 Nev. Adv. Op. 62, 332 P.3d 273 (2014):[3]

- "[C]ontracts and permits may assist in determining the scope of the work of improvement's "structure or scheme ... as a whole." Citing NRS 108.22188; *Schultz v. King*, 68 Nev. 207, 212–13, 228 P.2d 401, 404 (1951) (looking to the contract in addressing the possible scope of a work of improvement).

II. Non-Nevada Authorities

A. *Crutcher v. Block*, 19 Okl. 246, 91 P. 895 (1907):[4]

- "It is well settled ... that a mechanic's lien may attach to and be enforced against a leasehold estate for labor or materials furnished under a contract with the lessee."

- "It may be stated as a general rule that a mechanic's lien may attach to and can be supported by an estate in fee, or of an estate or interest less than a fee, such as an estate for life or years, a mortgagor's right of redemption, the interest of a person in possession claiming title, or, in short, any other interest which the owner of the building or improvement may have in the lot or land on which it is situated, provided such interest be such that it can be assigned or transferred,

[2] *See* **Appendix B.**
[3] *See* **Appendix C.**
[4] *See* **Appendix D.**

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

or sold under execution, or, it has been said, can pass by mortgage."

- "The authorities holding that a mechanic's lien cannot attach to land held as a government homestead, or to the buildings or improvements placed thereon, have no application in this case."

- "The United States authorized the leasing of such land for townsite purposes, and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien."

B. *Tropic Builders, Ltd. v. United States*, 52 Haw. 298, 475 P.2d 362 (1970):[5]

- "The judgment recognized the existence and enforceability of mechanic's lien not on the fee simple interest of the United States but on the interest of [the lessee], in the lease and leasehold improvements on the project site."

- "The fact that the project site was owned by the United States in fee simple did not make [the lease] and [the lessee's] interest in the leasehold improvements immune from such liens."

- Citing *Basic Refractories v. Bright*, 72 Nev. 183, 298 P.2d 810 (1956); *Crutcher v. Block*, 19 Okl. 246, 91 P. 895 (1907).

- Citing *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388, 59 S.Ct. 516, 517, 83 L.Ed. 784 (1939) ("the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.").

C. *Dow Chemical Co. v. Bruce-Rogers Co.*, 501 S.W.2d 235, 255 Ark. 448 (1973):[6]

- Materialmen's liens attached to a leasehold interest in land owned by a city in spite of public policy forbidding attachment of liens on public buildings and land.

- Citing *Basic Refractories v. Bright*, 72 Nev. 183, 298 P.2d 810 (1956), *Crutcher v. Block*, 19 Okl. 246, 91 P. 895 (1907), *Tropic Builders, Ltd. v. United States*, 52 Haw. 298, 475 P.2d 362 (1970) (all recognizing lien on leasehold interest and improvements on site owned by the United States in fee simple)

- Citing 53 Am.Jur.2d s. 44, at p. 557 ("The courts generally hold that, subject to the paramount title of the owner in fee and the conditions of the lease, a leasehold estate is subject to a mechanic's lien for an improvement erected by or under a contract with the lessee. It has been so held even though the land is the property of a municipality or of the United States.").

---

[5] *See* **Appendix E.**
[6] *See* **Appendix F.**

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 15th day of August, 2018.

PEEL BRIMLEY LLP

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Brahma Group, Inc.

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 15th day of August, 2018, I caused the above and foregoing document, **BRAHMA GROUP, INC.'S STATEMENT OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;

☐ pursuant to EDCR 7.26, to be sent **via facsimile;**

☒ to be hand-delivered; and/or

☒ other electronic mail

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
Attorneys for Plaintiff Tonopah Solar Energy, LLC

An employee of **PEEL BRIMLEY, LLP**

APPENDIX A

KeyCite Yellow Flag - Negative Treatment
Holding Limited by Trustees of Plumbers and Pipefitters Union Local 525 Health and Welfare Trust Plan v. Developers Sur. and Indem. Co., Nev., February 17, 2004

72 Nev. 183
Supreme Court of Nevada.

BASIC REFRACTORIES, Inc., a Corporation, Appellant,
v.
William C. BRIGHT and William C. Bright, Jr., Co-Partners Doing Business Under the Fictitious Name and Style of William C. Bright and Son; Harold W. Goodwin, Doing Business Under the Fictitious Name and Style of Nevada Paint and Floor Service; and Enterprise Electric Co., Inc., a Corporation; H. R. Curl; Ready-Mix Concrete Company, a Corporation; Saviers Electrical Products, Inc., a Corporation; Peterson-McCaslin Lumber Company, a Corporation; Jacques Morvay, Respondents.
STANDARD SLAG COMPANY, a Corporation, Appellant,
v.
BASIC REFRACTORIES, Inc., a Corporation, Respondent.
GLOBE INDEMNITY COMPANY, a Crporation, Appellant,
v.
The STANDARD SLAG COMPANY, a Corporation, Respondent.
The STANDARD SLAG COMPANY, a Corporation, Appellant,
v.
GLOBE INDEMNITY COMPANY, a Corporation, Respondent.

Nos. 3875, 3884, 3886, 3889.
|
June 18, 1956.

Synopsis
Action by mechanics' lien claimants against townsite lessee, third party, and the United States to foreclose mechanics' liens arising from construction on townsite of dwellings which would, upon completion, become property of the United States, as lessor. Other lien claimants intervened. Townsite lessee cross-claimed against third party, which had caused the dwellings to be constructed in accordance with agreement with lessee, and third party filed third party complaint against contractor's surety. Surety filed counterclaim against contractor. The Fifth Judicial District Court, Nye County, William D. Hatton, J., entered judgment against townsite lessee, third party, and surety, and townsite lessee, third party, and surety appealed, and third party cross-appealed against surety. The Supreme Court, Bowen, District Judge, held that, governmental immunity would not extend to the leasehold interest for purpose of preventing such interest from being subject to mechanics' lien arising from the construction work.

Judgments of lien foreclosure and of summary judgment against third party affirmed, and judgment against surety modified, and, as modified, affirmed.

West Headnotes (7)

[1] **Mechanics' Liens**
⇐Ownership or Possession of Land

Statute, which in effect provides that land occupied by structure is also subject to mechanic's lien if, at commencement of the work land belonged to person who caused building to be constructed, would not preclude lien from attaching to leasehold interest, even though party, at whose immediate instance the work was performed, had no interest in the land, in view of fact that, under agreement between such party and lessee, the buildings were constructed at lessee's request and with its knowledge. N.C.L.1929, §§ 3737, 3743.

2 Cases that cite this headnote

[2] **Mechanics' Liens**
⇐Leaseholds

Where townsite lessee entered agreement with third party for third party's construction on townsite of dwellings which would, upon completion, become property of the United States, as lessor, governmental immunity would not extend to the leasehold interest for purpose of preventing such interest from being subject to mechanics' lien arising from the construction

work. N.C.L.1929, § 3737.

2 Cases that cite this headnote

[3] **United States**
⚭Property, Actions Relating to in General

Where townsite lessee entered agreement with third party for third party's construction on townsite of dwellings which would, upon completion, become property of the United States, as lessor, and such agreement provided that third party was to construct the dwellings free and clear of any liens, claims, or encumbrances whatsoever, except for the lease, governmental immunity could not afford a defense against third party's violation of contract provision pertaining to liens and claims, but such contract would be capable of being either specifically enforced or its violation being made subject to a money judgment.

Cases that cite this headnote

[4] **Principal and Surety**
⚭Scope and Extent of Liability in General

Where townsite lessee entered agreement with third party for third party's construction on townsite of dwellings, and surety obligated itself to pay over, make good, and reimburse to third party all loss and damage which third party might sustain by reason of construction contractor's default, fact that lessee was not party to contract between surety and third party could not serve to release surety from its obligation to third party on contractor's default, in view of facts that third party was under immediate judgment either to clear liens arising from contractor's default or pay amount thereof, and that contractor agreed to keep third party free of all liens incurred in performance of contract and to indemnify third party against any and all damage which might result or occur during such performance.

2 Cases that cite this headnote

[5] **Mechanics' Liens**
⚭Estates or Interest Which May Be Subject to Lien

Where, under agreement with townsite lessee, third party was to construct on townsite certain dwellings, and third party was granted equal right to purchase the townsite through an agent corporation, which would act exclusively for both lessee and third party, and to construct additional dwellings by being solely responsible for the cost, parties to the agreement intended that third party should be granted the same rights to use and occupancy of the leased premises as held by lessee, and third party had, under the agreement, a proper lienable interest in the townsite which was subject of foreclosure of mechanics' liens arising from the construction.

Cases that cite this headnote

[6] **Principal and Surety**
⚭Interest, costs, attorney fees, and damages

Fact that costs and interests when added to principal sum of recoverable damages exceeded penal sum of bond would not preclude recovery of costs and interests from surety.

4 Cases that cite this headnote

[7] **Mechanics' Liens**
⚭Liabilities on bonds

Attorney's fees awarded mechanics' lien claimant became as much a part of the judgment as principal sum itself and subject to same limitation in regard to recovery thereof under contractor's bond, namely, the limit of the penal amount of the bond.

2 Cases that cite this headnote

Attorneys and Law Firms

****811 *184** Vargas, Dillon & Bartlett, Reno, for appellant Basic Refractories, Inc.

Stewart & Horton, Reno, for respondents William C. Bright, William C. Bright, Jr., Harold W. Goodwin, and Enterprise Electric Co., Inc.

Goldwater, Taber & Hill, Reno, for respondent H. R. Curl.

Springmeyer & Thompson, Reno, for respondent Ready-Mix Concrete Co.

John S. Halley, Reno, for respondent Saviers Electrical Products, Inc.

Wilson & Brown, Reno, for respondent Peterson-McCaslin Lumber Co.

Lohse & Fry, Reno, for respondent Jacques Morvay.

***185** Sidney W. Robinson, Reno, for Globe Indemnity Co.

Leslie B. Gray, Reno, for Standard Slag Co.

Opinion

***186** BOWEN, District Judge.

As a result of a judgment and decree of lien foreclosure, three appeals and one cross-appeal are now to be considered upon a consolidated appeal. While certain procedural steps have heretofore been considered in our decision on respondents' motion to dismiss the appeal of Basic Refractories, Inc., 71 Nev. 248, 286 P.2d 747, we must of necessity refer to those and to other facts and circumstances as they become applicable to our decision upon each of the appeals and the cross-appeal, which for convenience may be summarized as follows:

1. No. 3875. An appeal by Basic Refractories, Inc., hereinafter referred to as 'Basic' from that certain judgment of lien foreclosure, dated January 31, 1955, in favor of respondent lien claimants.

2. No. 3884. An appeal by Standard Slag Company, ***187** hereinafter referred to as 'Standard' from that certain order for summary judgment, dated February 17, 1955, in favor of Basic against Standard.

3. No. 3886. An appeal by Globe Indemnity Company, hereinafter referred to ****812** as 'Globe' from that certain order dated March 29, 1955, granting summary judgment in favor of Standard and against Globe.

4. No. 3889. Cross-appeal by Standard against Globe, which questions the limitation of the amount of the primary judgment of lien foreclosure to $30,294.50 and costs.

It appears from the agreed stipulation of facts upon which the action for mechanics' lien foreclosure was tried in the trial court, that on December 1, 1952, as a condition of purchase of certain property located at Gabbs and Luning, Nevada, Basic as lessee entered into a written lease of a certain townsite located at Gabbs, Nevada, together with the buildings and improvements located thereon and the utilities with the Reconstruction Finance Corporation and the United States of America, both acting by and through the Administrator of General Services as lessor. In addition to providing for a term of ten years and many other matters, the lessee was permitted to rent or lease portions of the premises without consent of the lessor and to enter into mutually satisfactory arrangements with the 'present users' of the properties and to protect their interests at Gabbs, Nevada.[1] It was further agreed that Basic should submit an irrevocable bid for the purchase of the property ***188** in the event the lessor should decide to sell the property.[2]

Because Standard had mining and manufacturing operations at or near Gabbs, Nevada, which were served by the utilities, and because Basic and Standard were interested in the maintenance and improvements of the townsite for the betterment of their respective operations and the best interests and general welfare of their respective employees, a program for the joint participation in the benefits of, and the obligations with respect to the operation and subleasing of the leased facilities and for the possible acquisition and disposition of the leased premises was entered into by written contract, dated May 1, 1953. Among other things, that agreement provided for the construction by Standard of not more than twenty multiple four-unit residential dwellings which, upon completion, would become the property of the lessor, in this instance the United States of America, and it was provided that these dwellings '* * * shall be free and clear of any liens, claims or encumbrances whatsoever except the lease.'[3]

****813 *189** On November 2, 1953, John C. Long, as the Long Construction Company, submitted a written 'Proposal' with several alternates to construct three

four-unit dwellings at a cost of $60,599, which Standard accepted in writing on November 10, 1953, upon the following terms:

(a) 'Builder to furnish completion bond in amount 50% of Contract Price' and

(b) 'Builder to keep the Standard Slag Company free from all liens and encumbrances incurred in the performance of this contract and to indemnify The Standard Slag Company against any and all damages which may result or occur during said performance.'

Pursuant to the construction agreement as evidenced by the 'Proposal' and its acceptance of November 10, 1953, Globe on November 30, 1953, as surety for Standard, thereafter executed a 'Contract Bond' in the penal sum of $30,294.50 conditioned upon full performance by Long Construction Company as principal of the construction contract which was incorporated in said bond. Pertinent provisions of that bond appear below.[4]

Long Construction Company thereafter performed the construction contract according to its agreement with Standard, and although fully paid, the Construction Company failed to pay certain labor claims and claims for materials. As a result respondents Goodwin, Bright, and Enterprise Electric filed an action against Basic, Standard, and the United States of America to establish and foreclose their respective liens. Other respondents intervened in the action as lien claimants. The United *190 States of America was not served with process and did not appear in the action. Basic thereafter cross-claimed against Standard, which in turn filed its third party complaint against Globe. Globe in turn filed a counter-claim against Long Construction Company.

The trial court entered its judgment and decree of foreclosure on January 31, 1955, and ordered that the leasehold interest of Basic in the three four-unit apartments, together with certain parcels of land upon which the dwellings were located be sold, that the lien claimants be paid, and that if such claim be not paid a deficiency judgment be entered against Long Construction Company. Thereafter followed the entry of successive judgments of Basic against Standard and Standard against Globe.

Appeal No. 3875

The first question presented is whether the trial court committed error when it rendered its primary judgment of lien foreclosure on January 31, 1955, in favor of the unpaid lien claimants and against respondent, Basic Magnesium Company. Basic, Standard and Globe all join in this appeal from the primary judgment.

Based upon a construction of a portion of the agreement of Basic and Standard, which provided as follows: '* * * that the twenty residential units when completed shall become the property of lessor, and shall be free and clear of any liens, claims or encumbrances whatsoever, except the lease,' appellants contend that the residential units, as soon as constructed, became the property of the lessor, the United States of America, and that governmental immunity attached as soon as they were placed upon the real estate. It is then said that a valid lien cannot be asserted against improvements on real property, title to which is in the United States of America, and governmental immunity not only attaches to the real property and improvements **814 but to every lesser interest. Respondents, on the other hand, contend that it is clear from the agreement that while *191 the erected buildings became the property of the United States of America free and clear of any liens they at the same time became subject to the lease between the United States of America and Basic, and thus became a part of Basic's leasehold interest, which interest may be subject to mechanics' liens.

On oral argument it was first urged that the United States of America was the only party that could urge the defense of governmental immunity, not Basic, Standard or Globe, and second that the Basic-Standard agreement should not be so construed as to permit them to remove a right of recovery under the State of Nevada mechanics' lien law from the field of litigation through the medium of contract.

While each of respondents' contentions may be determinative, we prefer to rest our decision on the question of whether governmental immunity extends to a leasehold interest.

Cases cited and relied upon by appellants in support of their position are not determinative. For example, John Kennedy and Company v. New York World's Fair, 260 App.Div. 386, 22 N.Y.S.2d 901, dealt with a particular mechanics' lien statute, which, unlike our State, provided for a lien only 'upon the moneys of the state or of such corporation applicable to the construction of such improvement'. Lien Law, McK.Consol.Laws, c. 33, § 5. Griffith v. Happersberger, 86 Cal. 605, 25 P. 137, 487, did not involve any question of the lienability of a leasehold interest, inasmuch as nothing was leased. Title Guaranty & Trust Co. v. Crane Co., 219 U.S. 24, 31 S.Ct. 140, 55 L.Ed. 72, involved a situation where title to certain completed portions of a ship vested immediately in the United States of America, and it was held that under the governmental immunity doctrine materialmen could not directly foreclose their lien against the ship. Unlike the instant case there was no lease-back provision.

On the other hand, Crutcher v. Block, 19 Okl. 246, 91 P. 895, 14 Ann.Cas. 1029, seems more nearly to *192 approximate our particular situation wherein an action to foreclose a materialmen's lien was upheld, notwithstanding the fact that the building was located on real property, title to which was vested in the United States of America. The Oklahoma court said: 'The board for leasing school, public building, and college lands of Oklahoma Territory leased to one * * * Butler * * *. He subleased, as he had a right to under the law and the written condition of his lease, to S. O. Crutcher * * *. Robinson, under contract with S. O. Crutcher, erected a house on this lot in question, and the plaintiff below, having furnished lumber for the erection of this building, and the same having been used in the building an not paid for, filed a materialman's lien for the lumber so furnished. * * * Such a lien, of course, would be subject to all of the conditions of the lease or conveyance under which the party held. Under the rule here adopted, it is immaterial that the legal title to the land in question is in the United States. The United States authorized the leasing of such land for townsite purposes, and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien.'

Appellants seeks to distinguish Crutcher v. Block by referring to a provision in that particular lease for the removal of the buildings upon the termination of the lease and because reference therein was made to the fact that neither the government nor the territory could be affected to their detriment by the enforcement of this lien because of the provision for removal of buildings, nevertheless, since judgment of lien foreclosure is not only against the buildings but the entire leasehold estate, we fail to see how that distinction is valid and controlling.

Appellants are unduly concerned over any action which might uphold the primary judgment of lien foreclosure in which the United States of America would be *193 compelled against its consent to accept an unwanted tenant, such as a purchaser upon foreclosure sale and assert that such a sale without the consent of the United States of **815 America or its presence would defeat the mechanics' lien law since it would be impossible to secure a purchaser who would pay anything of value for the sold right of litigating its claim as a successor lessee to properties owned by the United States of America.

Not only does § 3737, N.C.L.1929, provide for foreclosure of a lessee's interest but all the authorities hold that the lien merely attaches to the lessee's interest subject to the paramount title of the owner in fee. Whether the party foreclosing the lien may possibly be buying a lawsuit should not be the concern of the appellants. 'If it cannot be sold because it is of no value, or if the plaintiff chooses to bid it in at his own risk, he alone has the right to complain. But the purchaser under a legal sale, acquires all the rights, whatever they are, the entire estate, whatever it is, which the defendant has in the premises, to just the same extent that he would by a voluntary purchase from the party * * *.' Turney v. Saunders, 4 Scam., Ill., 527, 532. If there had been a provision against assignment in the lease, or if there had been a provision for forfeiture of the lease in the event a lien were levied against the property, the Government could have indicated its desire to contract solely with Basic. But such provisions are not to be found in the Basic-Standard lease and from that we may reasonably infer that the government was not concerned with a lien foreclosure and its consequent substitution of another tenant.

[1] [2] It is contended that by reason of the provisions of § 3737, N.C.L.1929, to the effect that the land occupied by the structure 'is also subject to the lien, if at the commencement of the work, * * * the land belonged to the person who caused said building' to be constructed, *194 no lien could attach upon the leasehold interest of Basic since Standard, the party at whose immediate instance the work was performed, had no interest in the land. We find no merit in this contention. In the first place § 3737 goes on to provide: '[B]ut if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.' We may further point to § 3743, Id., whereunder every building constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein shall be held to have been constructed at his instance, unless notice of nonresponsibility is given. Basic certainly had knowledge of the construction contemplated if the Basic-Standard agreement is to be given any effect whatsoever and therefore the buildings in law were constructed at Basic's request and knowledge. Construing this section, this court said in Gould v. Wise, 18 Nev. 253, 258, 3 P. 30, 31, 'But the interest of the owner may be subjected to lien claims, notwithstanding the labor and materials have not been furnished at his instance, if knowing that alterations or repairs are being made or are contemplated, he fail to give notice that he will not be responsible therefor, as provided in section nine of the act.'

The primary judgment of lien foreclosure should therefore be affirmed.

Appeal No. 3884

[3] On February 17, 1955, the trial court entered an order for summary judgment which was based upon the

Basic-Standard agreement of May 1, 1953, wherein Standard agreed to construct certain residential dwellings '* * * to be free and clear of any liens, claims, or encumbrances whatsoever, except the lease' and which provided that Standard should specifically perform that agreement by satisfaction and clearance of all liens and encumbrances as determined in the foreclosure judgment prior to the foreclosure sale, or in the event of *195 failure to render specific performance, a money judgment should be entered against Standard for $29,077.22, the total amount of the liens, together with certain costs, interest from February 11, 1954, and an attorneys' fee of 20% of the judgment.

Standard and Globe have asserted two grounds of invalidity of this particular summary judgment: First, that it is based upon an invalid primary judgment; and, Second, that there has been no violation of the Basic-Standard agreement because the improvements became the property of the United States of America free and clear of **816 any liens, and from that argue that since governmental immunity attached to those improvements it would necessarily follow that such improvements were received by the Lessor free and clear of any liens and therefore there was no violation of the Basic-Standard agreement.

We see no logic in the argument that the governmental immunity can afford a defense against Standard's violation of its contract with Basic. This contract was capable of being either specifically enforced or its violation made subject to a money judgment. We are of the opinion that this judgment should be affirmed.

Appeal No. 3886

On April 11, 1955, Standard obtained a summary judgment against Globe Indemnity Company, which ordered Globe to satisfy the judgment against Standard to the extent of and in the amount of $30,294.50, together with costs and interest from January 31, 1955. Globe has appealed from that order.

[4] It first contends that the judgment against it is invalid because it is based upon two previous invalid judgments. This contention falls in our affirmance of the judgments in Nos. 3875 and 3884. Globe next contends that Standard has no cause of action against it because Basic is not named as a party in Globe's bond whereunder it *196 obligated itself only 'to pay over, make good, and reimburse' to Standard all loss and damage which Standard may sustain by reason of Long's default; that while the purchase order agreement contemplated that Long, as builder, should keep Standard free of liens and indemnify Standard against damage, there is no evidence that Standard was damaged and that it in fact received full performance by Long of the latter's contract. There is neither precedent nor logic in the contention that Basic's absence as a party from Globe's contract with Standard can serve to release Globe from its obligation on Long's default. The contention ignores the fact that Standard is under an immediate judgment either to clear the liens or pay the amount thereof. It ignores, too, Long's agreement to keep Standard free of all liens incurred in the performance of the contract and to indemnify Standard against any and all damages which might result or occur during said performance. This is based on the further contention that Basic, not a party to Globe's bond, is the only owner of an interest in the realty against which a lien could be and was in fact enforced. The Basic-Standard agreement does not support this contention. Under it Standard was granted, in addition to other benefits (housing for its employees, one third of the profits from the operation, etc.), equal rights to purchase through an agent corporation, which would act exclusively for both Basic and Standard, and the right to construct additional dwellings by being solely responsible for the cost. Assignment of the agreement was provided for under strict terms and conditions. The agreement was recited to supersede all previous agreements between Basic and Standard 'as to the use and occupancy' of the leased premises by Standard. Appellant Globe characterizes the Basic-Standard agreement as merely an operating agreement without creation of any property interest in Standard. Standard urges that the agreement does in fact create a lienable property interest in it and one which may be the subject of lien foreclosure, citing the general rule found in *197 57 C.J.S., Mechanics' Liens, § 17, p. 512, as follows: 'Such a lien may also attach to the interest of a sublessee, assignee, or other person holding under the lessee or to the interest of the holder of the lease with an option to purchase.'

In Cary Hardware Company v. McCarty, 10 Colo.App. 200, 50 P. 744, 747, a somewhat similar use and occupancy agreement was construed to hold that a mechanics' lien could attach to the interest of a person holding under the lessee. The court said:

'If, therefore, the smelting company, at the time of the erection of the improvements in question, held possession of the land upon which they were constructed under a lease, or by virtue of a license, where its authority was coupled with an interest, then it was the owner of the land, within the mechanic's lien act.

'There is no question but that Norton, the grantor of the smelting company, **817 held under a lease, although he was given the right to occupy the five acres of surface ground for a specific purpose only, its use being restricted

to the erection of 'such buildings and machinery thereon as may be necessary for treating said slag dump.' A *critical examination of the contract between Norton and Holden warrants the conclusion, in our opinion, that its legal effect was to vest in Holden the same rights, as to the use and occupancy of the premises described in the lease, as Norton himself had, subject only to its possible avoidance by the refusal of Norton's grantors to ratify it, which, by the terms of the lease, they might have done.* This appears also to have been the intent and purpose of the parties, so far as we can gather from the instrument itself. There is certainly ample ground to sustain this view, and in a case like the present it is the duty of the court to so hold. The laborers and material men, who contributed so largely to the improvement of the premises, adding great value thereto, by erecting costly buildings and putting expensive machinery thereon, should not be defeated of their right to a just compensation solely by a strained and ***198** technical construction of the instrument under which possession was held.' (Italics ours.)

[5] A fair appraisal of the Basic-Standard agreement would clearly show that the parties intended that Standard should be granted the same rights to the use and occupancy of the leased premises and that the agreement granted to Standard a proper lienable interest in the realty now the subject of foreclosure. The summary judgment against Globe must also be affirmed.

Appeal No. 3889

One question has been raised on the cross-appeal of Standard against Globe and concerns the right of the trial court to limit the amount of costs, interest and attorney's fees to the penal sum of $30,294.50. In this connection it will be noted that the combined total of principal, interest and costs as of the date of the judgment, for which Standard became liable was the sum of $31,081.63, and that in addition thereto attorney's fees as fixed by the trial court amounted to $6,188.62. Not only were the attorney's fees in excess of the amount of the penal sum but costs and interest exceeded the penal sum by $787.13. [6] At one time neither costs nor interest were recoverable if they exceeded the penal sum but that rule has been changed. 2 Sedgwick On Damages, § 678, p. 1389. As a result counsel for Globe has conceded that it would be responsible for costs and interest even though such amounts exceed the penal sum of the bond. This is in effect, pro tanto, a confession of error, by reason whereof we need not pursue the matter further but simply modify the judgment so as to include the principal sum of $29,077.22, costs in the sum of $138.45 and interest in the sum of $1,865.96. That leaves the question of whether or not attorney's fees are recoverable.

***199** Globe asserts that attorney's fees are strictly the creature of either statute or contract, cites Dixon v. Second Judicial District Court, 44 Nev. 98, 190 P. 352, and says that since the bond contains no provision for attorney's fees such fees cannot be recovered in the event they exceed the penal sum and further that even if there was such a provision the penal sum would necessarily limit the amount of recovery. It relies strongly upon Hartford Fire Insurance Company v. Casey, 196 Mo.App. 291, 191 S.W. 1072, which holds that notwithstanding a stipulation in a bond for the payment of attorney's fees, such fees although considered in the nature of damages could not be recovered because the penal sum fixed the limit of liability and that the obligee must stand the loss himself or look elsewhere.

Counsel for Standard, on the other hand, asserts that Hartford Fire Insurance Company v. Casey, supra, represents the older and less realistic approach to the subject, argues that § 3746, N.C.L.1929,[5] which provides ****818** for attorney's fees in a lien foreclosure action should be considered as a part of the bond, and counters with Hartford Accident and Indemnity Company v. Casassa, 301 Mass. 246, 16 N.E.2d 860, which is cited in the pocket part supplement to Volume 11 of Corpus Juris Secundum, Bonds, § 132, and which holds that in an action upon an indemnity agreement the obligee is entitled to recover interest, costs and legal expenses over and above the penal sum where there was such a provision therefor.

Authorities for or against the allowance or dissallowance of attorney's fees when they exceed the penal sum in a bond are indeed limited. Prior to the publication of the 1955 supplement to Volume 11 of Corpus Juris Secundum, however, there was no question in the minds ***200** of the encyclopedia writers that counsel fees could not be recovered, for it is said in 11 C.J.S., Bonds, § 132, p. 511, as follows: '*Attorney's fees.* A provision in a bond further obligating the makers to pay attorney's fees in case of suit has been held not to enlarge the measure of recovery beyond the penalty named.' Citing Chesley v. Reinhardt, Tex.Civ.App., 300 S.W. 973.

Likewise there was no question that such fees could not be recovered when Hartford Fire Insurance Company v. Casey, supra, reaffirmed the settled law of Missouri. Similarly there was no question when the Supreme Court of California in Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 216 Cal. 40, 13 P.2d 699, 703, first construed a stipulation for the payment of counsel fees to mean that such fees are recoverable, but

only in the event the combined amounts of the award and the attorney's fee do not exceed the penal sum of the bond and then said: "Even where the bond stipulates that damages shall include attorney's fees, under the rule that a surety on a bond is not liable beyond the penalty named therein, the surety is not liable for attorney's fees in excess of the penalty named.' 50 Cor.Jur., p. 92, § 149. In the case of Hartford Fire Insurance Co. v. Casey, 196 Mo.App. 291, 191 S.W. 1072, 1076, the court ruled as follows: 'The general rule has always been that plaintiff cannot recover more than the penalty of the bond. Farrar [& Sweringen] v. Christy's Adm'rs, 24 Mo. [453] 474; State [to Use of Crawford] v. Woodward, 8 Mo. 353; State ex rel. [Moore] v. Sandusky, 46 Mo. [377] 381; Board of Education [of City of St. Louis] v. National Surety Co., 183 Mo. 166, 184, 82 S.W. 70; Showles v. Freeman, 81 Mo. 540. An attorney's fee is a part of the loss sustained by an obligee when compelled to sue on a bond. In other words, it partakes of the nature of the damages sustained, and the agreement to pay same makes it a part of such damages. But the bond does not provide for protection against damages beyond the amount of the penalty. As to such damages in excess of the penalty, the obligee must stand the loss ***201** himself or at least look elsewhere than to the surety. Consequently when the attorney's fee, made a part of the damages by a clause to that effect in the bond, forms a part of the excess above the face of the bond, then the obligee must stand the loss of that too, at least so far as the surety is concerned."

[7] Under our view the particular item of attorney's fees herein involved was the sum of $6,188.62, which was awarded to the lien claimants pursuant to our statute and became as much a part of the judgment as the principal sum itself and subject to the same limitation, namely, the limit of the penal amount of the bond.

From the foregoing, the court's judgment in favor of Standard and against Globe in the sum of $30,294.50 (the penal sum of the bond) must be modified so as to comprise the principal sum of the liens in the sum of $29,077.22, costs in the sum of $138.45, and interest in the sum of $1,865.96 (the last two items under respondent's confession of error), making an aggregate of $31,081.63. As so modified, it should be affirmed.

It is, therefore, ordered: The judgment in No. 3875 is affirmed with costs. The judgment in No. 3884 is affirmed with costs. The judgment in No. 3886 is affirmed with costs, subject to the modification of No. 3889, infra. In Standard's cross appeal against Globe, No. 3889, the judgment against Globe in the sum of $30,294.50 is modified by increasing the same to $31,081.63 ****819** and, as modified, is affirmed, with costs in favor of Standard.

BADT and EATHER, JJ., concur.

MERRILL, C. J., being disqualified, the Governor designated Honorable GRANT L. BOWEN, Judge of the Second Judicial District Court, to act in his place.

All Citations

72 Nev. 183, 298 P.2d 810, 59 A.L.R.2d 457

Footnotes

1 'Four: The Lessee shall have full operational responsibility for and control of the properties covered by this lease, including, but not limited to, the right and privilege, without the consent of lessor, to rent or lease portions of the premises or the facilities located thereon, and to furnish utility services by sale or otherwise; provided, however, that the lessee will undertake in good faith to make mutually satisfactory arrangements with other present users of the properties, to protect their interests at Gabbs, Nevada.'

2 'Five: If, during the terms of this lease, the Lessor invites bids from prospective purchasers in an effort to sell the entire premises leased hereby, subject to the terms and conditions of this lease, the lessee, as part of the consideration hereof, agrees that it will submit to the lessor a bid of not less than Two Hundred Seventy-Five Thousand Dollars ($275,000.00) for such premises, payable in installments over a period of twenty (20) years, said bid to constitute an irrevocable offer to purchase until accepted or rejected by Lessor: provided, however, that Lessor shall accept or reject such bid within a reasonable time after the date set for the opening of bids.'

3 'Two: Standard shall erect not to exceed twenty additional residential units on the townsite in multiple unit structures, each of which shall contain not more than four units, pursuant to this agreement and an agreement with the lessor which shall provide that the twenty residential units when completed shall be and become the property of the Lessor and shall be free and clear of any liens, claims or encumbrances whatsoever except the Lease. Eight of such units shall be erected by December 31, 1953, and the remaining twelve units shall be erected within nine months from the date of written request by either party. The plans and

specifications for the twenty residential units shall be subject to approval by Standard, Basic, and the Lessor. In event the cost of said units exceeds $50,000.00, the excess shall be borne one-third by Standard and two-thirds by Basic.'

4 'Whereas, the above bounden Principal has entered into a certain written contract with the above named Obligee, dated the 10th day of November, 1953, [for the] construction of three (3) four (4) unit apartment buildings to be located in Gabbs, Nevada, which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.
'Now, therefore, the condition of the above obligation is such, that if the above bounden Principal shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified, and shall pay over, make good and reimburse to the above named Obligee, all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect.'

5 Section 3746, N.C.L.1929, provides: 'The court may also allow, as part of the costs, the moneys paid for filing and recording the lien, and shall also allow to the prevailing party reasonable attorney's fees.'

End of Document

APPENDIX B

68 Nev. 207
Supreme Court of Nevada.

SCHULTZ et al.
v.
KING et al.

No. 3542.
|
March 7, 1951.

Synopsis
Action by Cleveland Schultz, Sr., and another, against Herbert S. King to foreclose a mechanics' lien. The Eighth Judicial Dis trict Court (Dept. 1) Clark County, Frank McNamee, J., entered order setting aside a judgment dismissing plaintiff's complaint for failure to amend within time allowed and granted plaintiff 10 days in which to amend, and defendant appealed. The Supreme Court, Badt, C. J., held that there was no abuse of discretion in relieving plaintiff from his default in not filing his amended complaint within time allowed where a showing of mistake and surprise was made.

Order affirmed.

West Headnotes (7)

[1] **Appeal and Error**
⇨Relief from default judgment

In the absence of clear abuse of discretion appellate court will not interfere with trial court's discretion in setting aside defaults and allowing trial on merits.

1 Cases that cite this headnote

[2] **Judgment**
⇨Mistake, surprise, or excusable neglect in general

In action to foreclose mechanic's lien where action was dismissed for failure of plaintiff to amend complaint within time allowed, and showing was made that such failure was due to misunderstanding between plaintiff and his attorney and absence of plaintiff to procure medical treatment for his wife, there was no abuse of discretion in relieving plaintiff from his default and allowing time in which to amend. N.C.L.1931-1941 Supp. § 8640(e).

Cases that cite this headnote

[3] **Appeal and Error**
⇨Mortgages, liens, and security interests

On appeal from order setting aside dismissal of action to foreclose mechanic's lien for failure to amend complaint within time allowed and allowing time in which to amend complaint, court would not determine applicability of statutory provisions concerning mechanics' liens to facts of case when complaint on its face showed compliance with statutory limitations for filing of lien, but such determination was for trial court. N.C.L. 1943-1949 Supp. § 3739; N.C.L.1929, §§ 3735, 3737, 3740.

Cases that cite this headnote

[4] **Appeal and Error**
⇨Dismissal and Nonsuit in General

On appeal from order setting aside dismissal of action to foreclose a mechanic's lien where issue was whether complaint stated meritorious cause of action justifying setting aside default, whether filing of lien claim was premature was issue of fact not determinable. N.C.L.1943-1949 Supp. § 3739.

Cases that cite this headnote

[5] **Mechanics' Liens**

⌲Separate lots or buildings

Where work to be done on several contiguous tracts of land is all embodied in one contract, mechanic's lien will as general rule, attach to the entire group.

Cases that cite this headnote

[6] **Judgment**
⌲Meritorious Cause of Action or Defense

In action to foreclose a mechanic's lien for painting done on four houses under one contractual arrangement, despite defendant's contention that lien notices on two lots were filed too late and too early on other two, complaint stated meritorious cause of action sufficient to sustain relief from default judgment for failure to amend within time allowed when trial court construing contract as one scheme of improvement could find compliance with statutory limitations. N.C.L.1943-1949 Supp. § 3739.

Cases that cite this headnote

[7] **Constitutional Law**
⌲Judgment or Other Determination

In action to foreclose a mechanic's lien, where there was a judgment of dismissal for failure to amend within time allowed, order entered pursuant to motion and notice, which set aside judgment of dismissal and allowed time to amend did not deprive owners of property without due process of law, since statute gave court jurisdiction to relieve from default for mistake, inadvertence, surprise or neglect. N.C.L.1931-1941 Supp. § 8640(e).

Cases that cite this headnote

**402 Appeal from Eighth Judicial District Court, Clark County; Hon. Frank McNamee (Dept. 1), Judge.

Attorneys and Law Firms

*207 Cleveland Schultz, Jr., of Las Vegas, for appellant.

William P. Compton, of Las Vegas, for respondent.

Opinion

*208 BADT, Chief Justice.

The district court, after sustaining defendants' demurrer to plaintiff's lien foreclosure complaint and giving plaintiff ten days to amend, signed and filed a judgment of dismissal after plaintiff had failed to amend within the time allowed. Thereafter, on motion of plaintiff, the court set aside the judgment of dismissal and granted plaintiff ten days to file an amended complaint. This appeal is from such order.

*209 Appellants assign four errors. The assignments are overlapping and we restate them as follows: (1) That the order complained of was an abuse of the trial court's discretion; (2) that the trial court was not even called upon to exercise its discretion because of respondent's failure to show that he had a meritorious cause of action; (3) that the same situation existed in the absence of a showing that a different judgment would probably be reached if plaintiff were given an opportunity to present his case on the merits; and (4) that the judgment theretofore obtained by appellants became a property right owned by them and that the dismissal of such judgment deprived them of such property without due process of law.

[1] [2] 1) The liberality of courts in setting aside defaults and permitting cases to be tried on their merits and the reluctance of appellate courts to interfere with the exercise of the trial court's discretion in thus acting, in the absence of a clear abuse thereof, have been so often recognized by this and all other courts as to require no citation of authority. That there was no such abuse of discretion in the instant case would appear from the facts presented to the district court. The basis for the order appealed from was plaintiff's affidavit, which referred to his lien foreclosure complaint filed in his behalf by the attorney then acting for him (he is represented by different counsel in resisting this appeal) on January 19, 1948, and which then proceeds to show the following facts. Defendnats filed their demurrer to such complaint January 30, 1948. On February 13, 1948 plaintiff was summoned to his attorney's office and was advised by his attorney that the latter would withdraw from the case

unless plaintiff paid a cash retainer of $750 by noon of that day. The plaintiff remonstrated with him and reminded him of his agreement to handle the matter on a contingent fee basis, whereupon his attorney informed him that he would 'take care of the demurrer.' On February 17, 1948 the plaintiff left *210 Nevada for California to obtain employment and to obtain medical treatment for his wife who was suffering from heart disease. On February 23, 1948 plaintiff wrote his attorney requesting information as to the status of the matter, and on March 4, 1948 received a reply advising that his attorney had withdrawn from the action and no **403 longer represented plaintiff as his attorney. On February 26, 1948, without the knowledge of plaintiff, the demurrer came on for hearing without plaintiff's presence or the presence of anyone representing him, and the demurrer was on said date sustained, with leave to amend within ten days, and plaintiff's attorney was on the same day served with notice of such order, but plaintiff was not advised thereof till March 19, 1948. On March 11, 1948, likewise without plaintiff's knowledge, the district judge had entered a judgment of dismissal for plaintiff's failure to amend within the time required. A counter affidavit filed by defendant Schultz alleged that by reason of his filing, as owner, of a certain notice of completion on part of the property and because plaintiff's lien was prematurely filed as to the remainder of the property, the purported lien foreclosure action would not lie under the terms of our statute. This raised certain questions of law which we shall treat later. The counter affidavit did not negative any of the matters of fact contained in plaintiff's affidavit. Under the combination of circumstances recited—the evidence misunderstanding between plaintiff and his attorney, plaintiff's departure for California, the necessity that he find work there, the illness of his wife, his verified lien claim and verified complaint alleging his performance of labor and furnishing of materials and the failure of compensation therefor, his lack of knowledge that the demurrer to his complaint had been submitted in the absence of his attorney, that it had been sustained, that the time for him to amend had actually expired and that a judgment of dismissal had been entered by default, and his desire in good faith to *211 prosecute his action—it cannot be said that there was an abuse of discretion in the order complained of. We are compelled to hold that this assignment of error is without merit.

2) Appellants' second and third assignments of error may be considered together. They arise out of the contention that no meritorious cause of action was shown by plaintiff as substantiating the court's order, and they refer to the prior order sustaining the general demurrer to the complaint. The record is bare of any indication as to the reason why the court found the complaint defective in stating a cause of action, and the granting of leave to amend is at least some indication that in the opinion of the trial court the complaint could be amended to state a cause of action. Appellants cite many cases holding a showing of a meritorious *defense* as necessary for an order setting aside a *defendant's* default, and we may assume by an analogy of reasoning that a showing of a meritorious cause of action is essential to an order setting aside a *plaintiff's* default, and, for sake of argument, that appellants are correct in their contention for the necessity of showing that a different judgment would probably be reached if respondent were permitted to go to trial on the merits if he could support the allegations of his verified complaint by proof. These various contentions deal particularly with appellants' assertion that as to two lots on which the labor was performed the lien claim was filed late and that as to the other two lots the filing was premature. A determination of these questions requires an examination of the requirements of the statute.

It is contended that upon the face of the record plaintiff cannot obtain a lien foreclosure judgment under the provisions of our statute. The statute in question, as last amended, is N.C.L. § 3739, 1943–1949 Supp., and reads in part as follows:

'Every person claiming the benefit of this chapter shall, not earlier than ten days after the completion of *212 his contract, or the delivery of material by him, or the performance of his labor, as the case may be, and in each case not later than thirty days after the completion of the contract and the recording of the completion notice by the owner as hereinafter provided, and in all other cases ninety days after the completion of the contract, or the delivery of material, or the performance of his labor as the case may be, file for record with the county recorder of the county where the property or some part thereof is situated, a claim containing a statement of his demand * * *

'In all cases, any of the following shall be deemed equivalent to a completion for **404 all the purposes of this act: the occupation or use of a building, improvement or structure by the owner, or his representative, accompanied by cessation from labor thereon; or the acceptance by the owner, or said agent of said building, improvement or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure, or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for.

'The owner may within ten days after the completion of any contract or work of improvement provided for in this act, or within ten days after there has been a cessation

from labor thereon for a period of thirty days, file for record in the office of the county recorder of the county where the property is situated a notice setting forth the date when the same was completed, or on which cessation from labor occurred * * *. In case such notice be not so filed, then all persons claiming the benefit of this act, shall have ninety days after the completion of said work of improvement within which to file their claims of lien. The phrase 'work of improvement' and the word 'improvement' as used in this act are each hereby defined to mean the entire structure or scheme of improvement as a whole.'

It appears from the complaint that the plaintiff, on July 10, 1947, entered into a written contract with *213 appellant Porter, the main contractor, for the furnishing of labor and material for the painting job on the property known as 'The Doris Homes' comprising four lots, on lots 13, 14, 15 and 16, of Block 10, Fairview Tract, at Las Vegas, Nevada. The painting was specifically described and the amount and terms of payment set forth, with other usual provisions as to the nature of the performance and containing the notation 'Total value of this contract is: $155.00 times 16 units: $2,480.00.' A memorandum attached listed the numbers of windows, doors, walls, ceilings, etc. and the numbers of coats of paint to be applied to the different items. For outside work is listed, among others, the item '33 windows.' There were also nine doors and four 'porch overhangs.' We mention these items as at least indicating that such work was not restricted to a single one of the units but embraced all of them, probably, though not necessarily, within the statutory contemplation of 'the entire * * * scheme of improvement as a whole.'

[3] The affidavit of appellant Schultz is to the effect that he filed a notice of completion on lots 15 and 16 on October 16, 1947, more than thirty days prior to the filing of plaintiff's lien claim (November 25, 1947), and appellants insist that this conclusively shows that plaintiff is barred by the terms of the statute from recovering a judgment for a lien foreclosure as to these two lots. So far as is indicated by the record, we are unable to say that this is so. The lien created by § 3735 N.C.L., 1929, is a lien upon the 'building or other superstructure' upon which the work is done, which lien under the provisions of § 3737 N.C.L. extends to 'a convenient space about the same, or so much as may be required for the convenient use and occupation thereof'. Under § 3740 N.C.L., where one claim is filed against two or more buildings owned by the same person, the claimant is required to designate the amount due him on each of such buildings, but the only penalty recited in the statute *214 for failure to make such designation is the postponement of his lien to other liens and the possible postponement of his claim to the claims of other creditors having liens by judgment or otherwise upon the buildings, improvements or land involved. The importance of the last sentence hereinabove quoted as a part of § 3739 to the effect that 'improvement' as used in the act is defined to mean the entire structure or scheme of improvement as a whole becomes manifest. We cannot in this proceedings make any determination as to the applicability of these provisions to the facts of the case. Such determination must be made primarily by the trial court. We are able to conclude, however, that from the record before us it does not affirmatively appear that the filing of the notice of completion as to lots 15 and 16 necessarily started the thirty-day period running for the filing of plaintiff's lien claim on the entire job. The verified complaint alleges the completion of labor by **405 the plaintiff and the occupation 'of the said apartment dwelling units' on November 14, 1947 and the filing of the lien on November 25, 1947. This would appear on its face to show a compliance with the requirements of § 3739, unless after a trial of the issues of law and fact raised by the completed pleadings of the parties, the situation is changed by the filing of the notice of completion as to the improvements on lots 15 and 16, as mentioned above. It may also be noted, in passing, that while appellants allege the filing of completion notice on November 25, 1947, they do not allege that such notice stated the date of the completion of the work, an express requirement of the statute.

[4] [5] Appellants also contend that as to the improvements on lots 13 and 14, the filing of the lien claim was premature, because as to these lots plaintiff filed notice of completion November 25, 1947, the same date as the filing of the plaintiff's lien, whereas it is asserted that the statute provides that the claim shall be filed 'not *215 earlier than ten days after the completion of his contract, or the delivery of material by him, or the performance of his labor, as the case may be,' and that the statute makes the filing of a notice of completion equivalent to completion. Under the statute, when ten days have elapsed after the completion of the contract or the delivery of the material or the performance of the labor, the claim of lien may be filed. Plaintiff alleges that he completed his contract, and that the owner took possession, on November 14, 1947, and that plaintiff filed his lien November 25, 1947, thus satisfying the statutory lapse of ten days. The defendant owner contends that, per his notice of completion, the work was completed on lots 13 and 14 on November 25, 1947, and the filing of the lien claim was therefore premature. Here again we have an issue of fact that cannot be determined on this appeal. There was, as we have seen, but one contract for plaintiff's entire paint job on the entire group of units on four contiguous lots. This fact would, as a general rule, permit plaintiff's lien to attach to the entire group, 57

C.J.S., Mechanics' Liens, § 189c, p. 741, although questions of severability might result in an exception to or modification of such rule. Golden Belf Lumber Co. v. McLean, 138 Kan. 351, 26 P.2d 274.

[6] Accordingly, appellants' assignments of error numbers 2 and 3, based on the contention that respondent's lien was late as to lots 15 and 16 and premature as to lots 13 and 14, by reason of the filing of the respective completion notices, and that respondent had therefore failed to show a meritorious cause of action, must be held to be without merit so far as the order appealed from is concerned, even though the complexion of the matter may be altered at a trial of issues raised by further pleadings. Esden v. May, 36 Nev. 611, 135 P. 1185; Stretch v. Montezuma Min. Co., 29 Nev. 163, 86 Pac. 445; and Nevada Consol. Min. & Mill. Co. v. Lewis, 34 Nev. 500, 126 P. 105, relied on by appellants, do not in our opinion preclude this conclusion.

[7] *216 3) Nor is there any merit to the assignment that by the court's order appellants were deprived of their property without due process of law. Assuming, arguendo, that the original judgment relieving the property from the claim of lien was a property right, there is still no showing of absence of due process. Under § 8640(e), N.C.L. 1931–1941 Supp., the court was vested with jurisdiction to relieve the plaintiff from his default in not filing his amended complaint by reason of his mistake, inadvertence, surprise or excusable neglect. The court's action was taken as the result of plaintiff's motion, notice of which had been served in accordance with statute and rule of court based upon the affidavits and counter affidavits of the parties and after argument and submission by their respective counsel.

The order appealed from is hereby affirmed, with costs.

EATHER, J., concurs.

HORSEY, formerly Chief Justice, did not participate, his term of office having heretofore expired.

MERRILL, J., having become a member of the Court after said matter was argued and submitted, did not participate.

All Citations

68 Nev. 207, 228 P.2d 401

End of Document

APPENDIX C

332 P.3d 273
Supreme Court of Nevada.

BYRD UNDERGROUND, LLC; and Wells Cargo, Inc., Appellants,
v.
ANGAUR, LLC; Balaji Properties Investment, LLC; and U.S. Bank National Association, Respondents.

No. 61978.
|
Aug. 7, 2014.

Synopsis

Background: Mechanics' lien claimants filed adversary complaint in property owners' bankruptcy proceeding, seeking to determine the priority of their liens. The United States Bankruptcy Court, District of Nevada, Bruce T. Beesley, J., certified questions.

Holdings: The Supreme Court, Gibbons, C.J., held that:

[1] Supreme Court's prior statement that "preparatory work on a site, such as clearing or grading, does not constitute commencement of construction" for purposes of lien priority was dictum;

[2] grading work can be an integral part of the entire structure or scheme of improvement, so as to establish commencement of construction; and

[3] mechanics' lien claimants could claim lien priority based on work performed months before a building permit was issued or the general contractor was hired.

Questions answered in part.

West Headnotes (11)

[1] **Mechanics' Liens**
⇨Liens and incumbrances in general

A mechanics' lien takes priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences. West's NRSA 108.225.

Cases that cite this headnote

[2] **Mechanics' Liens**
⇨Nature of lien in general

A mechanics' lien is a statutory creature established to help ensure payment for work or materials provided for construction or improvements on land.

Cases that cite this headnote

[3] **Mortgages and Deeds of Trust**
⇨Record and notice of mortgage

If construction has commenced on a "work of improvement" before a deed of trust is recorded, then a mechanics' lien will take a priority position over the deed of trust regardless of when the notice of lien is recorded. West's NRSA 108.225.

Cases that cite this headnote

[4] **Mortgages and Deeds of Trust**
⇨Record and notice of mortgage

To claim priority of its mechanics' lien over a deed of trust recorded after the commencement of construction, a lien claimant itself need not perform before the deed of trust is recorded, so long as the work of improvement began before the deed's recordation, because all mechanics' liens relate back to the date overall construction is commenced. West's NRSA 108.225.

Cases that cite this headnote

[5] **Courts**
⇨Dicta

Supreme Court's statement, in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, that "preparatory work on a site, such as clearing or grading, does not constitute commencement of construction," for purposes of priority of a mechanics' lien, was dictum and, thus, did not preclude a trier of fact from finding that grading work performed on property before construction lender recorded a deed of trust constituted visible commencement of construction; neither clearing nor grading were at issue in *J.E. Dunn*. West's NRSA 108.22112, 108.22188, 108.225(1)(a).

1 Cases that cite this headnote

[6] **Mechanics' Liens**
⇨Beginning of work

The trier of fact must look to the entire structure or scheme of improvement as a whole, that is, the overall construction, rather than solely evaluating the activities based on whether they are preparatory or structural or vertical construction, in determining whether construction on a work of improvement has commenced for purposes of priority of a mechanics' lien. West's NRSA 108.22112, 108.22188, 108.225(1)(a).

1 Cases that cite this headnote

[7] **Mechanics' Liens**
⇨Beginning of work

Grading work can be an integral part of the "entire structure or scheme of improvement as a whole" and part of the actual on-site construction; if it is, grading may be sufficient to establish commencement of construction, for purposes of priority of a mechanics' lien, as long as it is visible from a reasonable inspection of the site sufficient to provide lenders notice that lienable work has commenced. West's NRSA 108.22112, 108.22188, 108.225(1)(a).

Cases that cite this headnote

[8] **Mechanics' Liens**
⇨Beginning of work

Mechanics' lien claimants could claim lien priority based on work performed or materials delivered months before a building permit was issued for the construction project or the general contractor for the project was hired; timing of contracts and permits was irrelevant to whether visible construction had commenced, though it could assist in determining whether such work was within the scope of the construction project giving rise to the mechanics' liens. West's NRSA 108.22112, 108.22188, 108.225(1)(a).

Cases that cite this headnote

[9] **Mechanics' Liens**
⇨Beginning of work

The visibility, scope, and duration of a work of improvement, for purposes of determining when visible construction commenced for purposes of priority of a mechanics' lien, generally are factual questions for the trier of fact to decide. West's NRSA 108.22112, 108.22188, 108.225(1)(a).

1 Cases that cite this headnote

[10] **Federal Courts**
⇨Withholding Decision; Certifying Questions

In responding to a certified question, the answering court's role is limited to answering the questions of law posed to it, and the certifying court retains the duty to determine the facts and to apply the law provided by the

answering court to those facts; this approach prevents the answering court from intruding into the certifying court's sphere by making factual findings or resolving factual disputes.

Cases that cite this headnote

[11] **Federal Courts**
Particular questions

On certified questions from bankruptcy court regarding mechanic's lien priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences, Supreme Court would decline to answer certified question that asked whether grading work performed before construction lender recorded deed of trust constituted visible commencement of construction; issue was of an intensively factual nature, and was to be resolved by the trier of fact. West's NRSA 108.22112, 108.22188, 108.225(1)(a).

Cases that cite this headnote

Attorneys and Law Firms

*274 Foley & Oakes, PC, and Daniel T. Foley, Las Vegas; M. Nelson Segel, Las Vegas; Peel Brimley LLP and Eric B. Zimbelman and Richard L. Peel, Henderson, for Appellants.

Fennemore Craig Jones Vargas and Craig S. Dunlap and Christopher H. Byrd, Las Vegas; Meier & Fine, LLC, and Glenn F. Meier, Las Vegas, for Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, GIBBONS, C.J.:

[1] In Nevada, a mechanic's lien takes priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences. The visible-commencement-of-construction requirement often gives rise to dispute, however, and the United States Bankruptcy Court for the District of Nevada has certified three questions of law to this court regarding this aspect of mechanic's lien priority law.[1]

*275 The first question queries whether the placement of dirt material on a future project site before building permits are issued and the general contractor is hired can constitute commencement of construction. The second question asks us to clarify our decision in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, 127 Nev. ——, 249 P.3d 501 (2011), in which we stated that "clearing or grading" does not constitute commencement of construction. 127 Nev. at ——, 249 P.3d at 509. In our view, answering this question requires us to evaluate the appropriate precedential weight that courts should give to the passage in question, and we therefore rephrase the second certified question to include whether this statement was dictum. *See, e.g., Boorman v. Nev. Mem'l Cremation Soc'y*, 126 Nev. ——, ——, 236 P.3d 4, 6 (2010) (rephrasing certified questions under NEAP 5). We rephrase the second question as follows:

> Was the passage in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C*, 127 Nev. ——, ——, 249 P.3d 501, 509 (2011), that states "preparatory work on a site, such as clearing or grading, does not constitute commencement of construction," dictum? If so, can grading work constitute visible commencement of construction under NRS 108.22112?

Finally, the third question inquires whether the grading that took place in this case constituted visible commencement of construction, such that the mechanics' liens at issue take priority.

Because the second question influences our analysis of the other questions, we address it first. We respond to the three questions as follows. Regarding the bankruptcy court's second question, we conclude that this court's use of the term "clearing or grading" was dictum, and thus, our holding in *J.E. Dunn* does not preclude a trier of fact from finding that grading property for a work of improvement constitutes visible commencement of construction. Regarding the first question, we conclude that contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test, but may assist the trier of fact in determining the scope of the work of improvement. Finally, we decline to answer the

third question because it would require this court to resolve the factual dispute as to whether the grading presented here constituted visible commencement of construction of the work of improvement.

FACTS AND PROCEDURAL HISTORY

The construction project

The debtor respondents Angaur, LLC, and Balaji Properties Investment, LLC (collectively, the owners), jointly purchased a parcel of unimproved real property in Las Vegas, Nevada. No relevant activity took place with respect to the subject property until the spring and summer of 2006, when two different third parties placed, and allegedly spread, between 200 and 300 truckloads of dirt/material on the property.[2] Both of the third parties were performing work on unrelated construction projects on neighboring parcels and roadways. The degree to which the subject property was covered and subsequently spread or graded is unclear given the record before this court.

Meanwhile, the owners solicited bids from general contractors to construct a strip mall on the property. During bidding on the project, appellant Byrd Underground, LLC, submitted a bid to general contractor Joseph's Construction to perform subcontracted grading work, but Atlas Construction Ltd., not Joseph's Construction, was selected as the general contractor. On November 2, 2006, at the request of Atlas, a representative of Byrd dug four to six holes on the subject property with a backhoe. Byrd dug these holes to determine how much dirt/material had been brought onto the subject property since its prior bid in order to submit a revised bid to Atlas incorporating the new scope of work. On November 8, 2006, Atlas and the owners executed the written ***276** contract for Atlas to serve as the general contractor on the construction project.

On November 28, 2006, a title company conducted a site inspection of the subject property and concluded that the land was vacant and that there was no evidence of a recent work of improvement. Thereafter, the owners borrowed funds from PFF Bank & Trust for the purpose of constructing the strip mall on the subject property,[3] and on November 29, 2006, a deed of trust for the construction loan was recorded with the Clark County Recorder. Byrd had not performed any work on the subject property prior to November 29, 2006, other than digging the test holes and submitting bids to Joseph's Construction and Atlas.

Subsequently, a dust control permit and a building permit were issued for the subject property. During construction, Atlas used and incorporated at least a portion of the dirt/materials into the construction project. Atlas and Byrd executed three written subcontracts—for wet utilities, dry utilities, and grading—in 2007. Byrd and another subcontractor, appellant Wells Cargo, Inc. (collectively, lien claimants), provided services for the construction project but were not paid. As a result, they commenced mechanic's lien actions in state court and obtained judgments against Angaur, Balaji, and Atlas.

Angaur and Balaji file bankruptcy petitions and the lien claimants' objections lead the bankruptcy court to certify questions to this court

After the construction project was completed, the owners filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Both of the owners' schedules of creditors holding secured claims included (1) a "[f]irst [m]ortgage" to U.S. Bank, and (2) both lien claimants' judgment liens. The owners and U.S. Bank entered into a forbearance agreement and created a disclosure statement and plan of reorganization with the bankruptcy court that stated that U.S. Bank was the only "Class 1" secured creditor.

The lien claimants filed an objection to the owners' disclosure statement and plan of reorganization, and they subsequently filed an adversary complaint in bankruptcy court to determine the priority of liens. At the close of discovery, the owners, U.S. Bank, and the lien claimants filed competing motions for summary judgment.

During briefing on the competing motions for summary judgment, the lien claimants requested that the bankruptcy court certify questions to this court in order to clarify whether this court in *J.E. Dunn* mistakenly used the term "clearing [or] grading" instead of "clearing and grubbing" when describing non-"construction" preparatory work on a construction project. The lien claimants argued that "clearing and grubbing" is a recognized term of art used in the construction industry, whereas "clearing and grading" is not. Additionally, the lien claimants argued that evidence of the dirt/materials being spread or graded on the subject property creates genuine issues of material fact regarding when the construction visibly commenced

sufficient to avoid summary judgment. In response, the bankruptcy court certified questions to this court.

DISCUSSION

Priority of mechanics' liens in Nevada

[2] A mechanic's lien is a "statutory creature established to help ensure payment for work or materials provided for construction or improvements on land." *In re Fontainebleau Las Vegas Holdings (Fontainebleau II)*, 128 Nev. ——, ——, 289 P.3d 1199, 1210 (2012); *see also* Hearing on S.B. 343 Before the Assembly Judiciary Comm., 73d Leg. (Nev., May 13, 2005) (indicating that mechanics' liens "assist people who have improved real property so that they can get paid for their efforts"). Here, the parties do not dispute that the lien claimants performed lienable work. "But whether work is entitled to a lien pursuant to NRS 108.22184 and whether it is entitled to priority over other encumbrances pursuant to NRS 108.225 are *277 two entirely separate issues." *J.E. Dunn,* 127 Nev. at ——, 249 P.3d at 507.

[3] [4] Relevant to the priority issue, Nevada's mechanic's lien priority statute, NRS 108.225, provides that mechanics' liens are entitled to priority over any encumbrance that attaches after construction of a work of improvement began:

> 1. The liens provided for in NRS 108.221 to 108.246, inclusive, are preferred to:
>
> (a) Any lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement.
>
> ....
>
> 2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement are subordinate and subject to the liens provided for in NRS 108.221 to 108.246, inclusive, regardless of the date of recording the notices of liens.

Thus, if construction has commenced on a "work of improvement" before a deed of trust is recorded, then a mechanic's lien will take a priority position over the deed of trust regardless of when the notice of lien is recorded. NRS 108.225; *see J.E. Dunn,* 127 Nev. at ——, 249 P.3d at 509; *Fontainebleau II,* 128 Nev. at ——, 289 P.3d at 1211. Moreover, to claim priority, a claimant itself need not perform before the deed of trust is recorded, so long as the work of improvement began before the deed's recordation, because "all mechanics' liens relate back to the date overall construction is commenced." *J.E. Dunn,* 127 Nev. at —— n. 2, 249 P.3d at 504 n. 2. As a result, in this case, the lien claimants are entitled to priority positions over the deed of trust if the work of improvement's construction commenced, as those terms are defined by statute, on the subject property before the deed of trust was recorded on November 29, 2006.

Visibility of the work of improvement alone determines priority

NRS 108.22112 defines "[c]ommencement of construction" as the date on which:

> 1. Work performed; or
>
> 2. Materials or equipment furnished in connection with a work of improvement, is visible from a reasonable inspection of the site.

This court analyzed NRS 108.22112 in *J.E. Dunn* and concluded that, consistent with "the recognized policy interest in maintaining certainty and predictability in construction financing," which would be hindered if lenders were forced to assume the risk associated with funding a construction project over which nonvisible work could grant contractors priority, "visibility alone determines priority." 127 Nev. at ——, ——, 249 P.3d at 508, 506. We then reviewed the preconstruction activities that Dunn—the lien claimant—had performed, in light of NRS 108.22112's visibility standard. In doing so, we stated, "[o]ther courts have more generally held, and we agree, that preparatory work on a site, such as clearing or grading, does not constitute commencement of construction." *Id.* at ——, 249 P.3d at 509 (citing *Clark v. Gen. Elec. Co.,* 243 Ark. 399, 420 S.W.2d 830, 833–34 (1967), *superseded by statute as stated in May Constr. Co. v. Town Creek Constr. & Dev., L.L.C.,* 2011 Ark. 281, 383 S.W.3d 389, 392–95 (2011)). Because placing an architect's sign at the project site and removing power lines was "insufficient to provide lenders notice of lienable work entitled to priority," we held that those preconstruction

activities failed to constitute visible commencement of " 'actual on-site construction.' " *Id.* at ——, 249 P.3d at 509 (quoting *Aladdin Heating Corp. v. Trs. of Cent. States,* 93 Nev. 257, 260, 563 P.2d 82, 84 (1977)).

[5] Regarding the second question, the lien claimants take issue with our statement in *J.E. Dunn* that listed "clearing or grading" as types of nonvisible preparatory work that fail to establish construction commencement, and they argue that the statutes require merely that construction be visible to a reasonable site inspection to establish lien priority. *J.E. Dunn,* 127 Nev. at ——, 249 P.3d at 504–05 (citing *Aladdin Heating,* 93 Nev. at 260, 563 P.2d at 84). The lien claimants argue that it is unnecessary to declare ***278** broad categories of construction activities per se "nonvisible," thereby depriving the trier of fact of the opportunity to evaluate the visibility of such activities on a case-by-case basis. As concerns clearing and grading, we agree.

[6] As noted, mechanics' liens have priority over other encumbrances that attach to the property after "the [visible] commencement of construction of a work of improvement." NRS 108.225(1)(a). NRS 108.22188 defines "[w]ork of improvement" as the "entire structure or scheme of improvement as a whole, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of the property or any improvement thereon." Nothing in these provisions excludes preconstruction activities from the definition of work of improvement, and indeed, subsection 2 of NRS 108.22188 expressly recognizes that activities undertaken to prepare the project site can be a work of improvement. NRS 108.22188(2) (stating that "the improvement of the site" may be "contemplated by the contracts to be a separate work of improvement to be completed before the commencement of construction of the buildings"). Moreover, NRS 108.22128 defines "[i]mprovement," in pertinent part, as including buildings, irrigation systems and landscaping, removal of trees or other vegetation, the drilling of test holes, and grading, grubbing, filling, or excavating. In construing these provisions together, as we must, *City of N. Las Vegas v. Warburton,* 127 Nev. ——, ——, 262 P.3d 715, 718 (2011), we conclude that the trier of fact must look to the entire structure or scheme of improvement as a whole—the "overall construction"—rather than solely evaluating the activities based on whether they are preparatory or structural or vertical construction, in determining whether construction on a work of improvement has commenced. *J.E. Dunn,* 127 Nev. at —— n. 2, 249 P.3d at 504 n. 2.

[7] Accordingly, grading work can be an integral part of the "entire structure or scheme of improvement as a whole" and part of the actual on-site construction. NRS 108.22188. If it is, grading may be sufficient to establish commencement of construction in Nevada as long as it is visible from a reasonable inspection of the site sufficient to provide lenders notice that lienable work has commenced, and we are unwilling to conclude, as a matter of law, that on-site grading work can never place lenders on notice that lienable work has begun. NRS 108.22112; *see also May Constr. Co.,* 383 S.W.3d at 392–94 (construing Arkansas's mechanic's lien statute "just as it reads, giving the words their ordinary and usually accepted meaning in common language" in determining that grading can constitute commencement of construction).

This holding is consistent with *J.E. Dunn,* in which we explained that the visibility requirement for determining lien priority applies to preconstruction activities. 127 Nev. at ——, ——, 249 P.3d at 507–08. To the extent that the examples of nonconstruction preparatory work in *J.E. Dunn* suggest otherwise, neither clearing nor grading were at issue in that case, and thus the examples are mere dicta. *See St. James Vill., Inc. v. Cunningham,* 125 Nev. 211, 216, 210 P.3d 190, 193 (2009). We take this opportunity to clarify that *J.E. Dunn* does not preclude a trier of fact from finding that clearing and grading work constitutes visible commencement of construction of a work of improvement. We thus answer the second question, as we have rephrased it, in the affirmative: our statement in *J.E. Dunn,* 127 Nev. at ——, 249 P.3d at 509, regarding "clearing or grading" was dictum, and grading work may constitute visible commencement of construction under NRS 108.22112.

Contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test set forth by NRS 108.22112

[8] The bankruptcy court's first certified question asks whether a mechanic's lien claimant can properly claim lien priority under NRS 108.225 based on work that was performed or materials that were delivered months before the building permit was issued and the general contractor was hired. The lien claimants argue that the plain language of NRS 108.225 and NRS 108.22112 require visibility, and that nothing in the statutes conditions the priority of a lien on the issuance ***279** of permitting or contract dates. The lien claimants argue that the timing of contracts and permits related to a given project is irrelevant to the issue of whether the delivery of materials or the performance of work had, in fact, been furnished prior to the date the deed of trust was recorded. We agree.

Here, "the meaning of NRS 108.22112 is plain and requires visibility for work performed, including preconstruction services, in order for a mechanic's lien to take a priority position over a deed of trust." *J.E. Dunn,* 127 Nev. at ——, 249 P.3d at 506–07; *see also Aladdin Heating,* 93 Nev. at 260, 563 P.2d at 84. Thus, any subjective intent on the part of an owner to commence construction on a given date, based on either a contract or permit issuance date, is not an element of the commencement of construction and should therefore not be considered dispositive. See *May Constr.,* 383 S.W.3d at 395 (concluding that the district court erred when it failed to make factual determinations regarding objective, visible manifestation of activity on the property, and instead ruled that construction did not commence until after the mortgage was recorded based on the perceived intent of the lender).

But while the date of the contract or permits does not directly affect priority, the contract and permits may have some bearing on the issue, because the fact-finder must define the work of improvement before it can determine when that work of improvement visibly commenced. In this regard, contracts and permits may assist in determining the scope of the work of improvement's "structure or scheme ... as a whole." NRS 108.22188. If the contract expressly or impliedly excludes certain work, then that work might not be a part of the "work of improvement." *See Schultz v. King,* 68 Nev. 207, 212–13, 228 P.2d 401, 404 (1951) (looking to the contract in addressing the possible scope of a work of improvement); *see also I. Cox Constr. Co. v. CH2 Invs., L.L.C.,* 129 Nev. ——, ——, 296 P.3d 1202, 1205 (2013) (determining a work of improvement's scope by looking to the purpose, impetus, and continuity of the work, the parties' contemplations regarding the project, the building and operating permits, and the timing of the work in relation to the rest of the construction).

Thus, we answer the first question in the affirmative, with a caveat: a mechanic's lien claimant may properly claim lien priority under NRS 108.225 when the work or material forming the basis of the lien's priority was placed or performed on the site "months before the building permit was issued or the general contractor hired," as long as there was, in fact, visible commencement of construction as defined by NRS 108.22112 and as long as all of the work or material placed or performed on the site in the prior months was a part of the same work of improvement under NRS 108.22188 as the later work giving rise to the mechanic's lien.

We decline to answer the third certified question because it asks this court to make findings of fact that should be left to the bankruptcy court

[9] [10] The third certified question asks: "[d]oes 'grading' in the circumstances presented here constitute visible 'commencement of construction' under NRS 108.22112 for purposes of establishing lien priority under NRS 108.225?" But the visibility, scope, and duration of a work of improvement generally are factual questions for the trier of fact to decide, *I. Cox Construction,* 129 Nev. at ——, 296 P.3d at 1205, and this court recently noted that it cannot make findings of fact in responding to a certified question. *In re Fontainebleau Las Vegas Holdings* (*Fontainebleau I*), 127 Nev. ——, ——, 267 P.3d 786, 795 (2011). "The answering court's role is limited to answering the questions of law posed to it, and the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts." *Id.* at ——, 267 P.3d at 794–95. "This approach prevents the answering court from intruding into the certifying court's sphere by making factual findings or resolving factual disputes." *Id.* at ——, 267 P.3d at 795.

[11] The dispute between the parties as to whether the importing and spreading or grading of the dirt/material in this case constituted visible "commencement of construction" of one comprehensive "work of ***280** improvement" is, as explained above, of an intensively factual nature. Given these unresolved factual disputes, we decline to answer the third question.

CONCLUSION

We conclude that this court's use of the term "clearing or grading" in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.,* 127 Nev. ——, ——, 249 P.3d 501, 509 (2011), was dictum and does not alter our ultimate holding that visibility alone determines priority. We therefore clarify that grading work may constitute visible commencement of construction of a work of improvement in some circumstances, as long as it is visible from a reasonable inspection of the site in a manner sufficient to provide notice of lienable work that may be entitled to priority. Additionally, we conclude that contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test set forth by NRS 108.22112, but may assist the trier of fact in

determining the scope of the work of improvement. Finally, we decline to decide whether the circumstances presented here constitute visible commencement of construction under NRS 108.22112 of a comprehensive work of improvement under NRS 108.22188 because it would require this court to resolve the factual dispute between the parties.

We concur: PICKERING, HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY and SAITTA, JJ.

All Citations

332 P.3d 273, 130 Nev. Adv. Op. 62

Footnotes

1 The three certified questions were presented as follows:

1. Can a mechanic's lien claimant properly claim lien priority under NRS 108.225 when the dirt/material that is the basis of the lien on the project was placed on a prospective building project site months before the building permit was issued or the general contractor hired? Stated another way, does placing significant quantities of dirt/material on a prospective building project site months before a building permit is issued constitute "commencement of construction" on such a site pursuant to NRS [108.22112]?

2. Did the Nevada Supreme Court in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC*, — Nev. ——, ——, 249 P.3d 501, 509 (2011) mistakenly use the term of art "clearing and grading" instead of "clearing and grubbing" when describing preparatory work on a construction project?

3. Does "grading" in the circumstances presented here constitute visible "commencement of construction" under NRS 108.22112 for purposes of establishing lien priority under NRS 108.225?

2 The parties could not agree what to call the substance that was placed on the property, so the bankruptcy court used the term "dirt/material." The bankruptcy court noted that it did not intend the term to carry any specific legal meaning. We also will use the term "dirt/material" to remain consistent with the bankruptcy court.

3 PFF Bank eventually went into FDIC receivership and respondent U.S. Bank now claims ownership of the construction loan and deed of trust.

End of Document

APPENDIX D

KeyCite Yellow Flag - Negative Treatment
Distinguished by Wm. Cameron & Co. v. Beach, Okla., January 26, 1915

19 Okla. 246
Supreme Court of the Territory of Oklahoma.

CRUTCHER et ux.
v.
BLOCK.

Sept. 5, 1907.

Syllabus by the Court.

Where one causes to be erected a building on real estate in his possession, and material furnished for such purposes is not paid for, a materialman's lien may be had under the laws of Oklahoma, even though the person for whom such building was erected is not the owner of a perfect legal title. A leasehold estate, if the building is erected within the authority conveyed by such instrument, is a sufficient title of ownership to authorize such a lien; and, in default of payment, such lien may be foreclosed and the rights of the lessee in the land or to the occupancy thereof under his lease, as well as the building, may be sold to satisfy the judgment.

[Ed. Note.–For cases in point, see Cent. Dig. vol. 34, Mechanics' Lien, § 21.]

Where a court has jurisdiction over the persons to an action, by legal service or voluntary appearance and the cause is the kind of a cause triable in such court it has jurisdiction of the subject of the action and power to render any rightful judgment therein.

[Ed. Note.–For cases in point, see Cent. Dig. vol. 13, Courts, § 83.]

Synopsis
Error from District Court, Comanche County; before Justice Frank E. Gillette.

Action by G. H. Block against S. O. Crutcher and wife. Judgment for plaintiff, and defendants bring error. Affirmed.

West Headnotes (3)

[1] **Courts**
⚖Scope and Extent of Jurisdiction in General

Where the court has jurisdiction over the persons to the action by legal service or voluntary appearance, and the cause is of a kind triable in such court, it has jurisdiction to render any rightful judgment therein.

Cases that cite this headnote

[2] **Mechanics' Liens**
⚖Leaseholds

Where one erects a building, and material furnished is not paid for, a materialman's lien may be had, though the person for whom the building was erected is not the owner of a legal title but only of a leasehold estate.

14 Cases that cite this headnote

[3] **Mechanics' Liens**
⚖Sale

On foreclosure of a materialman's lien on a building erected on leased land, the rights of the lessee in the land or to the occupancy thereof as well as the building may be sold to satisfy the judgment.

8 Cases that cite this headnote

Attorneys and Law Firms

*895 Hudson & Keys, for plaintiffs in error.

Stevens & Myers, for defendant in error.

Opinion

BURWELL, J.

The board for leasing school, public building, and college lands of Oklahoma Territory leased to one O. P. M. Butler, for townsite purposes, the E. ½ of the N. E. ¼ of section 36, township 2 N., of range 12 W. of the Indian Meridian, in Comanche county. Butler platted the land into lots and blocks and streets and alleys, and it is known as Butler's addition to the city of Lawton. He subleased, as he had a right to under the law and the written condition of his lease, to S. O. Crutcher a certain lot in this addition. One L. H. Robinson, under contract with S. O. Crutcher, erected a house on this lot in question, and the plaintiff below, having furnished lumber for the erection of this building, and the same having been used in the building and not paid for, filed a materialman's lien for the lumber ***896** so furnished. There is no controversy about the facts. Judgment having been rendered by the court below for the plaintiff for $271.05, Crutcher appeals to this court and asks a reversal: First, because the lot on which the house was erected is school land, and the legal title is in the government; second, that the residence in question is personal property, and therefore not subject to a mechanic's or materialman's lien; and, third, that the trial court did not have jurisdiction of the subject of the action.

The third contention is manifestly without merit. The court had acquired jurisdiction over the persons to the action, and the cause was the kind of a cause which could be tried in the district court alone. It was therefore the duty of the court to determine the merits of the controversy and grant or deny relief as the facts and law of the case might justify. Section 4817, Wilson's Rev. & Ann. St. Okl. 1903, provides that: "Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, furnish material for the erection, alteration or repair of any building, etc., *** shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due to him for said labor, material, fixtures or machinery." And section 4819 of the same statute provides that: "Any person who shall furnish any such material or perform such labor under a sub–contract with the contractor, or as an artisan or day laborer in the employ of such sub–contractor, may obtain a lien upon such land from the same time, in the same manner, and to the same extent, as the original contractor for the amount due him for such material and labor; and any artisan or day laborer in the employ of such sub–contractor may obtain a lien upon such land from the same time, in the same manner, and to the same extent, as the sub–contractor, for the amount due him for such material and labor, by filing with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such sub–contract, a statement, verified by affidavit, setting forth the amount due from the sub–contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed," etc. Now, it is insisted that, under these provisions of the statutes of Oklahoma, a lien cannot be had unless the person for whom the building is erected is the owner of the legal title to the land on which the building is located, citing, in support of this position, the case of Kellogg et al. v. Littell & Smithe Mfg. Co., 1 Wash. St. 407, 25 Pac. 461; Tracy v. Rogers, 69 Ill. 662; Babbitt v. Condon, 27 N. J. Law, 154, and Coddington v. Dry Dock Co., 31 N. J. Law 477. We have examined all of these cases, and, with the exception of the first case just referred to, they do not support that contention. The statute of New Jersey provides that every building shall be liable for the payment of any debt contracted or owing for labor performed or materials furnished for the construction thereof, which debt shall be a lien on such building, and on the land on which it stands, including the lot or curtilage whereon the same is erected, and that, if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person so erecting such building shall be subject to the lien, unless it be erected by the consent in writing of the owner of the land, duly acknowledged or proved and recorded.

It will be observed that the statute made a distinction between the owner and a tenant, or person other than the owner erecting a building. In the case of Babbitt v. Condon, supra, one Lowell Mason was the owner of the land. D. G. Mason made a contract with James Condon to build a house on this land; the consent of the owner of the land not having been obtained. A mechanic's lien was filed against the house and the land, which described James Condon as the contractor and D. G. Mason as the owner of the land. Lowell Mason, who owned the land, and who furnished the money to build the house, was not a party. D. G. Mason had no interest in either the house or land. The lien was denied. The court did not hold that a lien cannot be had unless the party for whom a building is erected is the owner of the legal title to the land on which it is erected. Such a decision would have been in violation

of a positive statute. The case of Coddington et al. v. Dry Dock Co., supra, simply holds that the person for whom a building is erected must have some interest in the land, or else no lien can attach. The law is stated in the syllabus as follows: "In order to subject a building to the lien law, the owner of the building must have some estate in the land on which it stands; unless this is so, there can be no lien either on the land or the building." In the case of Tracy v. Rogers, supra, the court denied the position of appellant in the following language: "It is indispensable to a mechanic's lien that the party with whom the contract is made shall have some interest in the land upon which the building is to be erected or repaired, etc. This interest may be a fee simple, an estate for life, or it may be any estate less than a fee."

In the case under consideration, the record shows that Crutcher held a lease for the real estate on which the house was erected, and it is the general rule that it is not necessary that the person for whom a building is erected should own the fee–simple title, but the word "owner," as used in the statute, includes ***897** every character of title, whether legal or equitable, fee–simple or leasehold. In 20 Am. & Eng. Enc. of Law, p. 301, it is said: "It may be stated as a general rule that a mechanic's lien may attach to and can be supported by an estate in fee, or of an estate or interest less than a fee, such as an estate for life or years, a mortgagor's right of redemption, the interest of a person in possession claiming title, or, in short, any other interest which the owner of the building or improvement may have in the lot or land on which it is situated, provided such interest be such that it can be assigned or transferred, or sold under execution, or, it has been said, can pass by mortgage." And again, on page 303 of the same book: "It is well settled, as a general rule at the present time, that a mechanic's lien may attach to and be enforced against a leasehold estate for labor or materials furnished under a contract with the lessee, even though the tenancy is only from month to month, or, it has been held, though the tenant has the privilege of removing the machinery and fixtures on account of which the lien is claimed. The lien is, however, subject to all the conditions of the lease." The authorities are collated in this book under these different headings and fully support the text as quoted above. It should not be overlooked that the mechanics's lien law was enacted for the protection of those furnishing material for, or performing labor on, a building, and not for the benefit of him who has the building constructed; and the right to a lien upon the legal title includes the right to a lien on a lesser interest in the land. It is true that some courts have held that there must exist some estate in the land itself, but these same courts have also recognized that wherever one is in possession of real property, and has any estate therein, no matter how slight, if, under such title, he may lawfully erect a building thereon, such ownership will authorize a mechanic's or materialman's lien, and, under the law, that estate, whether it be the complete legal title or a lesser estate, may be sold. Such a lien, of course, would be subject to all of the conditions of the lease or conveyance under which the party held. Under the rule here adopted, it is immaterial that the legal title to the land in question is in the United States. The United States authorized the leasing of such land for townsite purposes, and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien.

The authorities holding that a mechanic's lien cannot attach to land held as a government homestead, or to the buildings or improvements placed thereon, have no application in this case. In such circumstances they are absolutely prohibited by Congress; but, where the government leases land for a term of years, such lease must be measured by the general law applicable to such instruments, unless exceptions affirmatively are made by the law itself. The lease of the appellant expressly authorizes the removal of the building placed on the land under the lease. Neither the government nor the territory can in any way be affected to their detriment by the enforcement of this lien. As to whether or not a lien might have been had against a building alone under the law in force when the building was erected, where the party for whom it was erected had no interest in the land, it is not necessary to determine, as that point is not involved. However, the Legislature, since this cause of action accrued, by section 1 of article 1 of chapter 28 of the Session Laws of 1905, limited the lien to the building and improvements alone, when erected on land that is leased and unimproved. This statute is in some respects a limitation on the general law, and not an enlargement of its provisions, as contended by appellant.

Under the great weight of the adjudicated cases, this judgment should be affirmed, and it is so ordered. Costs taxed to appellant. All of the Justices concurring, except GILLETTE, J., who presided at the trial below, not sitting, and IRWIN, J., absent.

All Citations

19 Okla. 246, 91 P. 895, 14 Am.Ann.Cas. 1029, 1907 OK 105

End of Document

APPENDIX E

52 Haw. 298
Supreme Court of Hawai'i.

TROPIC BUILDERS, LTD., Petitioner-Appellee,
v.
UNITED STATES of America, Owner, Navy Capehart Quarters, Inc., Lessee, Sam Len, dba The Len Company & Associates, contractor, and Aloha Construction Co., Inc., Subcontractor, Respondents-Appellants.
NAVY CAPEHART QUARTERS, INC., Respondent and Third-Party Plaintiff-Appellant,
v.
Sam LEN, dba The Len Company & Associates, Columbia Casualty Company, and Pacific Insurance Company, Ltd., Third-Party Defendants-Appellants.
COLUMBIA CASUALTY COMPANY and Pacific Insurance Company, Ltd., Cross-Claimants-Appellants,
v.
Sam LEN, dba The Len Company & Associates, Cross-Defendant-Appellant.

No. 4801.
|
Sept. 14, 1970.

Synopsis
Subcontractor brought action against primary contractor, subcontractor and corporation which was a successor to owner of project and lessee of project site to foreclose mechanic's lien, the corporation filed third-party complaint against contractor and sureties and sureties filed a cross claim for indemnification against contractor. From the judgment of the Eirst Circuit Court, City and County of Honolulu, Yasutaka Fukushima, J., in favor of the subcontractor the defendants appealed. The Supreme Court, Marumoto, J., held that fact that project site was owned by United States in fee simple did not make private leasehold interest thereon immune from mechanic's lien and that transfer of private lessee's capital stock to the United States did not render the lien unenforceable.

Affirmed.

West Headnotes (8)

[1] **Public Contracts**
⇨Jurisdiction and venue
United States
⇨Jurisdiction and venue

Statutory provision that Miller Act bond is enforceable only in a United States district court does not apply to bonds required under the Capehart Housing Act. Capehart Housing Act, § 403 et seq., 42 U.S.C.A. § 1594 et seq.; Miller Act, §§ 1–4, 2, 40 U.S.C.A. §§ 270a–270d, 270b; HRS § 507–43.

Cases that cite this headnote

[2] **Mechanics' Liens**
⇨Commencement of suit

Proceedings to enforce mechanic's liens are commenced when complaint is filed and process is obtained with intent that service be made immediately. HRS § 507–43.

Cases that cite this headnote

[3] **Mechanics' Liens**
⇨Commencement of suit

Where subcontractor filed its complaint seeking to foreclose mechanic's lien against corporate owner of project and lessee of project site and had summons issued thereon within statutory period, order that service subsequently be made on successor corporation was proper. HRS § 507–43.

1 Cases that cite this headnote

[4] **Mechanics' Liens**
⇨Leaseholds

Fact that building project site was owned by United States in fee simple did not make private leasehold interest thereon immune from mechanic's liens. HRS §§ 507–41 to 507–43, 507–46.

4 Cases that cite this headnote

[5] **Mechanics' Liens**
⇨Leaseholds

Transfer of capital stock of private corporation which was lessee of project site and owner of improvements thereon to the United States did not render mechanic's lien previously enforceable against corporation unenforceable.

4 Cases that cite this headnote

[6] **Principal and Surety**
⇨Scope and Extent of Liability in General

Where payment bond was conditioned on principal making prompt payment to claimants, and as a result of principal's failure to do so, mechanic's lien attached to obligee's property, obligation on part of sureties to indemnify obligee was implied so that obligee's property would be free of mechanic's lien.

1 Cases that cite this headnote

[7] **Limitation of Actions**
⇨Indemnity

Time to file an action for indemnification does not begin to run until right to be indemnified is fixed by judgment on payment by indemnitee.

1 Cases that cite this headnote

[8] **Indemnity**
⇨Time to sue
Mechanics' Liens
⇨Addition or substitution

Under statute permitting sureties and indemnitors to be interpleaded in actions to enforce mechanic's liens, property owner's third-party complaint against contractor and sureties and sureties' cross claim against contractor were timely and proper even though brought before right to indemnification accrued. HRS § 507–47.

Cases that cite this headnote

****363 *298** *Syllabus by the Court*

1. Bonds required under the Capehart Housing Act, 42 U.S.C. s 1594 et seq., may not be equated to the bonds required under the Miller Act, 40 U.S.C. ss 270a-270d, and the jurisdictional limitation of s 270b does not apply thereto.

2. Under HRS s 507-43, formerly R.L.H.1955, s 193-42, proceedings to enforce mechanic's lien are commenced when complaint is filed and process is obtained with intent that service be made immediately.

3. Fact that project site is owned by government in fee simple does not make private leasehold interest thereon immune from mechanic's liens.

4. Where a payment bond is conditioned on the principal making prompt payment to claimants, and as a result of the principal's failure to do so, mechanic's lien attaches to obligee's property, an obligation on the part of the surety to didemnify the obligee is implied, so that the obligee's property would be free of mechanic's lien.

Attorneys and Law Firms

***306** George R. Hyde, Washington, D. C. (Shiro

Kashiwa, Asst. Atty. Gen., Department of Justice, Washington, D. C., Yoshimi Hayashi, U. S. Atty., Joseph M. Gedan, Asst. U. S. Atty., and Roger P. Marquis, Washington, D. C., with him on the brief), for appellant Navy Capehart Quarters, Inc.

Edmund Burke, Honolulu (Henshaw, Conroy & Hamilton, Honolulu, of counsel), for appellants Columbia Casualty Co. and Pacific Ins. Co., Ltd.

Kinji Kanazawa, Honolulu, and Robert London, Los Angeles, Cal., for appellant Sam Len.

Howard K. Hoddick, Honolulu (Anthony & Waddoups, Honolulu, of counsel), for appellee.

Before RICHARDSON, C. J., and MARUMOTO, ABE, KOBAYASHI, JJ., and Circuit Judge KABUTAN in place of LEVINSON, J., disqualified.

Opinion

MARUMOTO, Justice.

This is the second appeal in the case, and is from a circuit court judgment entered at the conclusion of a trial on remand, pursuant to our opinion reported in *299 Tropic Builders v. Naval Ammunition Depot Lualualei Quarters, 48 Haw. 306, 402 P.2d 440 (1965).

The parties in the case originally were Tropic Builders, Ltd., plaintiff; and the United States, Naval Ammunition Depot Lualualei Quarters, Inc., Sam Len, doing business as the Len Company and Associates, and Aloha Construction Co., Inc., defendants. The United States was dismissed as a party immediately after service. In this opinion, the remaining parties will be referred to as Tropic, NADLQ, Len and Aloha, respectively.

The case arose in connection with the construction of military housing at Naval Ammunition Depot, Lualualei, Oahu, under the Capehart Act, 42 U.S.C. s 1594 et seq., pursuant to a housing contract executed by the United States, NADLQ, and Len on May 9, 1958.

Len was the prime contractor of the project. He performed his contract rhrough Aloha, a Hawaii corporation which he organized and of which he was the sole stockholder.

NADLQ was a Delaware corporation organized by Len to serve as the 'mortgagor-builder' of the project under the established Capehart procedure. Its capital stock was originally wholly owned by Len, but the plan from the outset was that it would be transferred to the United States immediately upon the completion of the project.

As the mortgagor-builder, NADLQ was the owner of the project, and held a 55-year lease of the project site from the United States. The lease was mortgaged to Ralph C. Sutro Co., which provided the construction money.

**364 Tropic was a concrete and masonry subcontractor on the project. It did its work under subcontract agreements with Aloha.

The project was completed to the satisfaction of the United States and NADLQ on April 30, 1959. On the same day, Len transferred the capital stock of NADLQ to the United States.

*300 The notice of completion of the project, prescribed in R.L.H.1955, s 193-42, was filed in the circuit court on May 19, 1959. On that day, Aloha owed $21,578.12 to Tropic under the subcontract agreements. In order to collect that amount, Tropic filed a notice of mechanic's lien, together with a demand for payment, on June 26, 1959, and had the same served on the United States, NADLQ, Len, and Aloha on June 30, 1959, all in compliance with ss 193-42 and 193-45. Mechanic's lien was claimed on the interest of NADLQ in the project site and the improvements thereon.

Upon failing to receive satisfaction from the notice and demand, Tropic filed a complaint for the enforcement of mechanic's lien, as well as for personal judgment against Len and Aloha, and had summons issued thereon, on August 10, 1959. The complaint and summons were duly served on the United States, Aloha, and Len, respectively, on August 11, 13, and 14. With respect to NADLQ, the circuit court ruled that it was also duly served, but we held otherwise, for the reasons stated in our prior opinion.

The original trial was held on July 9, 1962. It resulted in judgment for Tropic in all respects. The circuit court adjudged that Len and Aloha were liable to Tropic for $21,578.12, with interest, costs, and attorney's fee of $5,382.88, for the recovery of which Tropic was entitled to enforce the mechanic's lien which it claimed. The judgment became final on January 4, 1963, following denial of motions for new trial and to amend findings of fact. Len and Aloha appealed from the judgment on February 4, 1963.

We affirmed the judgment as to Aloha, except for attorney's fee, reversed it as to Len personally, and remanded the case for further proceedings with respect to attorney's fee. We also set aside the adjudication regarding mechanic's lien for lack of service on NADLQ,

without *301 prejudice to the question whether on remand Tropic should be given an opportunity to serve NADLQ so that its right to a lien and to enforce the same might be adjudicated.

The case went back to the circuit court on remand on May 21, 1965. At that time NADLQ was no longer in existence, for it had been merged into Navy Capehart Quarters, Inc., a Delaware corporation wholly owned by the United States, on December 3, 1962. Navy Capehart Quarters, Inc., will hereafter be referred to as NCQ.

NCQ was substituted for NADLQ, and was duly served by service upon the director of state regulatory agencies on November 12, 1965, and upon the commanding officer of the Capehart housing at the Lualualei Naval Ammunition Depot on November 15, 1965. NCQ's first response was a motion for dismissal of the action. Upon denial of the motion NCQ answered, and also filed a third-party complaint against Len, Columbia Casualty Company and Pacific Insurance Co., Ltd.

The third-party complaint was based upon a payment bond required under the Capehart Act and furnished by Len, as principal, and Columbia Casualty Company and Pacific Insurance Co., Ltd., as sureties. The complaint was filed on July 26, 1966, and served on Pacific Insurance Co., Ltd., on July 27, 1966, and Len and Columbia Casualty Company on October 10, 1966. Columbia Casualty Company and Pacific Insurance Co., Ltd., will hereafter be referred to as sureties.

After service of the third-party complaint, the sureties filed a cross-claim for indemnification against Len. This was done on November 2, 1966. The cross-claim was based upon Len's agreement with the sureties to indemnify them for all damages they might incur by reason of executing the bond.

The second trial was held on April 22-23, 1968. At its *302 conclusion, the circuit court **365 entered a judgment adjudging that Tropic had a valid and enforceable mechanic's lien for $21,578.12, interest, costs, and attorney's fee of $m,767.50, on NCQ's lease attorney's fee of $7,767.50, on NCQ's lease improvements thereon; that Len and the sureties were jointly and severally liable to NCQ for the amount of the lien; that the sureties were entitled to recover from Len the amount of the lien, plus their costs and attorney's fee of $3,367; and that an order of sale of the liened property would be entered in the event the lien was not satisfied within 30 days. NCQ, Len, and the sureties appealed from the judgment.

The basic question for decision on this appeal is the validity of the adjudication with respect to mechanic's lien. If that adjudication should be invalid, the balance of the judgment must fall. That is so because the judgment, both as against Len and the sureties vis-a-vis NCQ and as against Len vis-a-vis the sureties, depends upon Len's obligation to deliver the completed project to NADLQ free of any mechanic's lien.

The adjudication on mechanic's lien is attacked on the following grounds: first, that the circuit court had no jurisdiction to make the adjudication; second, Tropic did not proceed in a timely manner to obtain the same; and third, that mechanic's lien cannot be enforced against property belonging to the United States or in which the United States has any interest.

The first ground has been urged upon us only by Len. It has not been stated as a point on appeal either by NCQ or the sureties. It is based on equating a Capehart bond to a payment bond required under the Miller Act, 40 U.S.C. ss 270a-270d.

[1] In federal public work, there is no mechanic's lien protection, and protection to labor and materialmen is afforded by a Miller bond. Under s 270b, a Miller bond *303 is enforceable only in a federal district court. By equating the bond in this case to a Miller bond, Len contends that s 270b applied thereto, and that Tropic's recourse was in the federal district court for enforcement of the bond and not in the circuit court for enforcement of mechanic's lien.

Federal courts of appeal are divided on the question as to whether s 270b applies to Capehart bonds. The United States Supreme Court has not resolved the conflict. In the absence of authoritative federal decision, the New Jersey Supreme Court, in Minneapolis-Honeywell Regulator Co. v. Terminal Construction Corp., 41 N.J. 500, 197 A.2d 557 (1964), and the North Dakota Supreme Court, in Robertson Lumber Co. v. Progressive Contractors, Inc., 160 N.W.2d 61 (N.D.1968), have decided that s 270b does not apply. The reasoning in those cases is persuasive. So, we also hold that s 270b does not apply to the bond in this case.

[2] [3] On the second ground, the contention is that Tropic failed to comply with the provision of s 193-42 requiring that proceedings to enforce mechanic's lien be commenced within three months after the completion of improvements. We see no merit in the contention.

Tropic filed its complaint, and had summons issued thereon, well within the statutory period. Under H. Hackfeld & Co. v. Hilo Railroad Co., 14 Haw. 448 (1902), proceedings to enforce mechanic's lien are

commenced 'when the declaration has been filed and process issued, with intent that service be made promptly.' In our prior opinion, we recognized that rule, and left to the circuit court to determine whether on opportunity should be given to Tropic to serve NADLQ, in the light of Rollins v. United States, 286 F.2d 761 (9th Cir. 1961), and other cases cited therein. The circuit court ordered that service be made on NCQ, as successor to NADLDQ. We see no error in the order.

***304** The third ground is also without merit. The judgment recognized the existence and enforceability of mechanic's lien not on the fee simple interest of the United States but on the interest of NCQ, as successor to NADLQ, in the lease and leasehold improvements on the project site.

****366** [4] At the time Tropic did its work, leases and leasehold improvements were amenable to mechanic's liens, effective from the time of visible commencement of operations for the improvements. R. L.H.1955, ss 193-40, 41, 44. The fact that the project site was owned by the United States in fee simple did not make NAD LQ's lease and NADLQ's interest in the leasehold improvements immune from such liens. Basic Refractories v. Bright, 72 Nev. 183, 298 P.2d 810 (1956); Crutcher v. Block, 19 Okl. 246, 91 P. 895 (1907).

As a matter of fact, the United States, NADLQ, and Len contemplated the possibility that mechanic's liens might exist and be enforceable. The housing contract contained three references to such liens. Article IV(9) is pertinent here. It authorized the United States, NADLQ, or the mortgagee of the lease to withhold final payment to Len 'until after the expiration of any period which laborers, subcontractors, and materialmen may have for filing notice of mechanics' liens.'

[5] Thus, Tropic had a mechanic's lien on NADLQ's lease and on its interest in the leasehold improvements dating back to the time that it did its work. There is on question that the lien would have been enforceable if NADLQ remained privately owned after the project was compoeted. owned after the project was completed. NADLQ's capital stock to the United States changed the situation. NADLQ remained a private corporation, although serving the purpose of the United States.

It is stated in Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388, 59 S.Ct. 516, 517, 83 L.Ed. 784 (1939), that the 'government ***305** does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' That statement was made with reference to a corporation organized under the authority of a Congressional act. It should apply with equal or greater force to a corporation organized under a state law relating to private corporations.

Once the mechanic's lien claimed by Tropic is recognized to be valid and enforceable, there can be no question about the liability of Len and the sureties to NCQ and the liability of Len to the sureties.

[6] The liability of Len and the sureties stems from the payment bond which they furnished. NADLQ was co-obligee of that bond. The bond was conditioned on Len making prompt payment to all claimants, as therein defined, for all labor and materials furnished in the prosecution of the work under the housing contract. Tropic came within the definition of claimants. It was not fully paid. Because of the nonpayment, NCQ is now saddled with mechanic's lien. We think that the terms of the bond implied an obligation on the part of Len and the sureties to indemnify NCQ so that its lease and its interest in the leasehold improvements would be free of any mechanic's lien.

The liability of Len to the sureties is founded on an express agreement. In obtaining the bond, Len agreed with the sureties that he would indemnify them for any and all loss, costs, damages, expenses, and attorneys' fees incurred by them under the bond.

[7] [8] The third-party complaint of NCQ against Len and the sureties and the cross-claim of the sureties against Len were timely. Time to file an action for indemnification does not begin to run until the right to be indemnified is fixed by judgment or payment by the indemnitee. United New York Sandy Hook Pilots Association v. Rodermond Industries, 394 F.2d 65 (3rd Cir. 1968). Here, the third-party action and the cross-claim were in fact brought before the right to indemnification accured. However, they were proper under R.L.H.1955, s 193-45, which permitted sureties and indemnitors to be interpleaded in actions to enforce mechanic's lien.

Affirmed.

All Citations

52 Haw. 298, 475 P.2d 362, 41 Cont.Cas.Fed. (CCH) P 77,073

End of Document

APPENDIX F

255 Ark. 448
Supreme Court of Arkansas.

The DOW CHEMICAL COMPANY and the City of Russellville, Arkansas, Appellants,
v.
BRUCE-ROGERS COMPANY et al., Appellees.

No. 73—118.
|
Nov. 5, 1973.

Synopsis
Appeal by lessee and lessor city from a decree of the Chancery Court, Pope County, Richard Mobley, Chancellor, enforcing statutory materialmen's liens against leasehold interest in land owned by city. The Supreme Court, Jones, J., held that public policy forbids attachment of liens on public buildings and land for labor and materials furnished by contractors in construction of public facilities and that leasehold interest of lessee which contracted with city that it would not permit liens to attach to property was subject to liens.

Affirmed.

West Headnotes (3)

[1] **Mechanics' Liens**
⚖Leaseholds

Leasehold interests are subject to liens for materials and labor. Ark.Stats. §§ 51–601, 51–606.

2 Cases that cite this headnote

[2] **Mechanics' Liens**
⚖Public Buildings and Other Property

Public policy forbids attachment of liens on public buildings and land for labor and materials furnished by contractors in construction of public facilities. Ark.Stats. §§ 51–601, 51–606.

1 Cases that cite this headnote

[3] **Mechanics' Liens**
⚖Leaseholds

Even though property on which was constructed two manufacturing plants was owned by the city, where lessee which had option to purchase land contracted with city that it would not permit liens to attach to property, that it would cause any mechanics' liens against property to be discharged, that it would prevent enforcement of liens and that it would indemnify lessor city against all claims arising from any work done on property and lessee did not require surety bond from contractor which constructed manufacturing plants, leasehold interest was subject to statutory materialmen's liens. Ark.Stats. §§ 13–1601 to 13–1614, 14–604, 51–601, 51–606, 51–632.

2 Cases that cite this headnote

Attorneys and Law Firms

***449 **236** Ike Allen Laws, Jr., P. A., Russellville, for appellants.

Williams & Gardner, Russellville, for E. H. Sheldon, Bruce Rogers, Ask. La. Gas Co., Three States Supply and Rennae Sims Builders.

James A. McLarty, Newport, for Mobley Construction Co.

Jon Sanford, Russellville, for Luke Hester.

W. H. Schulze, Russellville, by James A. McLarty, Newport, for Russco Corp.

Opinion

JONES, Justice.

This is an appeal by Dow Chemical Company and the City of Russellville, Arkansas, from a chancery court decree enforcing statutory materialmen's liens filed by the appellees against the leasehold interest of Dow Chemical in land and improvements owned by the City of Russellville.

Most of the facts were agreed to by stipulation and they appear as follows: The City of Russellville sold industrial development bonds under the municipality and county development revenue bond law (Act 9 of 1960 (ex. session)) (Ark.Stat.Ann. ss 13—1601 to 13—1614 (Repl.1968)) and with the proceeds from said sale purchased land adjacent to Russellville in Pope County and leased the land to Dow Chemical Company over a period of years with option to purchase. The lease rentals to be paid by Dow Chemical were pledged to service the bonds. Upon retirement of the bonds, under Dow Chemical's option to purchase, it had a right to purchase the property including the improvements thereon for the sum of $100. Dow Chemical went into possession of the property under its lease and employed Russco Corporation and Russco Builders, Inc. in the building of two manufacturing plants on the property. These apparent two separate corporate entities will hereafter be referred to in the singular, simply as 'Russco.'

In the early part of 1972 Russco became unable to meet obligations and numerous liens for labor and materials were filed against the property, and numerous garnishments after judgments were filed against Dow Chemical and the City of Russellville. Russco had completed its work under its contract when the liens were filed and the judgments were obtained against it, but Dow Chemical and the City of Russellville were still indebted to Russco in the amount of $7,740. This amount still owed to Russco was far less than the amounts of the claims filed and judgments obtained against it. ***450** As a result of the liens and garnishments, Dow Chemical and the City of Russellville filed a bill of interpleader and deposited the amount still owed to Russco into the registry of the court.

A trial on the issues resulted in a decree adjudicating the amounts of the liens as valid claims against Russco but holding that the land and improvements were public property and beyond the reach of the statutory liens. The chancellor held, however, that the leasehold interest of Dow Chemical was subject to the claims of the lien claimants. The chancellor entered judgments for the lien claimants against Russco and decreed liens in favor of the lien claimants in the amounts of their respective judgments against the leasehold interest of Dow Chemical Company. The decree provided that if the judgments be not paid within 10 days that the leasehold interest of Dow Chemical be sold at public auction, with the proceeds from the sale to be used, after the payment of all costs and expenses of the sale, to satisfy the lien claimants pro rata with the excess, if any, ****237** to be remitted to Dow Chemical Company. The decree provided for a stay bond pending appeal to this court, and such bond was field by Dow Chemical. The appellants contend on this appeal that the chancellor erred in holding that the liens attached to the leasehold interest of Dow Chemical.

Ark.Stat.Ann. s 51—601 (Repl.1971) provides that:

> 'Every . . . workman . . . or other person who shall do or perform any work to or upon, of furnish any material, . . . for any building, erection, improvement to or upon land, . . . under or by virtue of any contract with the owner or . . . his . . . contractor or subcontractor, upon complying with the provisions of this act . . . shall have for his work or labor done, or materials, . . . furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same is situated. . . .'

[1] [2] By statute as well as case law in Arkansas, leasehold interests are subject to liens for materials and labor. ***451** Ark.Stat.Ann. s 51—606 (Repl.1971); Meek v. Parker, 63 Ark. 367, 38 S.W. 900. Public policy, however, forbids the attachment of liens on public buildings and land for labor and materials furnished by contractors in the construction of public facilities. Plummer v. School Dist. No. 1 of Marianna, 90 Ark. 236, 118 S.W. 1011; Holcomb v. American Surety Co., 184 Ark. 449, 42 S.W.2d 765. The parties in the case at bar seem to recognize the municipal immunity to liens on the fee title in this case. So, the question actually boils down to whether this municipal immunity extends to the leasehold interest owned by Dow Chemical Company.

[3] The appellants argue that the leasehold interest of Dow Chemical is pledged toward the retirement of the $20 million bond issue and the enforcement of materialmen's liens against this interest would amount to enforcing liens against public property held by the City of Russellville. The appellees argue that Dow Chemical contracted with the City of Russellville that it would not permit liens to attach to the subject property, and that appellees stand as third party beneficiaries of that contractual obligation. They also argue that appellants are estopped from

claiming immunity by virtue of their failing to comply with Ark.Stat.Ann. s 51—632 (Repl.1971) which provides as follows:

> 'No contract in any sum exceeding $3,000 providing for the repair, alteration, or erection of any public building, public structure or public improvement shall be entered into by the State of Arkansas, or any subdivision thereof, any county, municipality, school district, other local taxing unit, or by any agency of any of the foregoing, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract.'

Under the contract entered into between the City of Russellville as lessor, and Dow Chemical Company as lessee, it was provided that the lessor would obtain all necessary approvals from any and all governmental agencies requisite to the constructing and equipping of the project 'and the project shall be constructed and ***452** equipped in compliance with all state and local laws applicable thereto.' The contract further provided that the lessee shall, after occupancy of the premises under permits, approvals and authorities obtained by lessor, promptly comply with all valid statutes, laws, ordinances, orders, judgments, decrees, regulations, directions and requirements of all federal, state, local and other governments or governmental authorities, now or hereafter applicable to the leased premises. The contract provided, however, that the lessee should have the right to contest any such statutes, etc., and in such ****238** event compliance is to be postponed during the contest thereof, and:

> '(E)ven though a lien against the leased premises may be incurred by reason of such non-compliance Lessee may nevertheless delay compliance therewith during contests thereof, provided Lessee, if required, furnishes Lessor reasonably satisfactory security against loss by reason of such lien and effectively prevents foreclosure thereof.'

Section 801 of the leas pertains to mechanic's liens and recites as follows:

> 'After the completion of original construction and equipping, if any lien shall be filed against the interest of Lessor, Lessee, or the Trustee in the leased premises or asserted against any rent payable hereunder, by reason of work, labor, services or materials supplied or claimed to have been supplied on or to the leased premises at the request or with the permission of Lessee, or anyone claiming under Lessee, Lessee shall, within thirty (30) days after the receipt of notice of the filing thereof or the assertion thereof against such rents, cause the same to be discharged of record, or effectively prevent the enforcement or foreclosure thereof against the leased premises or such rents, by contest, payment, deposit, bond, order of Court or otherwise. Nothing contained in this Lease and Agreement shall be construed as constituting the express or implied consent to or permission of Lessor for the performance of any ***453** labor or services or the furnishing of any materials that woudl give rise to any such lien against Lessor's interest in the premises.'

The lease contract further provides that commencing with the completion of the project, or when the lessee takes possession if prior to the completion of the project, the lessee agrees to indemnify and save lessor harmless against and from all claims by or on behalf of any person, firm or corporation arising from the conduct or management, agement, or from any work or thing done on the leased premises during the term.

Section 1001 of the lease provides that if the lessee shall fail to keep the leased premises lien free, the lessor has the right to satisfy such lien and charge the amount thereof back to the lessor as rent or to exercise the same rights and remedies as in the cause of default by the lessee in the payment of back rent.

Under section 1501 of the lease it provides that the lessee may assign the lease or sublet the leased premises but in such event, the lessee is to remain liable and bound by the contract.

Section 1601 of the lease provides that the leasehold estate is, and shall continue to be, superior and prior to the trust indenture and any and all encumbrances, mortgages, deeds of trust and trust indentures constituting or granting

a lien on the leased premises or any part thereof or interest therein.

Section 1801 of the lease provides the lease may be terminated by the lessor if:

> 'This Lease and Agreement or the leased permises or any part thereof shall be taken upon execution or by other process of law directed against the Lessee, or shall be taken upon or subject to any attachment at the instance of any creditor of or claimant against the Lessee, and said attachment shall not be discharged or disposed of within ninety (90) days after the levy thereof.'

*454 Mr. Jack Capps, acting plant manager for Dow Chemical, testified that Russco constructed the buildings involved in this case under a contract with Dow Chemical and that the contract was entered into through Dow Chemical's Houston office. He said it was his understanding that Russco was to be paid out of the bond money raised for the construction of the plant. He said that bids were taken on the job and that Russco was not the low bidder but the contract was awarded to Russco because it was a local construction company. **239 He said that Russco was not bonded and that Dow Chemical did not generally require a bond on their contracts. He said that so far as he knows Dow Chemical was never advised by the City of Russellville, or anyone else, that there was supposed to be a bond required of a contractor on the job. He said that Russco had completely performed its contract.

Had the City of Russellville or its lessee Dow Chemical seen fit to comply with the mandatory provisions of s 51—632, supra, the difficulty presented in this case should never have arisen because under Ark.Stat.Ann. s 14—604 (Repl.1968) a surety bond would have protected against the claims for labor and materials, and the provisions of the bond would have become a part of the contract. New Am. Cas. Co. v. Detroit Fid. & Surety Co., 187 Ark. 97, 58 S.W.2d 418; Stewart-McGehee Const. Co. v. Brewster, 171 Ark. 197, 284 S.W. 53.

In the case of Nat'l Surety Corp. v. Edison, 240 Ark. 641, 401 S.W.2d 754, the City of Texarkana in a similar situation failed to exact a bond from the general contractor. Apparently as a device to circumvent the statute, it created a private corporation to go through the procedure of letting a contract for the construction of buildings before transferring the property to the city. In that case, however, National Surety had issued a performance bond to a subcontractor protecting the subcontractor from claims arising out of an additional subcontract. The bonding company contended it was not liable for labor and material lien claims under the general performance bond since the bond was not for the performance *455 of a public contract. We affirmed the liability of the bonding company and the concurring opinion pointed out as follows:

> '(T)he appellant must have known that the bond was made in connection with construction falling within the scope of Section 1 of Act 351, cited in the bond. In the circumstances the provisions of s 14—604 ought to be read into the bond, just as would have been the case if the city had complied with the law.'

It would appear from the record in the case at bar, that the City of Russellville also attempted to circumvent the mandatory provisions of the statute by simply requiring its lessee, Dow Chemical, to assume all responsibility made mandatory under the statute for the protection of laborers and materialmen on municipal property not subject to materialmen's and laborer's liens. Such could have been the only reason and effect in requiring Dow Chemical to protect and hold harmless the city against unenforceable laborer's and materialmen's liens against public property. Dow Chemical agreed to assume this responsibility under its lease contract and apparently elected to forego a bond on its contractor. According to the testimony of Mr. Capps, Dow Chemical as a matter of practice simply does not require bonds of its contractors. There is no question that Dow Chemical's leasehold interest was assignable by it.

In Grinnell Co. v. City of Crisfield, 264 Md. 552, 287 A.2d 486, cited by the appellants, the Rubberset Company owned land and sold it to the city under a contract providing that the city would build a plant thereon and lease the property back to Rubberset at a specified rental over a 20 year period, at the end of which Rubberset had an option to purchase the property. In that case the city contracted with Weidemuller Construction Company (without written approval of Rubberset) to erect the building on the property. Weidemuller entered into a subcontract with Grinnell for the installation of a fire protection system for the plant and when Grinnell was not paid for the materials it furnished, it filed a mechanic's *456 lien on the property. The trial court had no recourse against the city, Grinnell had no recourse against the city, and also held that the interest of Rubberset was subordinate to that of the city and was not subject to

Grinnell's lien. The trial court sustained a demurrer filed by Rubberset. In affirming the action of the trial **240 court, the appellate court remarked as 'significant' the fact that Rubberset was not a signatory to the construction contract, as required in the lease agreement, and the court in Grinnell cited from a previous case as follows:

> "* * * (A) mechanic's lien ordinarily attaches to whatever interest the person responsible for the improvements has in the property."

The court in Grinnell seemed to place the emphasis on who was responsible for the improvements or who was the employer of the contractor and as the appellees readily point out in the case at bar, Dow Chemical was the party responsible for contracting with Russco for the construction of the buildings involved in this case.

In the case of Tropic Builders, Ltd. v. United States, 52 Haw. 298, 475 P.2d 362 (1970) Len Company and Associates was the prime contractor on a government housing project. The Aloha Company was performing construction work for Sam Len. A subsidiary of Len referred to as 'NADLQ' had a 55 year lease on the site from the United States Government, and upon completion of the project the ownership stock was transferred to the federal government. Tropic was a subcontractor under Aloha and when it was not paid for its services, it filed a mechanic's lien against the interest of NADLQ and the improvements thereon. In the meantime NADLQ had merged into another corporate entity referred to as NCQ. The trial court held that Tropic had a valid lien against NCQ's lease on the project site and its interest in the improvements thereon. NCQ, Len, and his surety appealed and as assigned error contended that the mechanic's lien could not be enforced against property belonging to the United States or in which the United States had any interest. In affirming the trial court the Supreme Court of Hawaii said:
*457 'The judgment recognized the existence and enforceability of mechanic's lien not on the fee simple interest of the United States but on the interest of NCQ, as successor to NADLQ, in the lease and leasehold improvements on the project site.

* * * The fact that the project site was owned by the United States in fee simple did not make NADLQ's lease and NADLQ's interest in the leasehold improvements immune from such liens. Basic Refractories v. Bright, 72 Nev. 183, 298 P.2d 810 (1956); Crutcher v. Block, 19 Okl. 246, 91 P. 895 (1907).

It is stated in Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388, 59 S.Ct. 516, 517, 83 L.Ed. 784 (1939), that the 'government does not become the conduit of its immunity in suits against its agents or instrumentalties merely because they do its work.' That statement was made with reference to a corporation organized under the authority of a Congressional act. It should apply with equal or greater force to a corporation organized under a state law relating to private corporations.'

In the Crutcher case, cited by the Hawaii Supreme Court in Tropic Builders, supra, the lien was against houses erected by Crutcher in a housing project on land owned by the United States Government under lease to Crutcher. In approving the liens in that case the Oklahoma Supreme Court said:
'. . . Under the rule here adopted, it is immaterial that the legal title to the land in question is in the United States. The United States authorized the leasing of such land for townsite purposes, and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien.

*458 . . . where the government leases land for a term of years, such lease must be measured by the general law applicable **241 to such instruments, unless exceptions affirmatively are made by the law itself. . . .'

In 53 Am.Jur.2d, s 44, at p. 557, is found the following:
'The courts generally hold that, subject to the paramount title of the owner in fee and the conditions of the lease, a leasehold estate is subject to a mechanic's lien for an improvement erected by or under a contract with the lessee. It has been so held even though the land is the property of a municipality or of the United States. Some statutes expressly provide that the lien extends to leasehold interests.' See also 57 C.J.S. Mechanics' Lien s 17.

We are of the opinion the chancellor did not err in holding that the materialmen's liens involved in this case attached to the leasehold interest of Dow Chemical and in ordering the foreclosure of same.

The decree is affirmed.

All Citations

255 Ark. 448, 501 S.W.2d 235

End of Document

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
cbalkenbush@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Plaintiff
Tonopah Solar Energy, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company,

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

Case No. CV 39348
Dept. No. 2

TONOPAH SOLAR ENERGY, LLC'S ERRATA TO ITS REPLY TO BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN

Hearing Date: September 12, 2018

Hearing Time: 1:15 PM

Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE" or "Plaintiff"), by and through its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby submits this Errata to its Reply to Brahma Group, Inc.'s (hereinafter "BGI" or "Defendant") Opposition to TSE's Motion to Expunge BGI's Mechanic's Lien ("Motion").

In Sections I and II(C) of TSE's Reply, TSE implied and/or indicated that the Deed of Trust attached as Exhibit 4 to BGI's Opposition gave a security interest in the TSE improvements to PNC Bank. TSE submits this Errata to clarify that PNC Bank did not receive a security interest in the TSE owned improvements via the Deed of Trust. Rather, the Deed of

Trust conveyed a security interest in the improvements to the Department of Energy ("DOE"). The DOE is designated as the Beneficiary of the Deed of Trust. *See* Exhibit 4 to Opposition at pp. 1-2. The Deed of Trust merely designates PNC Bank as the DOE's collateral agent, making PNC Bank responsible for any necessary administrative and enforcement actions related to the property encumbered by the Deed of Trust.

DATED this 14th day of August, 2018.

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118

Attorneys for Plaintiff
Tonopah Solar Energy, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of August, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S ERRATA TO ITS REPLY TO BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

Richard L. Peel. Esq.
Eric B. Zimbelman, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
Attorneys for Defendant Brahma Group, Inc.

Cynthia S. Bowman

An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
cbalkenbush@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864
Attorneys for Plaintiff
Tonopah Solar Energy, LLC

IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company,

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

Case No. CV 39348
Dept. No. 2

TONOPAH SOLAR ENERGY, LLC'S RESPONSE TO BRAHMA GROUP, INC.'S STATEMENT OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN

Hearing Date: September 12, 2018
Hearing Time: 1:15 PM

On August 15, 2018, Defendant Brahma Group, Inc. ("Brahma") filed a Statement of Supplemental Authorities in Support of its Opposition to Tonopah Solar Energy, LLC's Motion to Expunge Brahma's Mechanic's Lien ("Supplement"). Plaintiff Tonopah Solar Energy, LLC ("TSE"), by and through its undersigned counsel, hereby responds to the Supplement. To the extent that this Court entertains the untimely Supplement filed without leave, TSE respectfully requests that this Court consider this response to the Supplement. As explained in the following Memorandum of Points and Authorities, the point drawn by the authorities identified in the Supplement actually supports the relief sought by TSE.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

To draw out the issue to which the Supplement appears to relate, requires a brief retracing of the briefing in this matter.

Brahma recorded a mechanic's lien and three amendments to the lien ("Lien"). In the original iteration of the Lien, Brahma attached federally-owned property. In the subsequent amendments of the Lien, Brahma attempted to attach the TSE-owned improvements on the federally-owned property instead of the federally-owned property.

TSE moved to expunge the Lien ("Motion"). In the Motion, TSE moved to expunge the Lien based on two overarching arguments: (1) Brahma failed to comply with the notice requirements of Nevada's mechanic's lien statutory scheme and (2) the original iteration of the Lien was void under the doctrine of sovereign immunity because it attached federally-owned property, and thus, the subsequent amendments of the Lien failed because a void lien cannot be amended.

Brahma opposed the Motion ("Opposition"). In the Opposition, Brahma raised a number of arguments. As it relates to the Supplement, Brahma argued that the amendments that comprise the Lien are (1) now proper because they only attach TSE-owned improvements on the federally-owned property and (2) valid because the original iteration of the Lien could be amended.

TSE filed a reply in support of the Motion and an errata to the reply ("Reply"). In the Reply, TSE showed that (1) it is hornbook law that a party cannot amend a void lien and (2) even if Brahma could amend the void lien, the doctrine of sovereign immunity bars Brahma from attaching the TSE-owned improvements on the federally-owned property because the federal government has a security interest and significant financial interest in the improvements which will be impaired if the lien is allowed to remain..

Brahma's Supplement appears to respond to the latter point raised in the Reply. The Supplement cites to six cases. Four of the cases support the proposition that a person recording a lien can attach a lessee's leasehold interest in property owned by the United States. Yet, as

explained below, none of these cases involve improvements where the United States has a prior, superior security interest in the attached improvements. On close examination, the additional cases cited by Brahma actually support TSE's position.

II. LEGAL ARGUMENT

The pertinent question presented by the Supplement is this: does sovereign immunity bar Brahma from attaching the TSE-owned improvements on federally-owned property in which the United States has a prior security interest?[1] Answering this question requires identifying the proper test to determine the scope of sovereign immunity. With this test in mind, it is clear that the cases cited in the Supplement, when contrasted with the facts presented here, actually support TSE's argument that Brahma cannot attach the TSE-owned improvements.

A. To determine if sovereign immunity applies, the Court must ask if the United States qualifies as a real substantial party in interest to this litigation.

The scope of sovereign immunity must be decided on a case by case basis. *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374, 66 S.Ct. 219, 221 (1945) ("The government's interest must be determined in each case by the essential nature and effect of the proceeding as it appears from the entire record." (internal quotations omitted)).

The Supreme Court of the United States has long held that sovereign immunity bars suits against property in which the United States has an interest. *See Cohens v. Virginia*, 19 U.S. 264, 412, 5. L.Ed. 257 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."); *United States v. Alabama*, 313 U.S. 274, 282, 61 S.Ct. 1011 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States.").[2]

While sovereign immunity clearly prevents a person from liening the United States' fee

---

[1] It is important to keep in mind that this Court need only address this issue if it finds that Brahma could amend the original iteration of the Lien, which was void, and as explained in the Reply, could not be amended.

[2] *See also* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 523, n. 5 (2003) (providing that *Cohens* was the Supreme Court of the United States' first "clear reference to the sovereign immunity of the United States in an opinion for the entire Court").

simple interest in property, sovereign immunity also prevents a person from liening property in which the United States has less than a fee simple interest. *See Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 1006 (1963). In *Dugan*, the Supreme Court of the United States elaborated on what type of a "less-than-fee-simple-interest" sovereign immunity would apply to. 372 U.S. at 620, 83 S. Ct. at 1006. There, the Court explained that "[t]he general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.* (internal quotations and citations omitted).

After discussing this law, the Seventh Circuit posed the following question to determine if the United States, when it has a less-than-fee-simple-interest in the property subject to a lien, has a significant enough interest in the property for sovereign immunity to apply: "the question to be determined in each case is whether the government's interest are such as to make it a 'real, substantial party in interest,' in the litigation." *United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 436 (7th Cir. 1991) (quoting *Mine Safety*, 326 U.S. at 374, 66 S.Ct. at 221). This is the test that applies in the instant case.

B. The cases cited by the Supplement exemplify when the United States does not qualify as a real substantial party in interest to a litigation.

Brahma cited to one Nevada case and three non-Nevada cases to support the proposition that a person recording a lien can attach an entity's leasehold interest in property owned by the United States. *See* Supplement, 1-3. These cases only stand for the proposition that a lien is not barred by sovereign immunity when the United States does not qualify as a real substantial party in interest to the litigation.

The Nevada case cited in the Supplement is *Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 187, 298 P.2d 810, 811 (1956). There, the Nevada Supreme Court had to determine whether sovereign immunity barred a person from liening a lessee's leasehold interest in property owned by the United States. *Id.* at 191, 298 P.2d at 814. In deciding that sovereign immunity did not bar the liening of the leasehold interest, the Court focused on two facts.

One, the lien did not interfere with the United States' interest as lessor. The Court explained that a leasehold interest is a separate estate, and the lien only attached to the leasehold interest possessed by the lessee subject to the United States' paramount title as lessor. *Id.* at 193, 298 P.2d at 815 (providing that "all the authorities hold that the lien merely attaches to the lessee's interest subject to the paramount title of the owner in fee").

Two, there was no indication that the United States cared who the lessee was or who possessed the leasehold interest. *Id.* To this point, the Court stated that "[i]f there had been a provision against assignment in the lease, or if there had been a provision for forfeiture of the lease in the event a lien were levied against the property, the Government could have indicated its desire to contract solely with [the original lessee]. But such provisions are not to be found in the Basic-Standard lease and from that we may reasonably infer that the government was not concerned with a lien foreclosure and its consequent substitution of another tenant." *Id.*

Taken together, these facts stand for the uncontroversial conclusion that a person can lien a lessee's leasehold interest in property owned by the United States as long as the United States is left in the same position upon the lien holder's foreclosure of the leasehold interest – i.e., the United States does not have a real substantial interest in the case. The other cases cited by the Supplement support the same conclusion. *See Dow Chemical Co. v. Bruce-Rogers Co.*, 255 Ark. 448, 501 S.W.2d 235 (Ark. 1973); *Tropic Builders, Ltd. v. United States*, 52 Haw. 298, 475 P.2d 362 (Haw. 1970); *Crutcher v. Block*, 19 Okla. 246, 91 P. 895 (Okla. 1907).

C. The cases cited in the Supplement support TSE's argument that Brahma cannot attach the TSE-owned improvements because the United States has a far more significant interest in this case than in those cases.

The cases cited in the Supplement show that a person can lien an interest which impacts an interest held by the United States, when, as in those cases, a foreclosure by the lienholder leaves the United States in the same position and its financial interest is not impaired. Yet, that is not what will occur here. Rather, this case presents the alternate scenario – foreclosure by Brahma on the TSE-owned improvements would not leave the United States in the same position -- it would harm the United States. Accordingly, the United States has a real substantial interest in this litigation. *See Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 404, 145

Cal. Rptr. 406, 412 (Ct. App. 1978) (providing that a party with a security interest can maintain a suit as a real party in interest against a third party for impairment of that security interest).

As explained in the Reply, if Brahma was able to attach the TSE-owned improvements and, thus, foreclose on them, unlike the cases cited in the Supplement, where foreclosure on the leasehold interest would not harm the United States, here, foreclosure on the TSE-owned improvements would harm the United States. The United States' security interest in the TSE-owned improvements derives from a $737 million loan guarantee issued by the Department of Energy. *See* Reply, p. 9. TSE makes payments on the loans guaranteed by the Department of Energy with funds it will receive from selling the power generated by the project on which it owns the improvements. *Id.* Further, TSE has a contract with NV Energy whereby NV Energy will purchase power from the project at significantly above market rates. *Id.* Foreclosure on TSE would result in termination of the NV Energy contract. *Id.* This is all to say that if Brahma was permitted to foreclose on the TSE-owned improvements, the financial interests of the United States would suffer.

In addition, unlike the cases cited in the Supplement, where the courts reasoned that it did not matter to the United States who possessed the leasehold interest, as evidenced by a lack of an anti-assignment provision, here, the United States has indicated its distinct interest in maintaining its relationship with TSE. The reasons discussed above show why this is the case.

Indeed, the United States memorialized this distinct interest in its Loan Guarantee Agreement with TSE ("Agreement"). *See* a True and Correct Copy of Pertinent Sections of the Agreement, attached hereto as **Exhibit 1**. Under the Agreement, TSE, the borrower, has to repay the guaranteed loan discussed above. *Id.* at section 3.1.1. Section 6.21 of the Agreement provides that TSE is required to maintain "good and valid title to its undivided ownership interest in the Project." *Id.* at Section 6.21. And Section 11.13(b) of the Agreement is an anti-assignment provision, providing that TSE "may not assign or otherwise transfer any of its rights or obligations" under the Agreement without the prior written consent from the Department of Energy. *Id.* at section 6.21 (emphasis added).

Contrasting these facts with the facts presented by the cases cited in the Supplement

confirms that the United States is a "real, substantial party in interest" to this case. As a result, Brahma cannot lien the TSE-owned improvements on the federally-owned property.

III. CONCLUSION

Based on the foregoing, and for the other reasons discussed in the Motion and the Reply, this Court should grant the Motion.

DATED this 6th day of September, 2018.

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118

Attorneys for Plaintiff
Tonopah Solar Energy, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of September, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S RESPONSE TO BRAHMA GROUP, INC.'S STATEMENT OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

Richard L. Peel. Esq.
Eric B. Zimbelman, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
Attorneys for Defendant Brahma Group, Inc.

Cynthia S. Bowman

An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

EXHIBIT 1

EXHIBIT 1

CONFORMED COPY
Last Updated January 31, 2017

LOAN GUARANTEE AGREEMENT

dated as of September 23, 2011

among

TONOPAH SOLAR ENERGY, LLC,
as Borrower,

U.S. DEPARTMENT OF ENERGY,
as Guarantor,

and

U.S. DEPARTMENT OF ENERGY,
as Loan Servicer,

Tonopah Solar Energy 110MW Concentrating Solar Power Plant
Tonopah, Nevada

This conformed copy includes amendments from the following: (i) Amendment No. 1 to the Loan Guarantee Agreement, dated as of March 2, 2012, (ii) Amendment No. 2 to the Loan Guarantee Agreement, dated as of November 6, 2013, (iii) Amendment No. 3 to the Loan Guarantee Agreement, dated as of August 13, 2014, (iv) that certain Omnibus Amendment, Consent, and Waiver Agreement, dated as of December 17, 2014, (v) that certain Second Omnibus Amendment, Consent, and Waiver Agreement, dated as of May 21, 2015, (vi) Amendment No. 4 to the Loan Guarantee Agreement, dated as of November 6, 2015, (vii) that certain Third Omnibus Amendment and Waiver Agreement, dated as of December 10, 2015, (viii) that certain Fourth Omnibus Amendment, Consent, and Waiver Agreement, dated as of May 4, 2016, (viii) Amendment No. 5 to the Loan Guarantee Agreement, dated as of June 7, 2016, (ix) Amendment No. 6 to the Loan Guarantee Agreement, dated as of August 17, 2016, (x) Amendment No. 7 to the Loan Guarantee Agreement, dated as of November 10, 2016, (xi) that

SECTION 2.4. Advance Requirements under the FFB Documents.

The Borrower shall comply with all disbursement requirements set forth in the FFB Documents.

SECTION 2.5. No Approval of Work.

The approval of any Advance under the Financing Documents shall not be deemed to be an approval or acceptance by DOE of any work, labor, supplies, materials or equipment furnished or supplied with respect to the Project.

SECTION 2.6. Secured Obligations.

From and after the First Advance Date, all Obligations at any time due, owing or incurred by the Borrower to any Finance Party under the Financing Documents shall be secured by the Collateral in accordance with the Security Documents.

ARTICLE 3
PAYMENTS; PREPAYMENTS

SECTION 3.1. Place and Manner of Payments.

3.1.1. Repayment of Guaranteed Loan.

The Borrower shall repay the Guaranteed Loan, including all fees and interest (whether taking the form of a Capitalized Interest Amount or otherwise) accrued thereon, in accordance with the FFB Documents. All payments due under the FFB Documents shall be made by the Borrower pursuant to the terms of the FFB Documents and the Accounts Agreement. The Collateral Agent shall apply each payment in accordance with the Accounts Agreement. The Borrower may not reborrow any amount of the Guaranteed Loan (whether in the form of an Advance or Capitalized Interest Amount) that is repaid.

3.1.2. Net of Tax, Etc.

(a) Tax. Any and all payments to any Secured Party by the Borrower hereunder or under any other Financing Document shall be made free and clear of, and without deduction for, any and all Taxes, excluding (i) income, franchise, branch profits, or similar taxes imposed on or measured by the net income or net profits (however denominated), or taxes imposed on or measured by the overall net assets, of such Secured Party by any jurisdiction or any political subdivision or taxing authority thereof or therein solely as a result of a present or former connection between such Secured Party and such jurisdiction or political subdivision (other than any connection arising as a result of the transactions contemplated by the Financing Documents) and (ii) any withholding Taxes or other Tax based on gross income imposed by the United States of America (all such Taxes, other than those excluded in clauses (i) and (ii) above, "Covered Taxes"). If the Borrower is required by law to withhold or deduct any Covered Taxes from or in respect of any sum payable hereunder or under any other Financing Document to any Secured Party, (A) the sum payable shall be increased as may be necessary so that after making all such required deductions (including deductions applicable to additional sums payable under this

Security Reserve Account until such Security Reserve Account is no longer required as security for a Support Instrument.

(v) If the Borrower replaces a Support Instrument with a new Support Instrument from a different issuer, the Borrower shall establish and maintain a Security Reserve Account in accordance with this Section 6.17(b) with the issuer of the replacement Support Instrument and shall cause the Security Reserve Account maintained by the prior issuer to be terminated.

SECTION 6.18. Debt Service Reserve Requirement.

Not later than thirty (30) days prior to the Amortization Start Date, the Borrower shall deposit in or credit to the Debt Service Reserve Account an amount equal to the Debt Service Reserve Requirement. Thereafter, until the Long Maturity Date, the Borrower shall make deposits to the Debt Service Reserve Account in accordance with the Accounts Agreement.

SECTION 6.19. Safety Audit.[92]

Not less frequently than annually, the Borrower shall conduct, or cause the Operator to conduct, a safety audit of the Project in a manner satisfactory to DOE, including an analysis of whether the Project is in compliance with all Applicable Laws and Environmental Laws and each such safety audit shall result in the prompt preparation of a written report, in form and substance reasonably satisfactory to DOE, with respect thereto that shall be delivered to DOE and the Independent Engineer. The Borrower shall provide for the prompt correction of any deficiencies identified in such safety audit and for the operation and maintenance of the Project in accordance with any recommendations set forth therein.

SECTION 6.20. Independent Consultants.

The Borrower (a) shall cooperate in all respects with each Independent Consultant and (b) shall ensure that each Independent Consultant is provided with all information reasonably requested by such Independent Consultant in fulfilling its duties to DOE and ensure that any information that it may supply to such Independent Consultant is accurate in all material respects and not, by omission of information or otherwise, misleading in any material respect at the time such information is provided.

SECTION 6.21. Title; Rights to Land.

The Borrower shall preserve and maintain (i) good and valid title to its undivided ownership interest in the Project and (ii) such rights to use the Project Site as are necessary to construct, operate and maintain, or cause the construction, operation, and maintenance of, the Project in all material respects in accordance with the requirements of the Transaction Documents.

---

[92] Amended pursuant to Section 2(n) of the Second Omnibus Amendment.

(c) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to the Borrower at its address set forth in Schedule 11.1 or at such other address that it shall notify the Loan Servicer hereunder;

(d) agrees that nothing herein shall (i) affect the right of any Secured Party to effect service of process in any other manner permitted by law or (ii) limit the right of any Secured Party to commence proceedings against or otherwise sue the Borrower or any other Person in any other court of competent jurisdiction nor shall the commencement of proceedings in any one or more jurisdictions preclude the commencement of proceedings in any other jurisdiction (whether concurrently or not) if, and to the extent, permitted by the Applicable Laws; and

(e) agrees that judgment against it in any such action or proceeding shall be conclusive, subject to any appeal of such judgment and may be enforced in any other jurisdiction within or without the U.S. by suit on the judgment or otherwise as provided by law, a certified or exemplified copy of which judgment shall be conclusive evidence of the fact and amount of the Borrower's obligation.

SECTION 11.13. Successors and Assigns.

(a) The provisions of this Loan Guarantee Agreement shall be binding upon and inure to the benefit of the parties to this Loan Guarantee Agreement and their respective successors and permitted assigns.

(b) The Borrower may not assign or otherwise transfer any of its rights or obligations under this Loan Guarantee Agreement or under any Financing Document without the prior written consent of DOE.

(c) FFB may assign any or all of its rights, benefits and obligations under the Financing Documents and with respect to the Collateral to any financial institution in accordance with the provisions of the FFB Documents.

(d) The Loan Servicer, acting for this purpose as an agent of the Borrower shall maintain a register for the recordation of the names and addresses of each Person that acquires an interest in the Guaranteed Loan in accordance with the provisions of the FFB Documents and the principal amounts of the Advances and Capitalized Interest Amounts owing to each such Person pursuant to the terms of this Loan Guarantee Agreement from time to time (the "Register"). The entries in the Register shall be conclusive, and the Borrower, the Loan Servicer and the Lenders shall treat each Person whose name is recorded in the Register as a Lender for all purposes of this Loan Guarantee Agreement, notwithstanding notice to the contrary. The register shall be available for inspection by the Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

SECTION 11.14. Participations.

FFB may from time to time sell or otherwise grant participations in any or all of its rights and obligations under the Financing Documents and with respect to the Collateral without the consent of the Borrower. In such case, Borrower and the Loan Servicer shall continue to deal