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under state law[20] as to the recoverability of any tax so paid, to require the prepayment of the tax as a requisite to testing any substantial questions involved, or to insist that the petitioner carry on his activities without the required license and face the risk of penal sanctions, would be to place too great a burden upon him. It was concluded that these considerations eliminated the statutory prohibition and established sufficient threat of irretrievable loss, so as to justify federal intervention. This decision is in conformity with the established rule which provides that even though there may be a remedy provided in the state, if it is inadequate, the petitioner may seek relief in the federal courts. It was apparent that the respondent attempted to restrict the growth of labor unions in its city. The petitioner had a right to engage in this activity. To insist that the peitioner seek the remedy provided would effectively deprive him of this right. By deciding that they had jurisdiction, the court arrived at the only just conclusion.

EDWARD S. JAFFRY

REAL PROPERTY—MECHANICS' LIENS—LIABILITY OF LESSOR FOR LESSEE'S IMPROVEMENTS

A lessee under a long term lease caused improvments to be made upon the leased premises. Subsequently, the lessee was evicted owing to a breach of conditions contained in the lease. Various mechanics' lienors sought to

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20. "There is no general statute in Georgia affording a taxpayer a remedy for the recovery of taxes illegally or erroneously assessed, except as herein before quoted [referring to GA. CODE § 20-1007 (4317) (1933)]." State Revenue Comm. v. Alexander, 54 Ga. App. 295, 187 S.E. 707, 709 (1936). The petitioner's right to recover depends completely on an interpretation and compliance with the Code of Georgia, *supra*, providing:

> Voluntary payments; recovery back-Payments of taxes or their claims, made through ignorance of the law, or where the facts are all known and there is no misplaced confidence and no artifice, deception or fraudulent practice used by the other party, are deemed voluntary, and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release a person or property from detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change this rule.

Thus, in Strachnan Shipping Co. v. Savannah, 168 Ga. 309, 147 S.E. 555 (1929), it was held that payment of taxes through *fear* of criminal prosecution, where no warrants had been issued and no prosecution commenced and there existed no *demands* or *threats* by persons with the authority to carry them out, are voluntary and not recoverable. See also Eibel v. Royal Indemnity Co., 50 Ga. App. 206, 177 S.E. 350 (1934) (where an officer, not authorized to issue a warrant, notified the taxpayer that if he did not make payment he would be arrested, and payment was made because of the threats, the payment was considered voluntary and not recoverable); Southern Stevedoring Co. v. Savannah, 36 Ga. 526, 137 S.E. 123 (1927) (wherein it was held that an allegation in taxpayer's petition that unless he paid the required occupation tax the city marshall would be notified and plaintiff prosecuted, alleged only a mere possibility of prosecution, and showed no immediate duress which would necessitate a payment in order to prevent immediate seizure of person or property); *accord*, Goodwin v. McNeil, 188 Ga. 182, 3 S.E.2d 675 (1939) (a fine paid to avoid imprisonment after a conviction which was later reversed, was held to be a voluntary payment and not recoverable).

enforce their liens. *Held*, although the lease did not specifically require the lessee to improve, there was a contemplation of improvements in the lease sufficient to cause the liens to attach to the lessor's interest.[1] *Anderson v. Sokolik*, 88 So.2d 511 (Fla. 1956).

A valid lien against a lessee's interest[2] in real property will not be extended to operate against the estate of the lessor, unless the lessee is the agent[3] or other statutory representative[4] of the lessor, or, unless the lessor has given his consent to or otherwise authorized the improvements made by the lessee.[5] Statutes vary in this regard but may be categorized into two general types: those requiring a contract with the lessor or his agent[6] (without regard to the element of consent); and those allowing a lien to be predicated on the owner's express or implied consent.[7]

Under the contract type statute, the courts have generally held that the lessee is not the agent of the lessor merely by virtue of the relationship

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1. FLA. STAT. § 84.03(2) (1955)
. . . when an improvement is made by a lessee, in accordance with a contract between such lessee and his lessor, liens shall extend also to the interest of such lessor. . . .

2. The Mechanics' Lien Statute provides that "owner" means the owner of realty, or any *interest* therein, who enters into a contract for the improvement of the realty. Therefore, "owner" applies to a lessee who contracts for the improvement of leased property, as well as to a fee simple title holder who so contracts. FLA. STAT. § 84.01 (1955); Lehigh Structural Steel Co. v. Joseph Langner, Inc., 43 So.2d 335 (Fla. 1949); *Cf.* Stowers v. Wheat, 78 F.2d 25 (5th Cir. 1927).

3. Lehigh Structural Steel Co. v. Joseph Langner, Inc., *Supra* note 2: "[I]t is generally held . . . that a lessor who requires his lessee to construct an improvement on the leased property may in certain instances thereby constitute the lessee his agent for that purpose. . . . "; see also Donald v. Heigel Lumber Co., 187 Ark. 1014, 63 S.W.2d 646 (1933); Robert L. Weed, Architect, Inc. v. Horning, 159 Fla. 847, 33 So.2d 648 (1947): "The rule appears to be general that when a lease requires the lessee to construct improvements . . . the lessee thus becomes the agent of the owner. . . ."; Stevens Supply Co. v. Stamin, 41 Ga. App. 239, 152 S.E. 602 (1930); Sol Abrahams & Son Const. Co. v. Osterholm, 136 S.W.2d 86 (Mo. 1940); Rio Grande Lumber & Fuel Co. v. Buergo, 41 N.M. 624, 73 P.2d 312 (1937); Bunn v. Bates, 31 Wash.2d 315, 196 P.2d 741 (1948).

4. Shreveport Armature & Elec. Works v. Harwell, 172 So. 463 (La. 1937): ". . . [T]he property of the owner can never be subject to a lien for material and labor, . . . unless it is first shown that the lessee in doing the work was acting as an agent, representative, or contractor of the owner. . . ."

5. Jones v. E. J. Rooks & Son, 78 Ga. App. 790, 52 S.E.2d 580 (1949); ". . . Title of the true owner of land cannot be subjected to a lien for improvements, unless it is shown that he expressly or impliedly consented to the contract under which the improvements were made. . . ."; Sandberg v. Burns, 198 Minn. 472, 270 N.W. 575 (1936); Osborne v. McGowan, 1 App. Div. 2d 924, 149 N.Y.S.2d 781 (3rd Dep't 1956); "A lien attaches when the improvement is made 'with the *consent*' of the owner"; Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 168 Misc. 376, 6 N.Y.S.2d 671 (1938).

6. Florida's Act (see note 1 *supra*) illustrates this type statute. See notes 4 & 5 *supra* for cases decided under this type statute. *Cf.* Masterbilt Corp. v. S. A. Ryan Motors, Inc., 149 Fla. 644, 6 So.2d 818 (1942).

7. The New York statute is typical: "A . . . laborer [or] materialmen . . . who performs labor or furishes materials for the improvement of real property with the consent or at the request of the owner thereof . . . shall have a lien. . . ." N. Y. STAT., c. 33, § 3 (1956). See note 5 *supra* for cases decided under this type statute.

of landlord and tenant.[8] Furthermore, in the absence of provisions in the lease requiring improvements, the mere consent of the lessor does not constitute the lessee the agent of the lessor.[9] On the other hand, under the consent type statute, the lien may be allowed against the estate of the lessor where he merely consents to the improvements.[10] However, where the terms of the lease require or obligate the lessee to make improvements of a permanent character, such provisions are generally held to constitute the lessee the agent of the lessor under the contract type,[11] or to constitute consent by the lessor under the consent type statute.[12] Where the improvements are merely "authorized" by the provisions of the lease, it is generally held that such authorization does not render the lessee the agent of the lessor;[13] but under the consent type statutes, authorization may be sufficient to bind the lessor's interest.[14]

Although the lease involved in the instant case appears not uncommon, the construction of the lease herein presented under the Mechanics' Lien Act,[15] gave rise to a case of first impression. The lease did not specifically require, nor did it expressly authorize, the lessee to improve the premises. At most "it is apparent from a reading of the lease[16] that the parties [merely] contemplated . . . a permanent improvement to be made . . ."[17] at some

8. Masterbilt Corp. v. S. A. Ryan Motors, Inc., 149 Fla. 644, 6 So.2d 818 (1942); Bunt v. Roberts, 76 Idaho 158, 279 P.2d 629 (1955): "A tenant or lessee is not generally considered the agent of lessor . . . merely by virtue of the relationship of landlord and tenant."; Donkle & Webber Lumber Co. v. Rehrman, 310 Ill. App. 17, 33 N.E.2d 709 (1941); Masterson v. Roberts, 336 Mo. 158, 78 S.W.2d 856 (1934); Rio Grande Lumber & Fuel Co. v. Buergo, 41 N.M. 624, 73 P.2d 312 (1937); Bunn v. Bates, 31 Wash.2d 315, 196 P.2d 741 (1948).

9. Masterbilt Corp. v. S. A. Ryan Motors, Inc., 149 Fla. 644, 6 So.2d 818 (1942); "The consent of the owner for the improvements . . . did not confer on or grant to the [lienor] the authority to do the work. . . ."; see also Donald v. Heigel Lumber Co., 187 Ark. 1014, 63 S.W.2d 646 (1933); Sol Abrahams & Son Const. Co. v. Osterholm, 136 S.W.2d 86 (Mo. 1940).

10. See note 5 *supra*.

11. See note 3 *supra*. The cases cited in footnote 4 supporting the agency relationship of lessor-lessee, dealt with leases in which the lessee was required to improve the premises.

12. See note 5 *supra*. *Cf.* Leon Decorating Co. v. Fifth Ave. Realty Corp., 191 Misc. 89, 76 N.Y.S.2d 652 (1st Dep't 1948).

13. Mulcahy Lumber Co. v. Ohland, 44 Ariz. 301, 36 P.2d 579 (1934); Bengal v. Madison Corp., 29 Wash.2d 779, 189 P.2d 480 (1948). See 79 A.L.R. 962 at 969; 163 A.L.R. 992 at 997.

14. "The unconditional authorization contained in the words of the lease giving the lessee the right to erect improvements . . . require that it be found that the lessor had 'consented' to the improvement". Osborne v. McGowan, 1 App. Div.2d 924, 149 N.Y.S.2d 781 (3rd Dep't 1956). In Gescheidt & Co. v. Bowery Savings Bank, 278 N.Y. 472, 15 N.E.2d 68 (1938) the lease gave approval to certain specific alterations but none without the lessor's consent. It was held that a lien existed against the lessor for only the work authorized by the lease.

15. See note 1 *supra*.

16. Article IV(A) of the 99 year lease requires payment of all taxes "on the land and all buildings, fixtures and *improvements* now or hereafter thereon." Article VI provides that the "lessors shall have a first lien . . . on the buildings . . . placed upon the premises. . . ." Article VII(A) provides that the lessee will ". . . keep all buildings and improvments . . . insured. . . ." Article XI, entitled "Lessee's obligation to Build" uses the term "*may*" in reference to any building the lessee *may* propose to erect.

17. Anderson v. Sokolic, 88 So.2d 511, 516 (Fla. 1956).

future date. Justice Terrell, speaking for the majority, pointed out that the Mechanics' Lien Act should be liberally construed to protect laborers and materialmen,[18] regardless of whether the required contract[19] is express, implied, or merely within the contemplation of the parties when drawing the lease agreement. Under this rationalization the court held that the lessee contracted for the improvements " 'in accordance with a contract' with the lessor whose interest in the property was then subject to the mechanics' and materialmen's liens."[20]

A well considered dissent[21] points out that the lessee was not obligated to improve and, therefore, a contract could not properly be implied.[22] In a recent case,[23] the court construed the same statutory provision "to make the lessor's interest in property liable for any construction work done by the lessee *only* if the lease agreement required the lessee . . . to effect the improvements involved. An acquiescence on the part of the lessor to the improvement [did] not render the interest of the lessor liable."[24] Moreover, in an earlier case,[25] the court held that written consent by the lessor authorizing the lessee to improve did not confer on the lienor the authority to do the work in the absence of any requirement or authorization to improve contained in the lease or in a written agreement between the lienor and lessor or lessee. The instant case obviously departs from the above two decisions in that a mere contemplation of improvements is now sufficient to burden the lessor's interest with mechanics' liens.

Although the decision in the principal case reaches an equitable result, it is submitted that the majority has extended the scope of the Mechanics' Lien Act provision here involved,[26] beyond that logically intended by the legislature. The lessor's liability has been expanded accordingly. To avoid unanticipated consequences, leases (especially long term leases) should evince clearly what the parties' intentions were with regard to improvements and repairs.

CARL G. PAFFENDORF

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18. "Lien Laws like that in question were designed to protect laborers and materialmen and should be liberally construed to accomplish that purpose." Robert L. Weed, Architect, Inc. v. Horning, 159 Fal. 847, 33 So.2d 648 (1947).

19. See note 1 *supra*.

20. *Cf.* Denniston & Partridge Co. v. Romp, 244 Iowa 204, 56 N.W.2d 601 (1953).

21. Anderson v. Sokolik, 88 So.2d 511, 515 (Fla. 1956).

22. Justice Drew in construing the statute states, "The manifest purpose of this specific provision of the statute is to limit the extent and the conditions under which liens may attach to the lessor's real property through acts of another so that the lessor at the time of the contract may determine, delineate, prescribe and limit the risk involved; and, if he so desires, take steps to protect his property against such liens by performance bonds, indemnity bonds or otherwise." *Id.* at 516.

23. Brenner v. Smullian, 84 So.2d 44 (Fla. 1956).

24. The original lease in the Brenner case did not require or authorize the lessee to alter the premises, but by subsequent agreements between the original lessor and the lessee, the improvements were not only authorized but the details and the extent thereof were agreed upon between the lessor and the lessee.

25. Masterbilt Corp. v. S. A. Ryan Motors, Inc., 149 Fla. 644, 6 So.2d 818 (1942).

26. See note 1 *supra*.