

IN THE MISSISSIPPI SUPREME COURT
NO. 2011-CA-00167

T. JACKSON LYON AND
ASSOCIATES, P.A.

APPELLANT

V.

PRECIOUS T. MARTIN, SR. AND
ASSOCIATES, PLLC

APPELLEE

BRIEF OF APPELLEE

Appeal From The Circuit Court Of Hinds County, Mississippi
(Sitting as an Appellate Court) Civil Action No. 251-10-140
Hon. Richard McKenzie, presiding

Precious T. Martin, Sr. MSB # [REDACTED]
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

T. Jackson Lyons & Associates, P.A.
Appellant

Lee Howell
Attorney for Appellant

Precious T. Martin, Sr. & Associates, PLLC
Appellee

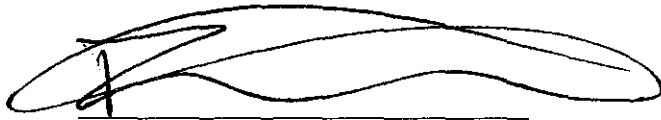
Precious T. Martin, Sr.
Attorney for Appellee

Hon. Malcolm Harrison
Circuit Court Judge who presided over appeal

Hon. Richard McKenzie
Special County Court Judge

Hon. Houston Patton
Trial Court Judge

SO CERTIFIED, this the 9th day of December, 2011.

A large, stylized handwritten signature in black ink, appearing to be 'P. T. Martin, Sr.', written over a horizontal line.

Precious T. Martin, Sr.

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STATEMEMNT OF THE ISSUE

The Circuit Court sitting on appeal was correct in reversing the trial court's award of attorneys fees. This case involved a series of contracts and not an open account.

STATEMENT OF THE CASE

On August 25, 2008, T. Jackson Lyons and Associates (“Lyons”) filed a complaint against Precious T. Martin & Associates, PLLC (“Martin”) in the County Court of Hinds County, Mississippi, Hon. Houston Patton presiding. CP.

3. In that lawsuit, Lyons claimed that Martin owed him \$14,543.19 on an open account for legal services or, in the alternative, for breach of contract. Lyons worked on a number of cases for Martin and billed him separately for each project at the rate of \$100.00 an hour. T. 18, 20.

The trial court awarded Lyons \$14,543.19 in damages and \$4,847.73 in attorneys fees for a total of \$19,390.92. CP. 115.

Martin filed a Motion for New Trial which was denied on February 4, 2010.

Thereafter Martin filed a Notice of Appeal to the Circuit Court. That Court upheld the award of damages but reversed on the issue of attorneys fees finding that the case was not one on an open account.

[Lyons] argues the two firms did have an open account based on continuing transactions between the two. [Lyons] allowed [Martin] to request work on a series of cases on credit between the two. [Lyons] allowed [Martin] to request work on a series of cases on credit without the necessity of negotiating separate contracts. The work was done for a set rate per hour plus expenses. [Lyons] argues the Supreme Court considers attorney-client contracts to be open accounts and not employment contracts. *Fawer v. Evans*, 627 So.2d 829 (Miss. 1993).

The county court order does not explain the award of attorneys fees; [Lyons] argues Rule of Civil Procedure 37 is an alternative explanation. Rule 37 allows for the recovery of fees when attorneys fail to comply with court orders compelling discovery. [Martin] refused to comply with court order compelling discovery.

This Court is of the opinion the two firms were operating under an oral contract and not an open account. Attorney fees should not have been awarded.

CP. 157.

It is from this Order that Appellant Lyons appeals.

SUMMARY OF ARGUMENT

The Circuit Court sitting as an appellate court was correct. This was not a suit upon an open account. Rather, the parties entered into a series of contracts whereby Lyons would perform contract work for Martin at the rate of \$100.00 an hour and bill separately for each lawsuit upon which he worked. The Circuit Court's ruling reversing the trial court's award of attorneys fees was correct and should be affirmed.

LAW AND ARGUMENT

The Circuit Court sitting on appeal was correct in reversing the trial court's award of attorneys fees. This case involved a series of contracts and not an open account.

The standard of review on appeal from a bench trial is as follows: findings of fact are upheld where they are supported by substantial, credible, and reasonable evidence. *Transocean Enterprise, Inc. v. Ingalls Shipbuilding, Inc.*, 33 So.3d 459, 462 (Miss. 2010). Conclusions of law are reviewed *de novo*. *Ervin ex rel. Wrongful Death Beneficiaries v. Delta Regional Medical Center*, 55 So. 3d 190, 193 (Miss.App. 2010).

Here, the trial court awarded attorneys fees which were allowable only if 1) provided for by contract or 2) the case was one based on an open account. Since there was no written contract (or any proof of an oral contract containing a provision for the payment of attorneys fees), the trial court's award of attorneys fees was apparently based on the premise that the amount due was on an open account pursuant to M.C.A. § 11-53-81. A plaintiff is not entitled to attorneys fees under M.C.A. § 11-53-81 where the plaintiff's claim is based on contract rather than on an open account. *C.R. Daniels v. Yazoo Mfg. Co.*, 641 F.Supp. 205, 210 (S.D.Miss. 1986). Since the award of attorney's fees permitted in open account suits is a derogation of common law, courts must strictly construe attorney fees on the open accounts statute. *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So.2d 974, 977-978 (Miss. App. 2007).

In *City of Jackson v. Camelot Apartments Ltd. Partnership*, 707 So.2d 191, 193-94 (Miss.App. 1998), the Mississippi Court of Appeals explained that “An open account is a ‘type of credit extended through advance agreement by a seller to a buyer which permits the buyer to make purchases without a note of security and is based on an evaluation of the buyer’s credit.’” *City of Jackson*, 707 So.2d at 193 quoting *Cox v. Howard, Weill, Labouisse, Friedrichs, Inc.*, 619 So.2d 908, 914 (Miss. 1993) (finding an open account where the customer signed an agreement allowing him to make purchases over several years without engaging in separate transactions).

The term “open account” has been given various definitions, but it is generally held to mean an account based on continuous transactions between the parties which have not been closed or settled but are kept open in anticipation of further transactions.” *Westinghouse Credit Corp. v. Moore, McCalib, Inc.*, 361 So.2d 990, 992 (Miss. 1978). An open account has been described as “similar to a line of credit.” AmJur Accounts § 4. This is demonstrated by the case of *Mauldin Co. v. Lee Tractor Co. of Mississippi, Inc.*, 920 So.2d 513 (Miss.App. 2006). The trial court in *Mauldin* awarded attorneys fees in an action to recover for the amount due on the sale of a tractor. On appeal, the Court of Appeals reversed finding that “nothing in the record indicates that the transaction was predicated upon Mauldin Company’s credit or an advance agreement to allow purchases on credit.” *Mauldin Co.*, 920 So.2d at 515.

What was true in *Mauldin* is true here. The County Court ruled that this was an open account yet nothing in the record indicated that the transaction was predicated on Precious Martin & Associates' credit or an advance agreement to allow services on accredit. Additionally, within the context of M.C.A. § 11-53-8, an account is not considered an open account absent a final and certain agreement on price. *McLain v. West Side Bone and Joint Center*, 656 So.2d 119, 123 (Miss. 1995). This was not a case based on an open account but rather one based on a series of oral contracts and, thus, the award of attorneys fees was error and the circuit court's ruling, on appeal, that the attorneys fees were erroneously awarded was correct and must be upheld. T. Jackson Lyons & Associates did a certain amount of legal work for Precious T. Martin, Sr. and Associates and the latter paid for it based upon their mutual oral agreement.

The elements of a valid contract are 1) two or more contracting parties, 2) consideration, 3) an agreement that is sufficiently definite, 4) parties with the legal capacity to make a contract, 5) mutual assent, and 6) no legal prohibition precluding contract formation. *Rotenberry v. Hooker*, 864 So.2d 266, 270 (Miss. 2003). Based on the testimony at trial, the existence of a contract is abundantly clear. However, the trial court improperly found that this was an action on an open account.

It is true that attorney services may be charged via an open account. *See, e.g., Michael S. Fawer v. Evans*, 627 So.2d 829, 833 (Miss. 1993). However, a distinction must be made between an open account and a series of contracts.

Richards v. Gulfco Electronics Corp., 360 So.2d 609 (La.App. 1978) (Attorney filed claim to recover for services rendered defendant in connection with different lawsuits; attorney's claim for payment in connection with different lawsuits was for series of contracts for professional services and could not be considered an open account); *Ernest v. Richards*, 360 So. 2d 609, 610 (La.App. 1978) ("The instant claim is for a series of contracts for professional services and cannot be considered an open account"); *Smith Bros. Trucking of Mt. Airy v. Baker Truck Brokerage, Inc.*, 2008 U.S. Dist. LEXIS 84759 (M.D.N.C. 2008) ("Smith Brothers has made no showing of [] an [open] account. While it is true that the parties engaged in a series of transactions, each transaction was evidenced by a distinct contract, whereby Smith Brothers hauled goods for BTB, submitted necessary documentation, and received payment for a specific contract(s)").

An open account is one in which some item of contract is not settled by the parties, or where there have been running or current dealings between the parties and the account is kept open with the expectation of further dealings. In other words, it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions not reduced to writing, and subject to future settlement and adjustment. However, all accounts which are not stated or reduced to writing are not necessarily open accounts; and an account, although not reduced to writing or stated, cannot be said to be open where it is based on a contract whose terms are fixed and certain.

* * *

1 C.J.S. Account, p. 574.

In this case, the facts demonstrate that payment was based on the contemplation of Lyons performing services in connection with multiple lawsuits. As such, the case involves a series of contracts for professional services and not a single open account. Therefore, as a matter of law, the trial court's award of attorneys fees was erroneous. The Circuit Court, sitting on appeal, was correct to reverse the trial court's award of attorneys fees and, thus, this Court should affirm the order of the Circuit Court sitting on appeal.

Conclusion

The trial court's award of attorneys fees was erroneous. The transactions at issue here were a series of contracts for professional contracts and not an open account. Therefore, the Circuit Court sitting as an appellate court was correct to reverse the trial court's award of attorneys fees. The Circuit Court's holding should be affirmed.

RESPECTFULLY SUBMITTED,

BY: 
PRECIOUS T. MARTIN, SR.

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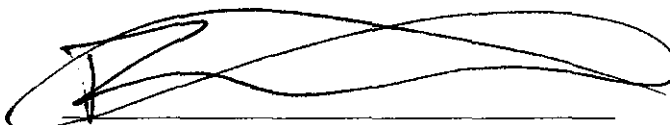
CERTIFICATE OF SERVICE

I, Precious T. Martin, hereby certify that I have this day caused to be delivered via United States Mail, first class postage prepaid, a true and correct copy of the foregoing to the following:

Lee Howell
P.O. Box 251
Jackson, MS 39205-0251

Hon. Richard McKenzie
Special County Court Judge
P.O. Box 1403
Hattiesburg, MS 39403

This, the 9th day of December, 2011.

A handwritten signature in black ink, appearing to read 'Precious T. Martin, Sr.', written over a horizontal line.

PRECIOUS T. MARTIN, SR.