

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-00167

RT

T. JACKSON LYONS & ASSOCIATES, P.A.

APPELLANT

VS.

PRECIOUS T. MARTIN, SR. & ASSOCIATES, PLLC

APPELLEE

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SUMMARY OF REBUTTAL ARGUMENT

I. Open Account

The only issue addressed by appellee Precious T. Martin, Sr. & Associates, PLLC ("Martin Firm") in its brief was whether appellant T. Jackson Lyons & Associates, P.A. ("Lyons Firm") was entitled to attorney's fees based on open account. For the first time, the Martin Firm argued that this case involved a series of separate contracts rather than an open account. The Martin Firm, however, does not cite anything in the record to support this argument. There is nothing in the record that would support the Martin Firm's new argument. The record does support a finding that the Lyons Firm is entitled to attorney's fees because it complied with MISS. CODE ANN. § 11-53-81 (eff. July 1, 1980) and proved it was entitled to payment from the Martin Firm on open account.

II. Uncontested Matters

The Martin Firm did not contest the facts that (1) the circuit court did not have jurisdiction over this appeal, (2) an award of attorney's fees was appropriate because the Martin Firm willfully refused to participate in discovery and disregarded the county court's orders compelling discovery, and (3) an award of attorney's fees was appropriate because the Lyons Firm proved matters at trial that the Martin Firm refused to concede in response to requests for admission.

ARGUMENT

I. The Lyons firm proved its action on open account.

Without citation to the record, the Martin Firm argues that the Lyons Firm entered into “a series of contract” with the Martin Firm and is not entitled to attorney’s fees based on open account. The record, however, only supports the conclusion that this is a case of open account.

The invoices that were entered into evidence reflect only one “initial meeting” with the Martin Firm’s principal to discuss the terms of the Lyons Firm’s representation. [Ex. P-9.] In fact, that invoice supports the conclusion that a single agreement with the Martin firm regarding the Lyons Firm’s representation was reached at that meeting. The invoice reflects that Lyons met “w/PT Martin re: various appeals...” and that there was no charge for this initial meeting. [Ex. P-9]. No subsequent invoice reflects any discussion regarding the Lyons Firm’s representation. [Exs. P-3 through P8, P-10 through P-14]

All of the invoices to the Martin Firm are on the same terms. The Lyons Firm billed the Martin Firm for any costs incurred and \$100.00 per hour for services. [Exs. P-3 through P-14] The Lyons Firm extended credit to the Martin Firm. There is no evidence of prepayment by the Martin Firm.

“‘Open account’ has been given various definitions, but it is generally held to mean an account based on continuing transactions between the parties which have not been closed or settled but are kept open in anticipation of further transactions.” *Mauldin Co. v. Lee Tractor Co. of Miss.*, 920 So.2d 513, 515 (Miss. App. 2006) quoting *Westinghouse Credit Corp. v. Moore, McCalib, Inc.*, 361 So.2d 990, 992 (Miss. 1978). That is exactly what happened in the instant case. Lyons’s testimony, supported by exhibits, showed a contract that involved continuing transactions between the parties for work on various legal matters. Lyons did not require any security from Martin. Lyons allowed Martin to request work on a series of cases on credit without the necessity of negotiating separate contracts. Martin offered no evidence to the contrary.

Mississippi statutes and case law applied to the facts supported by the record in this case only support the conclusion that this is a case of open account. The Martin Firm’s brief cites no Mississippi case or statute to the contrary. The Martin Firm does not cite any facts in the record, and there are no facts in the record, that would support the Martin Firm’s contention that this case involved a series of separate contracts.

The law cited by the Lyon’s Firm in its principal brief applied to the facts shown by the record provide more than enough basis to support the

conclusion that the Lyons Firm is entitled to the trial court's award of attorney's fees based on open account. *See*, Appellant's Brief at pp. 17-19.

II. Uncontested Matters

In its brief, the Martin Firm did not contest the fact that the circuit court did not have subject matter jurisdiction over this appeal. Section 11-51-79 of the Mississippi Code of 1972, Annotated, provides that in an appeal from county court the filing of an appeal bond is jurisdictional. Failure to post the required bond within the time prescribed is jurisdictional and the circuit court has no power to hear an appeal in which bond is not timely posted. The Martin firm did not file a bond in this appeal and there was nothing in the record before the circuit court regarding a bond except for the Martin firm's motion requesting that bond be waived. *See*, Appellant's Brief at pp. 15-17.

The Martin Firm did not contest the fact that an award of attorney's fees was appropriate as a sanction because the Martin Firm did not respond to discovery and did not comply with court orders compelling discovery. *See*, Appellant's Brief at pp. 19-21.

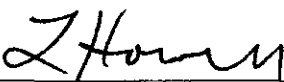
The Martin Firm did not contest the fact that an award of attorney's fees was appropriate as a sanction because the Lyons Firm proved at trial the truth of certain basic matters that the Martin Firm failed to admit. *See*, Appellant's Brief at pp. 21-23.


CONCLUSION

For the reasons set forth above, the circuit court lacked subject matter jurisdiction and the Martin Firm's appeal should have been dismissed. In the alternative, the circuit court's judgment reversing the county court's award of attorney's fees should be reversed. Further, the Martin Firm's appeal was frivolous and without merit and the Lyons Firm should be awarded its costs and attorney's fees incurred in the appeal.

Respectfully submitted this 19th day of January, 2012.

T. JACKSON LYONS & ASSOCIATES, P.A.

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CERTIFICATE OF SERVICE AND FILING

The undersigned attorney of record to the Appellant hereby certifies that the above and foregoing Appellant's Reply Brief has been filed with the Clerk of the Court, together with the electronic copy, via United States mail, first class postage prepaid, and that true and correct copies have been deposited into the United States mail, first class postage prepaid, to the following addressees:

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Special County Court Judge
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SO CERTIFIED, this the 19th day of January, 2012.



Lee Howell