

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-00167

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T. JACKSON LYONS & ASSOCIATES, P.A.

APPELLANT

VS.

PRECIOUS T. MARTIN, SR. & ASSOCIATES, PLLC

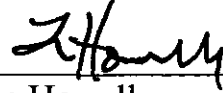
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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 the Mississippi Supreme Court and the Judges of the Mississippi Court of Appeals may evaluate disqualification or recusal.

1. The Appellee Precious T. Martin, Sr. & Associates, PLLC ("Martin firm"), is a Mississippi professional limited liability company with its principal offices in Jackson, Hinds County, Mississippi.
2. The Martin firm is represented currently by Precious T. Martin, Sr. and Saundra Maria Thompson. The Martin firm has also been represented in the case below by Gerald A. Mumford and Sorie Tarawally.

3. Appellant T. Jackson Lyons & Associates, P.A. ("Lyons firm")
is a Mississippi professional corporation with principal offices in
Jackson, Hinds County, Mississippi.
4. The Lyons firm is represented by Lee Howell.



Lee Howell
Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

Certificate of Interested Persons.....	i
Table of Contents.....	ii
Table of Authorities.....	v
Issues.....	1
Statement of the Case.....	2
A. Procedural History.....	2
B. Facts.....	6
Summary of the Argument.....	12
I. Subject Matter Jurisdiction.....	12
II. Attorney's Fees.....	13
Standard of Review.....	14
Argument.....	15
I. Posting a Bond is Jurisdictional in Appeals from County Court...15	
II. Attorney's fees.....	17
A. The Lyons firm proved its action on open account.....	17
B. The Martin firm did not cooperate in discovery and failed to comply with the county court's order compelling discovery.....	19
C. The Lyons firm proved at trial the truth of certain basic matter the Martin firm failed to admit under Rule 36.....	21
D. The amount of fees awarded is supported by the record.....	23

Conclusion.....	24
Certificate of Service.....	25

TABLE OF AUTHORITIES

Cases:

<i>Allen v. Mac Tool, Inc.</i> , 671 So.2d 636 (Miss. 1996)(rehearing denied).....	18
<i>Andrews v. Williams</i> , 723 So.2d 1175 (Miss.App.1998).....	14
<i>Carmichael v. J. Cahn Co.</i> , 183 Miss. 535, 184 So. 417 (1938).....	14, 16
<i>Doe ex rel. Brown v. Pontotoc County School Dist.</i> , 957 So.2d 410 (Miss.App. 2007).....	14
<i>Douglas Parker Electric, Inc. v. Mississippi Design and Development Corp.</i> , 949 So.2d 874 (Miss. 2007).....	19
<i>J.N.W.E. v. W.D.W.</i> , 922 So.2d 12, 14 ¶ 5 (Miss. App. 2005)(<i>en banc</i>), <i>cert. den.</i> 926 So.2d 922 (Miss. 2006).....	2
<i>Johnson v. Evans</i> , 517 So. 2d 570 (Miss. 1987).....	15
<i>Mauldin Co. v. Lee Tractor Co. of Miss.</i> , 920 So.2d 513 (Miss. App. 2006)	17-18
<i>McArthur v. Acme Mechanical Contractors, Inc.</i> , 336 So.2d 1306 (Miss. 1976).....	18-19
<i>Michael S. Fawer v. Evans</i> , 627 So.2d 829 (Miss. 1993).....	18
<i>Sumner v. City of Como Democratic Executive Committee</i> , 972 So. 2d 616 (Miss. 2008).....	16
<i>Stacy v. Ross</i> , 798 So.2d 1275 (Miss. 2001).....	14
<i>Westinghouse Credit Corp. v. Moore, McCalib, Inc.</i> , 361 So.2d 990 (Miss. 1978).....	17
<i>Wilbourne v. Wilbourne</i> , 748 So.2d 184 (Miss.App. 1999).....	14

<i>Williams v. Michael</i> , 319 So. 2d 226 (Miss. 1975).....	15
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Statutes and Other Authorities:

MISS. CODE ANN. §11-53-79 (1972).....	1, 12, 15
MISS. CODE ANN. §11-53-81 (eff. July 1, 1980).....	2, 12, 19
Mississippi Rules of Appellate Procedure, Rule 36.....	13, 21
Mississippi Rules of Civil Procedure Rule 37.....	1, 13, 19-21, 22-23

ISSUES

This is an appeal from an order of the circuit court sitting as an appellate court. The county court judgment that was reviewed by the circuit court was entered after trial on issues of breach of contract and open account. The issues in this appeal are (1) whether the circuit court had subject matter jurisdiction of this appeal, and (2) whether the county court's award of attorney's fees was proper.

The circuit court did not have subject matter jurisdiction because the Martin Firm did not perfect an appeal pursuant to Section 11-51-79 of the Mississippi Code of 1972 Annotated, as amended. The statute requires that a bond shall be filed to perfect an appeal from county court to circuit court. If an appeal bond is not filed within the prescribed time, then a circuit court has no jurisdiction to hear the appeal. In this case, the Martin Firm did not file a bond and there was no bond in the record on appeal before the circuit court. The circuit court erred by not dismissing the appeal for lack of subject matter jurisdiction.

The record before the circuit court showed that the county court had several good grounds to award the Lyons Firm attorney fees based both on the open account statute and as a sanction under Rule 37 of the Mississippi Rules of Civil Procedure. That record supports the conclusion that the Lyons Firm was entitled to attorney fees as part of the judgment because (1)

the Lyons Firm 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, (2) the Martin Firm willfully refused to participate in discovery and disregarded the county court's orders compelling discovery, and (3) the Lyons Firm proved matters at trial that the Martin Firm refused to concede in response to requests for admission.

STATEMENT OF THE CASE

A. Procedural History

The Lyons firm filed its complaint in August of 2008, stating claims on open account and for breach of contract. [R.3-28] Copies of demand letters and unpaid invoices were attached to and made a part of the complaint. [R. 11-28]

The Martin firm filed an answer on October 7, 2008. [R. 29-31] The Martin firm was represented by its principal, Precious T. Martin, Sr. [R. 30]

The Lyons firm filed a motion for trial setting in late October, 2008. [R. 32-34] This was necessary because the Martin firm's counsel would not accept or return telephone calls and did not reply to letters regarding scheduling. [R. 32] The Lyons firm filed a motion to compel discovery on December 4, 2008. [R. 35-82] The Martin firm had not responded to interrogatories or requests for production of documents. [R. 37, 47-60] The

Martin firm filed defective responses to requests for admissions. [R. 37-38, 64-68]

Counsel for the Lyons firm personally hand-delivered seven letters from October to November of 2008 to the Martin firm's physical location in an effort to deal with discovery without the intervention of the court. [R. 38, 69-83] These letters document the many times that counsel for the Lyons firm telephoned and left messages and that no calls were ever taken or returned. [R. 70-83] The Martin firm's principal and defense counsel, Precious T. Martin, Sr., refused to confer with the Lyons firm's counsel to resolve discovery issues and failed to appear for a noticed deposition. [R. 40, 81-83] The Martin firm did not propound any discovery requests and did not seek to depose the Lyons firm.

The Martin firm was served with a motion to compel discovery and a notice of hearing on the motion, but did not respond and did not appear at the hearing. On December 11, 2008, the county court ordered the Martin firm to respond to discovery and appear for a deposition on or before January 4, 2009. [R. 83-84] The Martin firm filed a "motion to reconsider" the order compelling discovery responses. [R. 85-86] The Martin firm was represented in this motion by new counsel, its associate Gerald Mumford. [R. 86]

In this motion to reconsider, the Martin firm claimed that it was “improper for this Court to compel Defendant to respond to Plaintiff’s arbitrary dates without its presence.” [R. 86] In response, the Lyons firm showed that the hearing had been properly noticed and that other notices had been hand-delivered to the Martin firm’s offices not once, but repeatedly from October 27 through December 4, 2008. [R. 89-99]

The Martin firm continued to express its contempt for the court by ignoring the order compelling discovery. On February 5, 2009, the Lyons firm brought on for hearing its motion to prohibit the Martin firm from using any information at trial that should have been produced during normal discovery and the Martin firm’s motion to reconsider. [R. 105-07] Again, the Martin firm did not appear at the noticed hearing.

The county court denied the Martin firm’s “motion to reconsider.” [R. 104] The court granted the Lyons firm’s motion to prohibit the Martin firm from using evidentiary materials at trial that should have been produced during discovery. In its order, the court found that the order to compel had been entered, that the Martin firm never served responses as required by the order, that the Martin firm refused to schedule or appear for deposition, and that the rule-based discovery period had expired. [R. 102-03]

In February, 2009, the county court entered an order on the Lyons firm’s motion to set a trial date. [R. 110-11] The parties proceeded to trial

and a judgment was entered in favor of the Lyons firm and against the Martin firm on November 12, 2009. [R. 112] The county court awarded the Lyons firm the \$14,543.19 in damages requested in the complaint and \$4,847.73 in attorney's fees, together with costs of court and post-judgment interest at the legal rate. [R. 112] The Martin firm filed a motion for new trial. [R. 116-19] The trial court entered an order denying the motion for new trial on February 4, 2010, and the Martin firm filed its notice of appeal the same day. [R. 126-28]

The Martin firm did not file an appeal bond. In fact, on February 22, 2010, the Martin firm filed a motion asking the court to waive bond. [R. 129-32]

The Circuit Clerk certified the record on appeal and transmitted the record to the circuit court on February 23, 2010. [Supp. R. 8]

The Lyons Firm moved the circuit court to dismiss this matter because the Martin Firm never filed an appeal bond. [R. 138-41] The circuit court denied the motion to dismiss by order entered June 7, 2010. [R. 155]

On December 9, 2010, the circuit court entered a final order reversing the county court judgment as to attorney's fees. [R. 156-57] In that order, the circuit court found that it was "of the opinion the two firms were operating under an oral contract and not an open account." [R. 157] On

January 4, 2011, the Lyons Firm filed its notice of appeal, designation of the record, and certificate of compliance with Rule 11(b)(1). [R. 158-63]

B. Facts

The thirty (30) exhibits offered by the Lyons Firm and admitted into evidence at trial prove every element of the Lyons Firm's claims for breach of contract and open account.¹

The Lyons Firm made written demand for the Martin Firm to pay its accounts more than thirty (30) days before filing this civil action. Exhibits P-1 and P-2 are demand letters dated June 6, 2008, and June 26, 2008, respectively, from the undersigned on behalf of the Lyons Firm directed to the agent of the Martin Firm, Precious T. Martin, Sr. Both of these demand letters contain the itemization of the amounts due on account as required by MISS. CODE ANN. § 11-53-81 (1972). [Ex. P-1 and P-2]

The exhibits show that the Lyons Firm billed the Martin Firm for work on a series of transactions. Invoices were submitted after the work was done and were payable on receipt. For example, Exhibit P-3 is an invoice rendered by the Lyons Firm to the Martin Firm that the Martin Firm paid. The invoice is dated August 8, 2006, and bears the notation that it is a correction of an invoice rendered a day earlier. The case referenced is

¹ The county court transcript that is part of the record on appeal before this court was not a part of the record before the circuit court. The Martin Firm chose not to include the transcript in the record and did not pay for the transcript. [Supp. R. 8] That is why this exposition of the facts refers solely to the trial exhibits.

Wheeler v. Horace Mann Life Ins. Co., et al. The narrative entries show that Lyons reviewed an appellate record, conducted research, and wrote an appellate brief. [Ex. P-3]

Exhibit P-4 is a composite of a billing statement dated December 6, 2006, and supporting materials for the same case as in Exhibit P-3. The “notes” section of the bill states that it is for the reply brief in that matter. [Ex. P-4] A handwritten notation indicates the bill was paid in February of 2007.

Exhibits P-5, P-6, P-7, P-8 and P-9 are invoices from the Lyons Firm to the Martin Firm that reflect work on a series of appellate matters. All of these invoices have notations on them stating that they were paid. [Ex. P-5, P-6, P-7, P-8 and P-9]

Exhibit P-9 is a bill paid by the Martin Firm in May of 2006. This is the Lyons Firm’s earliest billing to the Martin Firm. [Ex. P-9] The first narrative entry, dated May 12, 2006, reflects that Jack Lyons and Precious Martin met that day to discuss “various appeals and JCManning trial court matter.” [Ex. P-9] The invoice reflects no charge for a one hour initial meeting with Martin.

Exhibit P-10 is a “statement of account” of amounts overdue summarizing the Martin Firm’s debt to the Lyons Firm for work performed on three different matters. The statement is dated October 15, 2007. [Ex.

P-10] The three cases for which the Lyons Firm sought payment were *Horace Mann Ins. Co. v. Nunaley*, *Evanston Ins. Co. v. Martin*, and *Callaway Appeal*. [Ex. P-10]

Exhibit P-11 is a composite of billings for work done in *Evanston Ins. Co. v. Martin et al.*, the case referenced in Ex. P-10. The original invoice is dated July 10, 2007, and the composite exhibit contains “overdue notices” dated December 1, 2007, through September, 2008. [Ex. P-11] The Lyons Firm filed suit on August 25, 2008. [R. 4]

Exhibit P-12 is a composite exhibit of billings for the same matter, but represent a billing for earlier work. The original bill is dated March 15, 2007. [Ex. P-12] As with P-11, the composite exhibit consists of the original bill together with many overdue notices. [Ex. P-12]

The next exhibit is similar to P-11 and 12; it represents an original bill for the *Callaway Appeal* dated October 15, 2007. [Ex. P-13] This composite exhibit consists of the original bill together with overdue notices from December of 2007 through August, 2008. [Ex. P-13]

The next composite billing exhibit refers to *Horace Mann Life Ins. Co. et al. v. Nunaley*. [Ex. P-14] The original invoice is dated March 15, 2007, and is in the amount of \$7,043.66, and records nearly 70 hours of work done by Lyons on behalf of Mrs. Nunaley from October of 2006, when Lyons entered an appearance, to February 26, 2007, when Mrs. Nunaley’s

brief was filed. [Ex. P-14] The face of the original invoice bears the handwritten note "pd 2000- 4/16/07." [Ex. P-14] The other billings show that an additional payment of \$731.89 was credited to this account, but that the balance was never paid. [Ex. P-14]

Exhibits P-15, and P-16 through P-24, are the various briefs and motions that Lyons filed on behalf of the Martin Firm's clients. On all of these documents, Mr. Martin is listed as counsel along with Lyons. [Ex. P-15, P-16-P-24] The exhibits show that Mr. Lyons appeared before Mississippi's appellate courts on behalf of Martin's clients in the following cases:

1. Thomas Lee Parker and Rubye C. Parker v. Horace Mann Life Insurance Company and Leo Hawkins, Jr.;
2. Johnnie Callaway, individually and on behalf of the wrongful death beneficiaries of J. C. Manning; and Jeffery Blackmon v. Dreamline Trucking, Inc., and Diamond Horseshoe Trucking, Inc.;
3. Della Watts v. Horace Mann Life Ins. Co., and Leo Hawkins, Jr.;
4. Pamela Evans v. Horace Mann Life Ins. Co., and Leo Hawkins, Jr.;
5. Laurette Warren v. Horace Mann Life Ins. Co., and Leo Hawkins, Jr.;
6. Horace Mann Life Ins. Co., and Leo Hawkins, Jr. v. Betty Nunaley; and
7. Willy M. Wheeler and Emma J. Wheeler v. Horace Mann Life Ins. Co., and Leo Hawkins, Jr.

In addition, Mr. Lyons represented Mr. Martin when Martin's professional negligence insurer sued Martin and others in a declaratory

judgment action in federal court:

8. Evanston Insurance Company v. Byrd, et al, No. 3:06-cv-00725

Exhibit P-16 is the Lyons firm's motion to withdraw from representing the Martin firm's clients in a case styled *Johnnie Callaway, individually and on behalf of the wrongful death beneficiaries of J.C. Manning; and Jeffery Blackmon vs. Dreamline Trucking, Inc., and Diamond Horseshoe Trucking, Inc.* [Ex. P-16] The motion reflects that Lyons had filed the Appellants' principal brief but that "economic issues" had arisen between Martin and Lyons. [Ex. P-16] Because of the actual conflict of interest caused by Martin's failure to pay his account, Lyons sought the Supreme Court's leave to withdraw. [Ex. P-16] While not reflected in the record, as shown on the Supreme Court's general docket, the motion to withdraw was granted by the Clerk under Rule 27(b)(3), Miss.R.App.P., on August 15, 2007.

Exhibits P-25 through P-28 are invoices for the various cases that were claimed by the Lyons Firm to be due and outstanding as of the trial date, including interest through the trial date. These amounts are reflected on the composite Exhibit P-29, showing a total due with interest through the date of the trial in the amount of \$17,510.15. Exhibit P-29 shows the amounts originally due on the three outstanding accounts. That total is

\$12,619.32. [Ex. P-29] The lower half of the exhibit shows just the interest amounts through the trial date. That amount was \$4,890.83. [Ex. P-29]

The county court awarded the amount claimed as damages in the complaint, \$14,543.19, but did not award all of the interest as requested in Exhibits P-25 through P-29. Interest was awarded at the legal rate from and after the date of final judgment. [R. 113]

The final exhibit offered at trial was the Lyons Firm's lawyer's bill. The first page of the billing is a summary showing attorney fees in the amount of \$9,618.00, and costs of \$288.85, for a total amount of \$9,906.85. [Ex. P-30] The undersigned's bill for work in this case – to the date of trial – shows an expenditure of 45.8 hours at an hourly rate of \$210.00. [Ex. P-30, last page]

The Lyons Firm's lawyer's bill is a short-hand means of understanding this case from the initiation of demand through the date of trial. As reflected in the billing, the Martin Firm's principal and counsel, Precious Martin, Sr., spoke with counsel for the Lyons firm only twice prior to trial, on June 26, 2008, and on July 8, 2008. [Ex. P-30, page 2] The billing reflects calls to Mr. Martin or to his office on at least 18 different dates. Martin only responded twice and office personnel responded four times. [Ex. P-30, page 2-8] The bill reflects work preparing the demands,

preparing and filing the complaint, and propounding discovery. [Ex. P-30, page 2-3]

The bill reflects the Martin Firm's lack of response to discovery and counsel's efforts to obtain a response both by telephone and written correspondence. [Ex. P-30, page 3-5] The motion to compel responses to discovery and to set a deposition was necessary because the Martin Firm refused to respond to discovery requests and did not accept or return repeated queries by telephone. [Ex. P-30, page 4-6]

The record on appeal to the circuit court reflects that the Martin Firm engaged the Lyons Firm to do appellate work from May of 2006 through mid-2007. In addition, Lyons performed other services in the *Callaway* and *Evanston Insurance Company* matters. The invoices reflect a series of transactions on different matters. The Martin Firm was not billed until after the work was done. On appeal to the circuit court, the Martin Firm did not contest that it owed the Lyons Firm \$14,543.19, for work done by Jack Lyons on behalf of the Martin Firm's clients and Mr. Martin individually.

SUMMARY OF THE ARGUMENT

I. Subject Matter Jurisdiction

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. The circuit court never had subject matter jurisdiction of this appeal.

II. Attorney's Fees

The only issue raised on appeal by the Martin Firm was whether the trial court erred in awarding attorney's fees or, in the alternative, whether the Lyons Firm proved the amount of fees awarded. The Martin Firm did not dispute the damage award of \$14,543.19 or the award of interest and costs.

The trial court did not state the basis for its award of attorney's fees. There are at least three independent bases for the award that are supported by the record. First, the Lyons Firm proved all of the elements essential to recover on open account. Second, the record reflects the Martin Firm's contempt for the trial court and its orders that would support an award of fees as a sanction under M.R.C.P. Rule 37. Third, the Martin Firm failed to admit matters under M.R.C.P. Rule 36 that the Lyons Firm proved at trial and, therefore, an award reasonable expenses, including attorney's fees, is proper pursuant to M.R.C.P. Rule 37(c).

STANDARD OF REVIEW

The circuit court, sitting as a court of appeals, can consider nothing but the record coming up from the county court. *Carmichael v. J. Cahn Co.*, 183 Miss. 535, 184 So. 417 (1938).

As a contract and open account matter this case was tried in a Mississippi law court. However, it was tried to the county court sitting without a jury. Under these circumstances the factual findings of the trial judge are accorded the same deference, and the case reviewed under the same general standard, as cases tried to chancellors in our equity courts. *Doe ex rel. Brown v. Pontotoc County School Dist.*, 957 So.2d 410, 416 ¶ 14 (Miss.App. 2007). Generally, a Mississippi appellate court reviews cases for legal error and does not otherwise reverse the decisions of chancellors except under certain defined exceptions. Those exceptions are where a court has clearly or manifestly erred. *Id.*; *Andrews v. Williams*, 723 So.2d 1175, 1177 ¶ 7 (Miss.App.1998). If substantial evidence in the record supports the County Court's findings, the appellate court will not reverse. *Id.*; *Wilbourne v. Wilbourne*, 748 So.2d 184, 186 ¶ 3 (Miss.App. 1999). Questions of law, of course, are reviewed under a *de novo* standard. *Stacy v. Ross*, 798 So.2d 1275, 1278 ¶ 13 (Miss. 2001).

ARGUMENT

I. Posting a Bond Is Jurisdictional in Appeals from County Court

Section 11-51-79 of the MISSISSIPPI CODE OF 1972 ANNOTATED, as amended, is the jurisdictional statute for appeals from county court. The statute provides that filing of an appeal bond in an appeal from county court is required. *Williams v. Michael*, 319 So. 2d 226 (Miss. 1975). Failure to post the required bond within the time prescribed by law is jurisdictional and the circuit court has no power to hear an appeal in which bond is not timely posted. *Johnson v. Evans*, 517 So. 2d 570 (Miss. 1987).

In the instant case, the county court entered a money judgment in favor of the Lyons Firm against the Martin Firm in the amount of \$19,390.92, plus plaintiff's costs of action and interest at the legal rate from November 12, 2009. [R. 112] The Martin Firm's Motion for New Trial was denied by order entered on February 4, 2010. [R. 126]

The Martin Firm served a Notice of Appeal on February 4, 2010. [R. 127-28] The Martin Firm did not submit a bond to the clerk. The certified copy of the county court docket that was part of the record on appeal to the circuit court does not reflect any bond filed by the Martin Firm.

The record on appeal before the circuit court consisted of the following portions of the record before this court in this order: Supplemental Volume pages 5-7, Record pages 3-137, Supplemental Volume

page 8, and the envelope containing 30 exhibits. The remaining portions of the record before this court, including the county court transcript, were not part of the record on appeal before the circuit court.²

The circuit court, sitting as a court of appeals, can consider nothing but the record coming up from the county court. *Carmichael v. J. Cahn Co.*, 183 Miss. 535, 184 So. 417 (1938). In this case, the Martin Firm did not post an appeal bond. The only thing in the record before the circuit court regarding bond was the Martin Firm's motion asking the county court to waive supersedeas bond that was filed on February 17, 2010. [R. 129-32] Therefore, the circuit court had no subject matter jurisdiction in this matter.

In *Sumner v. City of Como Democratic Executive Committee*, 972 So. 2d 616 (Miss. 2008), this court has held that "[a] bond is a pledge or guarantee for fulfillment of an undertaking." *Sumner*, 972 So. 2d at 619. That was an election contest case in which the contestant paid the clerk \$300 cash in lieu of the \$300.00 cost bond required by the jurisdictional statute. In *Sumner*, this court concluded that the cash payment, in lieu of a promise to pay, satisfied the cost bond requirement.

In this case, however, the Martin Firm never filed a bond. There was no evidence in the record on appeal of the bond required by the jurisdictional

² There were irregularities in the Circuit Clerk's preparation of the record that have been addressed by motion to this court.

statute and, therefore, the circuit court had no subject matter jurisdiction and should have dismissed the Martin Firm's appeal.

II. Attorney's Fees

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

“‘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.

The evidence in this case shows that the Lyons firm did legal work for the Martin firm for a set rate per hour plus expenses on a series of matters. The evidence shows that the Martin firm paid the Lyons firm's invoices on this basis on a series of matters. [Exs. P-3 - P-14] The *Mauldin* case cited by the Martin firm was based on a single transaction for the sale of tractors.

902 So.2d at 514-15. “Open account,” as is the instant case, is an account based on continuing transactions between parties which have not been closed or settled but are kept open in anticipation of further transactions. *Allen v. Mac Tool, Inc.*, 671 So.2d 636 (Miss. 1996)(rehearing denied).

This court has held that an action by an attorney against a client for fees for professional services rendered on open account pursuant to an unwritten agreement is subject to the statute of limitations for actions on open accounts and oral contracts instead of the statute for employment contracts. *Michael S. Fawer v. Evans*, 627 So.2d 829, 833 (Miss. 1993). The record in this case shows that the Lyons firm provided professional services on behalf of the Martin firm in the form of briefs and motions that are exhibits in the record. [Exs. P-15 - P-24] On page four of its brief to the circuit court, the Martin firm states that “the existence of a contract is abundantly clear.”

The circuit court erred in holding that there was an oral contract but not an open account. All actions on open account are contract cases. This court has held that an open account is an oral or unwritten contract. *Douglas Parker Electric, Inc. v. Mississippi Design and Development Corp.*, 949 So. 2d 874 (Miss. 2007); *McArthur v. Acme Mechanical Contractors, Inc.*, 336 So.2d 1306 (Miss. 1976). The operation of running an open account is

generally governed by rule of contract. *McArthur v. Acme Mechanical Contractors, Inc.*, 336 So.2d 1306 (Miss. 1976).

“When any person fails to pay an open account within thirty (30) days after receipt of written demand therefor correctly setting forth the amount owed and an itemized statement of the account in support thereof, that person **shall be liable for reasonable attorney’s fees** to be set by the judge for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the plaintiff.” MISS. CODE ANN. §11-53-81 (eff. July 1, 1980) (Emphasis added). In this case, counsel for the Lyons firm delivered the requisite notice twice. [Exs. P-1 and P-2] The Martin firm did not pay and judgment on the claim was rendered in favor of the plaintiff. [R. 113] Based on the statute and the facts in the record, the Martin firm shall be liable for reasonable attorney’s fees in an amount set by the county court. The amount awarded by the county court was approximately half of the fees incurred before trial proven by the Lyons firm and approximately one-third of the amount of the unpaid account. [Ex. P-30]

B. The Martin firm did not cooperate in discovery and failed to comply with the county court’s order compelling discovery.

Rule 37 of the Mississippi Rules of Civil Procedure provides for the award of expenses, including attorney’s fees, and for sanctions for failure to

make or cooperate in discovery and for failure to comply with orders compelling discovery.

In this case, the Martin firm refused to respond to interrogatories and requests for production of documents, submitted defective responses to requests for admission, and refused to appear for a deposition. Counsel for the Lyons firm made diligent attempts to work with the Martin firm in this matter, but the Martin firm did not respond. These matters are shown in the Motion to Compel. [R. 36-83] The Martin firm did not respond to the Motion to Compel and did not appear at the noticed hearing on the motion and did not appear at the noticed hearing on the motion. The county court entered an order compelling the Martin firm to respond to interrogatories, requests for production, and requests for admissions and to appear for a deposition. [R. 84-85]. The Martin firm's only acknowledgment of the court's order was a Motion to Reconsider. [R. 86-89] As shown in the Response to the Motion to Reconsider, there was no basis for the Martin firm's motion. [R. 90-100, 105].

In spite of the county court's direct order, the Martin firm did not file any responses to interrogatories or requests for production of documents, did not file amended responses to requests for admissions and refused to appear for a deposition. This complete failure to comply with the court's order is contempt of court and is sanctionable. Where a motion under M.R.C.P. 37 is

granted, the rule provides that “the court **shall**, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion...to pay the reasonable expenses incurred in obtaining the order, including attorney’s fees.” (Emphasis added.)

This is not a case where the Martin firm did not completely respond to discovery. The Martin firm did not respond to interrogatories or requests for production in any manner whatsoever. The Martin firm refused to appear for a deposition at all.

This is not a case where the Martin firm did not completely comply with the court’s order compelling discovery. The Martin firm did not comply with the court’s order in any manner whatsoever.

This is a case in which expenses, including attorney’s fees, and sanctions are warranted under Rule 37 of the Mississippi Rules of Civil Procedure.

C. The Lyons firm proved at trial the truth of certain basic matter the Martin firm failed to admit under Rule 36.

The Lyons firm served a Request for Admissions on the Martin firm eleven months before trial. (R. 43-47] This request asked the Martin firm to admit the truth of certain basic matters which the Martin firm denied. All of these matters were proven true by the Lyons firm at trial.

Requests 6 through 13 asked the Martin firm to admit that certain briefs and motions had been filed on behalf of the Martin firm's clients by the Lyons firm. [R. 44-45] It is not clear why the Martin firm would deny matters that are in the public record in the office of the Clerk of the Supreme Court of Mississippi, but that is what happened. [R. 66-67] All of the matters addressed in Requests 6 through 13 were proven true by the admission into evidence of the filed stamped copies of the briefs and motions. [Exs. P-15 - P24]

Requests 18 and 19 asked the Martin firm to admit the delivery of written demand for payment. [R. 45-46] In spite of the fact that the demands were hand delivered to the Martin firm on the dates set forth in the requests, the Martin firm denied these matters. [R. 68] The matter were proven true by the admission into evidence of copies of the demands. [Exs. P-1 and P-2]

Other matters included in the requests were the amount due on account and other basic facts about the Martin firm's account. [R 43-47] The Martin firm denied almost all of these matters. [R. 65-69] All of the matters were proven true as shown by the exhibits admitted into evidence and the county court's entry of judgment granting the requested relief.

Rule 37(c) of the Mississippi Rules of Civil Procedure provides in part that "[i]f a party fails to admit...the truth of any matter as requested

under Rule 36, and if the party requesting the admissions thereafter proves...the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. In this case, the Martin firm is liable to the Lyons firm for expenses and attorney's fees incurred in proving the matters which the Martin firm should have admitted.

D. The amount of fees awarded is supported by the record.

Exhibit P-30 shows that the invoice submitted by counsel for the Lyons firm as of the day before trial amounted to \$9,906.85. Since that time, counsel for the Lyons firm tried the case and has responded to post trial motions and to this appeal. The trial court awarded the Lyons firm only \$4,847.73 as attorney's fees. [R. 113] This is approximately half of the fees incurred by the Lyons firm before trial and approximately one-third of the \$14,543.19 damages awarded in the judgment. That award is more than supported by the evidence. [P-30] The record on appeal contains pleadings, discovery, motions, correspondence and other papers that were filed and submitted by counsel on behalf of the Lyons firm. Counsel for the Lyons firm appeared at all noticed hearings and at trial. The award of attorney's fees is supported by substantial evidence. The Lyons firm has, in fact, paid its counsel more than the amount awarded as attorney's fees by the court.


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 6th day of September, 2011.

T. JACKSON LYONS & ASSOCIATES, P.A.

By: 
Lee Howell, its Attorney

Lee Howell
Attorney at Law
P. O. Box 251
Jackson, Mississippi 39215-0251
Tel. (601) 573-4157
Fax (601) 519-0000
MSB # 

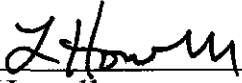
CERTIFICATE OF SERVICE AND FILING

The undersigned attorney of record to the Appellant hereby certifies that the above and foregoing Appellant's 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:

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

Precious T. Martin, Sr.
Saundra Maria Thompson
Precious T. Martin, Sr. & Associates, PLLC
P.O. Box 373
Jackson, Mississippi 39201

SO CERTIFIED, this the 6th day of September, 2011.



Lee Howell