

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WELCH ROOFING & CONSTRUCTION, INC.
Appellant

vs.

MARY JOANN FARINA, JOSEPH FARINA,
M.D. AND RAILROAD INVESTMENTS, LP
Appellees

Supreme Court No.:
2011-CA-0201

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSISSIPPI
HONORABLE DAVID STRONG, PRESIDING

BRIEF OF APPELLEES
ORAL ARGUMENT NOT REQUESTED

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INVESTMENTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record, in accordance with Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, 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.

1. Judge David H. Strong, Jr.
14th District Circuit Court
2. Mary JoAnn Farina and husband, Dr. Joseph Farina,
Appellees
3. Rex Welch and wife, Lisa Welch, principals of Welch
Roofing & Construction, Inc., Appellants
4. Conrad Mord, Attorney for Appellants

SO CERTIFIED, this the 16th day of April, 2012.

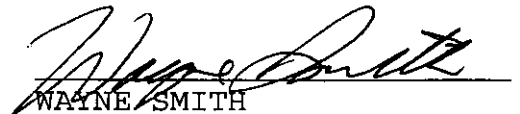

WAYNE SMITH
Attorney for Appellees

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STATEMENT OF ISSUE(S)

1. The issues in this case is whether or not the trial Court erred by dismissing all parties from a complaint and amended complaint to enforce construction lien?

STATEMENT OF THE CASE

Welch Roofing & Construction, Inc. filed a construction lien for alleged services performed on a building owned by Railroad Investments, L.P. This initial complaint was filed on May 31, 2007. Oral depositions were not noticed on several occasions. Only a part of Dr. Farina's deposition was taken in July of 2008. These notices are noted on the Court docket, CP-1.

An amended complaint was filed in this case by the plaintiff/appellant, Welch Roofing & Construction, Inc., on the 18th day of August, 2008. A summons was issued on that date. The summons was again issued to Dr. Farina as the registered agent of service of process for Railroad Investments, L.P. on July 15, 2012 and process was later served.

After process was served, a series of motions were filed by Railroad Investments, L.P., the last of which was joined by Joseph and Mary JoAnn Farina requesting a dismissal of the case for failure to serve process of the amended complaint within 120 days after the Amended Complaint was filed.

The Circuit Court of Lincoln County heard oral argument on the 1st day of August, 2011, and entered its' Order dismissing the case of Welch Roofing & Construction, Inc., CP-50.

STATEMENT OF FACTS

The appellees would raise an objection to the Statement of Facts provided by the appellant. It appears that the appellant incorporated its' Memorandum in Opposition to Defendants' Second Amended Motion into the facts of its' brief. There are facts that are not and have not been introduced into evidence and are only a part of an argument presented to the trial Court by the appellant. The appellees specifically object to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12. There is no record or proof that these facts occurred. Appellees would request that the Court strike and/or disregard these specific paragraphs.

The appellees would show that this is a case that specifically deals with the pleadings, the filing of pleadings, the issuance of process and service of process. All relevant items are noted in the Court documents.

A complaint was filed on May 31, 2007 by the appellant, Welch Roofing & Construction, Inc. against Mary JoAnn Farina and Joseph Farina, M.D. The complaint is styled "Complaint To Enforce Construction Lien". In reading the complaint, it appears that it is requesting the Court to enter a judgment for the purpose of enforcing the construction lien that has been filed. There is no other specific request for relief.

An Amended Complaint was filed on August 18, 2008 and process was issued. Process was not served and a second process was issued to Railroad Investments, L.P. in July 2010, well past the 120 days

allowed by Rule 4(H) of the Mississippi Rules of Civil Procedure. The record is void as to whether a copy of the Amended Complaint was ever delivered to Mary JoAnn Farina, Joseph Farina or their counsel of record.

The Amended Complaint makes the same allegations and request a monetary judgment and to enforce the construction lien. No other allegations or cause of action is alleged.

The Court entered an Order dismissing the suit on August 1, 2011.

SUMMARY OF ARGUMENT

It appears from the brief of the appellant that they are conceding the fact that Railroad Investments, L.P. should be and was properly dismissed from the suit.

The question is whether Mary JoAnn Farina and Joseph Farina should have been dismissed. It is disputed as to whether or not Mary JoAnn Farina and Joseph Farina received service of the Second Amended Complaint. Further, it is disputed as to whether or not the complaint is for a breach of contract.

It is the appellees' position that the trial Court made the proper ruling and dismissed all parties.

ARGUMENT

This is a cause of action that stems from a "Complaint To Enforce Construction Lien" filed by Welch Roofing & Construction, Inc. The very wording of the complaint clearly indicates that this complaint (CP-6-8) was for the sole purpose of enforcing a construction lien against certain real property claimed to be owned by Mary JoAnn Farina and Joseph Farina. There is no allegation in this complaint of a breach of contract. The allegations as they appear request a judgment and foreclosure on the construction lien. There is no other causes of action noted within the complaint.

Depositions were taken pursuant to notice in July 2008. It was at this time that Welch Roofing discovered that they did not have the proper party to the suit. At that point, Welch Roofing then filed an "Amended Complaint To Enforce Construction Lien". This Amended Complaint repeated the allegations of the first complaint, and added Railroad Investments, L.P. as a defendant. This complaint states no additional causes of action. The complaint does request a judgment and an award for foreclosure of the construction lien. There is no allegation as to breach of contract.

The docket indicates that a summons was issued at the time the Amended Complaint was filed on August 18, 2008. Process was reissued July 15, 2010 and process was not served on Railroad Investments, L.P. until late July or early August 2010, two (2) years after the Amended Complaint was filed. The record before

the Court is void as to whether a copy of the Amended Complaint was delivered to the attorney for Mary JoAnn Farina and Joseph Farina. It is interesting that process issued after a Clerk's notice to dismiss was filed, CP-20.

A Motion to Dismiss was filed by Railroad Investments, L.P., amended and a Second Amended Motion was filed to include Mary JoAnn and Joseph Farina. After a hearing, briefs were submitted and the Court dismissed the case.

It is evident that the trial Court believed this case to be one that is solely to enforce a constructive lien. When the suit was filed there was no claim for breach of contract. The Amended Complaint has no claim for breach of contract. It is clear that the claim is to enforce the construction lien.

There was no disagreement that the property in question was the separate property of Railroad Investments, L.P. Railroad Investments, L.P. was the proper party to the suit. Mary JoAnn Farina and Joseph Farina, M.D. were inappropriate parties to this cause of action.

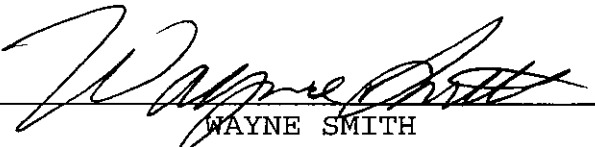
The trial Court made a careful review of the complaint and interpreted the complaint to one requesting the enforcement of a construction lien. The owner of the property, Railroad Investments, L.P., was the owner and therefore the proper party. Service of process was not completed within 120 days under MRCP Rule 4(H). Based on this fact, Railroad Investment, L.P. was properly dismissed.

Due to the Court's interpretation of the Complaint to Enforce Construction Lien, with no additional claim, the Court dismissed Mary JoAnn Farina and Joseph Farina, M.D. as improper parties to the suit.

CONCLUSION

The trial Court in this case made an appropriate ruling in this case. The complaint and amended complaint request the enforcement of a construction lien, with no additional cause of action. Railroad Investments, L.P. was the proper party to this suit to enforce the construction lien. Process was improper under Rule 4(H) of the Mississippi Rules of Civil Procedure. Further, Mary JoAnn Farina and Joseph Farina, M.D. were not proper parties to the suit. The ruling of the Circuit Court of Lincoln County should be affirmed.

MARY JOANN FARINA, JOSEPH FARINA,
M.D. & RAILROAD INVESTMENTS, L.P.


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CERTIFICATE

I, Wayne Smith, do hereby certify that I have this date mailed
by United States mail, postage prepaid, the original and three (3)
copies of the Appellees' Brief to:

Kathy Gillis, Clerk
Supreme Court of Mississippi
P. O. Box 249
Jackson, MS 39205

and one (1) copy of the Appellees' Brief, by United States mail,
postage prepaid to:

Conrad Mord
Attorney at Law
P O Drawer 311
Tylertown, MS 39667

Honorable David H. Strong
Circuit Court Judge
P. O. Drawer 1387
McComb, MS 39649-1387

This the 16th day of April, A.D., 2012.


WAYNE SMITH