

2011-CA-01201 T

CERTIFICATE OF INTERESTED PERSONS

This is to certify that in the case of

Welch Roofing & Construction, Inc., Plaintiff/Appellant

versus

Mary Joann Farina, Joseph Farina, M.D.

and Railroad Investments, LP, Defendants/Appellees

Docket Number 2011-CA-01201

all persons, associations of persons, firms, partnerships or corporations to my knowledge having an interest in the outcome of this case are:

- (1) Welch Roofing & Construction, Inc., represented herein by Conrad Mord, Tylertown, Mississippi
- (2) Rex Welch and wife, Lisa Welch, principals of Welch Roofing & Construction, Inc.
- (3) Mary Joann Farina, Joseph Farina, M.D. and Railroad Investments, LP, represented herein by Honorable Wayne Smith, Liberty, Mississippi.

SO CERTIFIED, on this the 13th day of January, 2012.

A handwritten signature in cursive script, appearing to read "Conrad Mord", is written over a horizontal line.

CONRAD MORD

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**STATEMENT OF ISSUES**

**ISSUE:**

The Trial Court abused its discretion, applied an erroneous legal standard and committed manifest error in sustaining Farina's Second Amended Motion to Dismiss as to JoAnn Farina and Joseph Farina.

### STATEMENT OF THE CASE

Welch Roofing & Construction, Inc., Plaintiff/Appellant, hereinafter "Welch", filed its Construction Lien against Defendant Mary JoAnn Farina, hereinafter "JoAnn" in the amount of \$53,874.04, on February 26, 2007 (RE 106). Welch filed its Amended Construction Lien against JoAnn in the amount of \$57,763.55 on May 31, 2007 (RE 107) and simultaneously filed its Complaint to Enforce Construction Lien, alleging that on or about August 15, 2006, Welch and Joseph Farina, hereinafter "Joseph" and his wife, JoAnn verbally agreed to the renovation and repair the roof on JoAnn's building located at 303 North Jackson Street, Brookhaven, Mississippi, by Welch on the basis of \$68,000 base contract, plus labor and materials for other work and repairs discovered during roof repair. Welch alleged that at all times during the repair of said building, Welch performed all work and services at the direction and instructions of Joseph and JoAnn and that it performed work on said building in a total amount of \$71,415.00, plus tax in the amount of \$2,415.00; that because of Joseph and JoAnn's refusal to pay Welch, Welch incurred late fees on payment of material in the amount of \$3,501.55, as of February 28, 2007, which said amount continues to accrue; that Joseph and JoAnn gave Welch a check for \$10,000 that was returned to Welch unpaid by the bank, resulting in overdraft charges in the amount of \$432.00 (RE 7-9); that Joseph and JoAnn have only paid Welch the sum of \$20,000.00 for a balance owed of \$57,763.55, as of February 28, 2007; that the unpaid balance bears interest at the rate of 1 ½ percentum per month from and after January 30, 2007.

Welch requested that the Court enter an order awarding damages in the amount of \$57,763.55, as of February 28, 2007, together with damages and interest accruing after

January 30, 2007 and further awarding foreclosure of the construction lien recorded in the Construction Lien Records at the office of the Chancery Clerk of Lincoln County, Mississippi, and awarding Welch's attorneys fees and other costs of pursuing this action in accordance with law. (RE 7-9)

On July 9, 2007, counsel for JoAnn and Joseph filed an Entry of Appearance and Motion for Additional Time. (RE 10-12) No answer to the Complaint was ever filed.

On August 18, 2008 Welch filed its Second Amended Construction Lien against Railroad Investments, hereinafter "Railroad Investments" (RE 108) and simultaneously filed an Amended Complaint to Enforce Construction Lien, alleging the same facts but adding Defendant Railroad Investments, LP as a party defendant. (RE 18-20) Service of process on Joseph, as registered agent for Railroad Investments was not completed until July 19, 2010. No answer to this complaint has ever been filed.

On August 19, 2010 Railroad Investments filed its motion to dismiss for failure to issue process on Railroad Investments within 120 days after the filing of the Amended Complaint (RE 22-24) and on February 16, 2011 filed an Amended Motion to Dismiss, being joined by Joseph and JoAnn. (RE 25-30)

On May 2, 2011 Railroad Investments, Joseph and JoAnn filed their Second Amended Motion to Dismiss (RE 32-37) which was heard by the trial court that same day. After oral argument (T 2-11), counsel for both sides submitted respective memoranda of law (Sup. RE 38-50) (RE 88-108)

From an adverse ruling (RE51-53), Welch appeals.

### STATEMENT OF FACTS

1. On June 21, 2006, JoAnn acquired legal title from Silver Cross Home to certain real property (hereinafter referred to as the "Hospital") located and being situated in Lincoln County, Mississippi and being more particularly described as follows:

A parcel of land containing 1.975 acres, more or less, being situated in Block "D" in the City of Brookhaven, Lincoln County, Mississippi, and being more particularly described as follows: Beginning at the intersection of the west right of way of North Jackson Street and the north right of way of Congress Street and run thence: North 17 degrees 42 minutes 10 seconds East 184.09 feet along the west right of way of Jackson Street; Thence North 02 degrees 41 minutes 09 seconds West 100.10 feet along the west right of way of Jackson Street; Thence North 88 degrees 28 minutes zero seconds West 235.42 feet; Thence South 03 degrees 18 minutes 56 seconds West 67.95 feet; Thence North 62 degrees 54 minutes 49 seconds West 66.83 feet; Thence North 73 degrees 04 minutes 51 seconds West 95.00 feet to the east right of way of Church Street; Thence South 15 degrees 54 minutes 11 seconds West 161.49 feet along the East right of way of Church Street to the north right of way of Congress Street; Thence South 73 degrees 03 minutes 10 seconds East 400.0 feet along the north right of way of Congress Street to the point of beginning.

2. On July 28, 2006, Silver Cross Home delivered to JoAnn a correction warranty deed to the Hospital, which changed the spelling of JoAnn's name, (RE 96-99)
3. On September 18, 2006 pursuant to the request of JoAnn and Joseph, Welch delivered an estimate for the repair of the roof to the Hospital. (RE 100)
4. This estimate was accepted by Joseph and JoAnn and on September 21, 2006, Welch started ordering materials, moved in and commenced work on the project. Welch continued ordering materials and working on the project until November 6, 2006 when the Farina's paid the first draw of \$10,000.
5. On November 9, 2006 JoAnn conveyed the Hospital to Railroad Investments. (RE

101-102)

6. On November 24, 2006 Joseph delivered his check number 6255 to Welch. (RE 103-104) This check was returned unpaid causing Welch to suffer over \$400 in fees when Welch's checks for labor and material were returned for insufficient funds.
7. On December 14, 2006 Joseph delivered an official bank check, from First Bank in the amount of \$10,000 to Welch to cover the returned check number 6255. (RE 105)
8. Welch continued the project until it was completed but in the meantime, on February 26, 2007 Welch filed a construction lien against JoAnn in the amount of \$53,874.04. (RE 106)
9. On May 31, 2007 Welch filed an amended construction lien against JoAnn in the amount of \$57,763.55 (RE 107), and on that date filed a complaint against JoAnn and Joseph for a money judgment against them in the amount of \$57,763.55, together with attorney fees, damages and interest accruing after January 30, 2007 and further for foreclosure of the construction lien heretofore filed. (RE 7-9)
10. Joseph and JoAnn were both served with process on June 12, 2007 and filed an Entry of Appearance and Motion for Additional Time on July 9, 2007. (RE 10-12)
11. After attempts at discovery (RE iii-v), on August 18, 2008, Welch filed the second amended construction lien against Defendant Railroad Investments in the amount of \$57,763.55, (RE 108) and on that date filed an amended complaint against JoAnn, Joseph and Railroad Investments for a money judgment against them in the amount of \$57,763.55, together with attorney fees, damages and interest accruing after



January 30, 2007 and further for foreclosure of the construction lien heretofore filed. (RE 18-20) Process issued that day for Joseph W. Farina, Jr., resident agent for service of process for Railroad Investments. (RE iii)

12. More attempts were made to continue discovery and process was completed on Railroad Investments on or about July 19, 2010. (RE 33)
13. On August 19, 2010 Railroad Investments filed its motion to dismiss for violation of the 120 day requirement for service of process provided in Rule 4(h), M.R.C.P. This motion was never brought on for hearing. (RE 22-24)
14. On February 14, 2011, Railroad Investments, JoAnn and Joseph filed an amended motion to dismiss, alleging that Welch should have obtained authority to amend from the Court before filing the amended complaint and further that the amended complaint should be dismissed as to Railroad Investments for violation of the 120 day requirement for service of process provided in Rule 4(h), M.R.C.P. This motion was never brought on for hearing. The motion further alleges that Joseph and JoAnn are not the owners of the Hospital, are therefore inappropriate parties to the lawsuit and should be dismissed with prejudice. Joseph, JoAnn and Railroad Investments further requested that the construction lien be stricken from the conveyance records. (RE 25-30)
15. On May 2, 2011, Railroad Investments, JoAnn and Joseph filed a second amended motion to dismiss, alleging the same facts and requesting the same relief except that in the alternative, the Defendants request additional time within which to prepare

responsive pleadings. (RE 32-37)

16. On May 2, 2011 this Court heard oral argument on the motion and invited counsel to submit a memorandum of law in support of their respective positions.

### SUMMARY OF THE ARGUMENT

**ISSUE:** The Trial Court abused its discretion, applied an erroneous legal standard and committed manifest error in sustaining Farina's Second Amended Motion to Dismiss as to JoAnn Farina and Joseph Farina.

Welch, in its Amended Complaint to Enforce Construction Lien, sued JoAnn, Joseph and Railroad Investments for damages for breach of contract in the amount of \$57,763.55, as of February 28, 2007, together with damages and interest accruing after January 30, 2007 and further for foreclosure of the construction lien recorded in the Construction Lien Records at the office of the Chancery Clerk of Lincoln County, Mississippi, and the amended construction lien and awarding Welch's attorneys fees and other costs of pursuing this action in accordance with law. JoAnn and Joseph were served with process in the time and in the manner provided by law and that fact is undisputed. The only issue concerns the service of process on Railroad Investments.

Railroad Investments was brought into the lawsuit on August 18, 2008 and process issued the same day for Joseph W. Farina, Jr., as the registered agent for service of process for Railroad Investments. However, process was not completed on Railroad Investments until July 19, 2010. Rule 4(h), M.R.C.P. provides that

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Welch does not dispute that the length of time between the filing of the Amended

Complaint on August 18, 2008 and service of process upon Railroad Investments on July 19, 2010 exceeds the limitation provided in Rule 4(h), M.R.C.P. Assuming *pro arguendo* that the trial court was correct in not finding that Welch had shown good cause why Railroad Investments was not served within 120 days, the correct ruling would have been to dismiss the complaint as to Railroad Investments, not as to all defendants.

## ARGUMENT

ISSUE: The Trial Court abused its discretion, applied an erroneous legal standard and committed manifest error in sustaining Farina's Second Amended Motion to Dismiss as to JoAnn Farina and Joseph Farina.

Welch had the right to sue for damages for breach of contract and for enforcement of its construction lien in the same complaint. *Evans v. Central Service and Supply Company*, 226 So.2d 616 (Miss. 1969) Welch contracted with JoAnn and Joseph at a time when the Hospital was in fact owned by JoAnn. When it was not paid for material and labor performed on that contract, Welch was entitled to maintain suit against both JoAnn and Joseph, which it did. Regardless of the existence of the construction lien or not, Welch had the right to file suit against JoAnn and Joseph individually. As it pertains to JoAnn and Joseph, the trial court treated the Second Amended Motion to Dismiss as a motion to dismiss pursuant to Rule 12 (b)(6). *Jordan v. Wilson*, 5 So.3d 442 (Miss. 2008) provides:

In ruling on a motion to dismiss under Rule 12(b)(6) or Rule 12(c), "the pleaded allegations of the complaint must be taken as true, and a dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Overstreet v. Merlos*, 570 So.2d 1196, 1197 (Miss.1990) (Rule 12(b) motion); see also, *R.J. Reynolds Tobacco Co. v. King*, 921 So.2d 268, 270(¶ 10) (Miss.2005) (citing *Bridges ex rel. Bridges v. Park Place Entm't*, 860 So.2d 811, 813(¶ 5) (Miss.2003) (Rule 12(c) motion)).

The original complaint correctly pleaded breach of contract against JoAnn and Joseph Farina. Process was completed correctly and in a timely manner on JoAnn and Joseph. Counsel for JoAnn and Joseph entered a general appearance for both of them, but never filed

an answer denying any of the allegations of the complaint. The amended complaint correctly pleaded breach of contract against JoAnn and Joseph Farina and a copy of the amended complaint was served upon counsel for JoAnn and Joseph.

CONCLUSION

The trial court abused its discretion, applied an erroneous legal standard and committed manifest error in sustaining Farina's Second Amended Motion to Dismiss as to JoAnn Farina and Joseph Farina. This case should be reversed and remanded for a trial on the merits as to damages for breach of contract against JoAnn and Joseph.

WELCH ROOFING & CONSTRUCTION, INC.,  
APPELLANT

BY: \_\_\_\_\_  
ITS ATTORNEY

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CERTIFICATE OF SERVICE

I, Conrad Mord, attorney of record for Appellant, do hereby certify that I have, on January 13, 2012, mailed first class, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following:

Honorable Wayne Smith  
Attorney at Law  
P.O. Box 525  
Liberty, MS 39645

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

SO CERTIFIED, on the above date.

  
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CONRAD MORD