IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 71,387

HOLDING ELECTRIC, INC.,

Petitioner,

v.

LINDA M. ROBERTS,

Respondent.

INITIAL BRIEF OF AMICUS CURIAE ASSOCIATED SUBCONTRACTORS OF AMERICA

On Appeal From the District Court of Appeal, State of Florida, Third District

Case No.: 87-108

GOSSETT, McDONALD, GOSSETT & CRAWFORD, P.A.
Attorneys for Amicus Curiae
3595 Sheridan Street, Suite 204
Hollywood, FL 33021

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES:

CASES:

STATEMENT OF THE CASE AND FACTS

This case is before this court by virtue of the certification of express conflict contained within the opinion of the Third District Court of Appeal.

Petitioner is a "contractor" under Florida's Mechanic's Lien Law. Respondent is an "owner" under the same law.

Petitioner contracted for its work with the developer who is not a party to this appeal. When the contract went unpaid at the conclusion of all of the construction, Petitioner recorded its claim of lien. The lien was recorded on July 1, 1985. The legal description was amended through the recording of a second claim of lien on August 29, 1985.

Five and one-half months after recording the initial claim of lien, Petitioner filed its complaint seeking to foreclose the lien. Petitioner had not served a final contractor's affidavit on the owner prior to filing the lawsuit as required by Section 713.06(3)(d)1, Fla. Stat.(1985). The developer filed a motion to dismiss citing non-compliance with Section 713.06(3)(d)1, Fla. Stat. (1985).

Six and one-half months after recording the claim of lien, (and one month and 2 days after filing the lawsuit), Petitioner served the final contractor's affidavit. Subsequently, Petitioner was granted leave to amend the complaint to allege compliance with the statute.

While this was occurring, the developer sold a condominium unit to Respondent. Petitioner sought leave to again amend its

complaint to add Respondent as an additional party defendant since she was now the owner of the property against which Petitioner sought to impress a lien.

After filing and serving the second amended complaint, Respondent filed her motion to dismiss alleging non-compliance with the final contractor's affidavit statute. The trial court dismissed the second amended complaint as to Respondent on that basis without leave to amend.

The Third District affirmed the dismissal on the basis of Mardan Kitchen Cabinets, Inc. v. Bruns, 312 So.2d 769 (Fla. 3d DCA 1975). In its affirmance, the Third District certified direct conflict with McMahan Construction Co. v. Carol's Care Center, 460 So.2d 1001 (Fla. 5th DCA 1984).

This court is asked to resolve the conflict.

SUMMARY OF ARGUMENT

Since 1950 this court has held that the failure to timely serve a final contractor's affidavit is an error which may be cured by subsequent action. The subsequent action is by serving the final contractor's affidavit within the life of the lien, and seeking leave to amend the complaint to specifically allege delivery of the contractor's affidavit. That proposition of law has remained intact throughout several amendments to the mechanic's lien law.

The decision of the Third District in this case is in direct conflict with several decisions of this court and numerous decisions of each appellate district, including the Third District. The basis of the Third District's opinion in this case, to wit: Mardan Kitchen Cabinets, Inc. v. Bruns, 312 So.2d 769 (Fla. 3d DCA 1975), can be construed to be consistent with this court's earlier decisions. However, with that construction, Mardan has been misapplied to the facts of this case.

The law has been, and should remain, that the contractor who initiates a suit to foreclose its lien prior to serving the final contractor's affidavit can remedy that by serving the final contractor's affidavit and seeking leave to amend the foreclosure complaint to specifically allege compliance with the affidavit requirement.

ARGUMENT

A CONTRACTOR MAY CURE THE FAILURE TO SERVE A FINAL CONTRACTOR'S AFFIDAVIT BEFORE INSTITUTING SUIT BY AMENDMENT OF ITS COMPLAINT AFTER SERVING THE AFFIDAVIT

This case involves the operation of Florida's Mechanic's Lien Law, Chapter 713, Fla. Stat. The question the court must decide is whether a contractor who institutes suit to foreclose its claim of lien, then serves its affidavit required by † 713.06(3)(d)1 and seeks leave to amend its complaint more than five days after serving its affidavit to specifically allege the serving of the affidavit, has stated a cause of action. The Third District has answered this question in the negative in its decision reported at 512 So.2d 1112 (Fla. 3d DCA 1987), adhering to its previous decision in Mardan Kitchen Cabinets, Inc. v. Bruns, 312 So.2d 769 (Fla. 3d DCA 1975). That decision directly conflicts with the decisions of the First, Fourth and Fifth Districts in the following cases: Johnson v. West Florida Gas & Fuel Co., 105 So.2d 373 (Fla. 1st DCA 1958); Townsend v. Giles, 133 So.2d 451 (Fla. 1st DCA 1961); Coquina, Ltd. v. Nicholson Cabinet Company, 509 So.2d 1344 (Fla. 1st DCA 1987), Shores of Indian River, Inc. v. Gart Urban Associates, Inc., 478 So.2d 893 (Fla. 4th DCA 1985), Bishop Signs, Inc. v. Magee, 494 So.2d 532 (Fla. 4th DCA 1986), and McMahan Construction Company, Inc. v. Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984). Jurisdiction vests in this court pursuant to Article V,

Section 3(b)(3), Florida Constitution.[1]

The decision under review also directly conflicts with the decisions of this court in Hardee v. Richardson, 47 So.2d 520 (Fla. 1950) and Moore v. Crum, 68 So.2d 379 (Fla. 1953). The decision under review also creates intra-district conflict with Walter Harvey Corp. v. Cohen-Ager, Inc., 317 So.2d 775 (Fla. 3d DCA 1975) and Oppenheim v. Newport Systems Development Corporation, 348 So.2d 328 (Fla. 3d DCA 1977).

Amicus Curiae asserts that the law in Florida has always been that a lienor who serves a final contractor's affidavit subsequent to filing suit to foreclose the lien, thereby violating the mechanic's lien law, can correct the violation by serving the final contractor's affidavit then seeking leave to amend the initial complaint to specifically allege compliance with the affidavit requirement. Since the 1963 amendment to the mechanic's lien law added that the affidavit must be served at lease five days prior to instituting suit, the motion for leave to amend must be made after five days from serving the affidavit.

HISTORY OF MECHANIC'S LIEN LAW

The section of the mechanic's lien law that is of concern in this appeal is Section 713.06(3)(d)1, which provides:

> (d) When the final payment under a direct contract becomes due the contractor:

---

[1] While not forming a base for jurisdiction, it should be noted that the decision under review also conflicts with the decision of the Fifth Circuit Court of Appeals in Ramada Development Company v. Rauch, 644 F.2d 1097 (5th Cir. 1981).

> 1. The contractor shall give to the owner an affidavit stating, if that be the fact, that all lienors under his direct contract have been paid in full or, if the fact be otherwise, showing the name of each lienor who has not been paid in full in the amount due or to become due each for labor, services, or materials furnished. The contractor shall have no lien or right of action against the owner for labor, services, or materials furnished under the direct contract while in default for not giving the owner the affidavit. The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of any action to enforce his lien under this chapter, even if the final payment has not become due because the contract is terminated for a reason other than completion and regardless of whether the contractor has any lienors working under him or not.

This section apparently has its roots in Chapter 3747, Laws of Florida (1887). The eighth section of that act provided that a contractor, when required in writing to do so, shall furnish the person having the work done a correct list of all persons who, as subcontractors or materialmen, were furnishing materials. Refusal to furnish the list could be pled as a bar to the lien claimed for work done unless it could be shown that all claims for materials so furnished had been paid. As this court interpreted that statute in Summerlin v. Thompson, 31 Fla. 369, 12 So. 667 (1893):

> . . . this does not impose upon a plaintiff the necessity for stating in his affidavit that a demand has been made for the list, and the same furnished, or that no demand has been made, as the case may be.

In 1935, the legislature adopted Chapter 17097, Laws of

Florida (1935),[2] which provided in Subsection 3 of Section 4 of that Act:

> When final payment becomes due the contractor from the owner, the contractor shall give to the owner a statement under oath stating, if that be the fact, that all lienors contracting directly with or directly employed by such contractor have been paid in full or, if the fact be otherwise, showing the name of each such lienor who has not been paid in full and the amount due or to become due each for labor or services performed or materials furnished and describing in a general way such labor, services, or materials. The contractor shall have no lien or right of action against the owner for labor or services performed or materials furnished under his contract while in default by reason of not giving the owner such statement under oath.

This provision of the statute now makes the giving of the affidavit by the contractor a prerequisite to acquiring a lien. Where the complaint did not allege that this condition precedent had been met or performed, a motion to dismiss the bill of complaint would be granted. Dodson v. Florida Nursery & Landscape Co., 138 Fla. 887, 190 So. 695 (1939), and Buker v. Webster, 140 Fla. 471, 191 So. 835 (1939). See also Shad v. Arnow, 19 So.2d 612 (Fla. 1944).

In 1950 this court took a long and hard look at the same provision of the mechanic's lien law to construe it in light of all of the provisions of the mechanic's lien law. In Hardee v. Richardson, 47 So.2d 520 (Fla. 1950), plaintiffs filed a bill of

---

[2] With the exception of one section, Chapter 17097 is a copy of The Model Mechanic's Lien Act, which was approved by the National Conference of Comissioners on Uniform State Law in 1932. Volume 9 ULA 495. No other state has adopted it. See Sheffield-Briggs Steel Products v. Ace Concrete Service Co., 63 So.2d 924 (Fla. 1953).

complaint asserting that they had in all respects complied with the mechanic's lien law of Florida.

> The defendants did not move to dismiss the bill of complaint but filed an answer containing, among other things, a denial that the plaintiffs were entitled to a lien against the property, and a denial that the plaintiffs "have in all respects complied with the mechanic's lien law of Florida."
>
> After the answer had been filed the plaintiffs sought leave to amend their bill of complaint by alleging:
>
> "that the plaintiffs have served on the defendants * * * a sworn statement on behalf of the plaintiffs that the plaintiffs have paid all laborers performing labor on said land and have paid for all materials used on said land and that no laborer or materialman has any lien and has filed no notice of any lien and the time for filing such lien, or notice of such lien by any materialman or laborer dealing with the plaintiffs has long passed and no laborer or materialman can now assert any claim against said land by reason of labor done or materials furnished at the request of the plaintiffs.
>
> The court below refused to allow the amendment, and it is the order made thereon that has been brought here for review.
>
> . . . The question for decision, in the light of this construction, is whether the trial court abused its judicial discretion in refusing to allow the plaintiff to amend in the manner requested. The answer to the question must depend upon the effect to be given such a sworn statement where it appears that the statement was served upon the owner subsequent to the institution of suit and after the owner had filed his answer.
>
> * * *
>
> . . . It is plain, therefore, that had the defendants in the case at bar moved to dismiss the original bill on the ground that it was without equity, instead of electing to forego that procedure and to go to trial on an answer traversing the allegations of the bill . . . the

motion to dismiss might have been sustainable on authority of the previously cited cases. But by failing to test the sufficiency of the bill by motion to dismiss the defendants recognize that there was at least some equity in the bill, . . . and thus place themselves in the position that if the plaintiffs proved that they had in fact complied "in all respects" with the lien laws of Florida, including the provision of the law requiring the service upon the defendants of a sworn statement as to full payment of all lienors, that plaintiffs would be entitled to a decree enforcing their lien for the value of the improvements accruing as the result of the plaintiffs' performance of the general contract.

* * *

As has been heretofore quoted, Section 84.04(3), Fla. Stat. 1941, F.S.A. provides in its last sentence that a contractor "shall have no lien or right of action against the owner for labor or services performed or materials furnished under his contract while in default by reason of not giving the owner such statement under oath." Viewed in isolation, this sentence might seem to suggest that the giving of a sworn statement by a contractor in privity with the owner is an indispensable condition precedent to the acquisition of a lien against the property of the owner for work done and material furnished by the contractor under his contract, as well as a condition precedent to the right of the contractor to enforce the lien against the property once the lien has been perfected. But when the section is considered in connection with other pertinent provisions of the chapter pertaining to mechanics' liens, it can be readily seen that such cannot be the case. [The opinion goes on to cite other provisions of the mechanic's lien law that exists presently in a slightly altered form.]

When the pertinent provisions of the Uniform Mechanics' Lien Law are thus viewed together the language used makes it clear that the legislature intended that the general contractor should have his lien by performing the work and furnishing the materials in accordance with his contact. . .

It intended further, that the sworn statement to be given pursuant to Section 84.04(3) should not be necessary to the acquisition of the lien but

> should operate to protect the owner against the possibility of paying more than once for the same item of labor or materials; the effect of the section being to afford to the owner the right, without being deemed in default, to withhold payments due on the general contract until proof has been given that subcontractors, materialmen and laborers have in fact been paid, or that specified amounts are due and owing such preferential lienors which the owner may lawfully pay out of the money due the general contractor. . .
>
> . . . While the fact that the service of the statement was not made upon the owners until after the institution of the suit might have been good ground for moving to dismiss the suit as premature until Section 84.04(3) had been complied with, such ground is not now available in view of the answer filed by the defendants. The proffered amendment contained material matter going to the right of the plaintiffs to maintain their suit and to become entitled to a decree, if they proved their amended bill, decreeing a lien upon the property the owners for any amounts due under the general contract.
>
> Under the circumstances of the case the plaintiff should have been permitted to file their amendment, . . .

Supra, at 522-524.

In Moore v. Crum, 68 So.2d 379 (Fla. 1953), this court expended its holding in Hardee, to include the situation where a motion to dismiss was filed as opposed to an answer. In Moore, this court stated at 382:

> The essential difference between this case and that of Hardee v. Richardson, supra, is that in the Hardee case an answer was filed and in this case no answer has ever been filed. If the statement under oath was given prior to the expiration of the lien, the contractor should allege and prove that fact and he would then be entitled to a decree. If, on the other hand, the statement under oath was given after the lien had expired, then the general contractor has lost his lien and the mere giving of the statement under

> oath after the expiration of the lien cannot breath new life into it. . .
>
> . . . The order of the trial court denying the motion to dismiss the amended bill of complaint should be quashed, with directions that the chancellor proceed further in accordance with this opinion and grant to the respondent the right to file an amendment to the bill of complaint, showing, if he can, the date of the giving of the required statements.

The First District followed these decisions in Johnson v. West Florida Gas & Fuel Company, 105 So.2d 373 (Fla. 1st DCA 1958), and Townsend v. Giles, 133 So.2d 451 (Fla. 1st DCA 1961). In Johnson, the order of the trial court denying a motion to dismiss was quashed with directions that the court grant the contractor the right to amend its complaint to show, if possible, that the final contractor's affidavit was given prior to the expiration of the lien. In Townsend, the court went further by allowing the amendment to the complaint to occur subsequent to all of the evidence being taken but prior to a decision. The court stated, at 453:

> Therefore, it is apparent that the controlling factor is the giving of the statement prior to the expiration of the lien and prior to the entry of the final decree rather than prior to filing the complaint. . .
>
> . . . Plaintiff in the instant case should be afforded the opportunity of proving that the sworn statement was furnished within one year after filing his claim of lien.

The court specifically held, at page 454:

> The sworn statement called for in Section 84.04(3), F.S. 1959, F.S.A., may be furnished to the owner during the first year of the lien and after filing the complaint, but prior to the entry of a final decree.

The mechanics' lien law was amended, substantially, in 1963. The predecessor of § 713.06(3)(d)1 was amended by adding thereto the requirement that the contractor execute and deliver the affidavit at least five days prior to instituting an action to foreclose a lien. Chapter 63-134, Laws of Florida (1963). See Oper v. Russell, Inc., 197 So.2d 13 (3d DCA 1967).

In May, 1975, the Third District issued its opinion in Mardan Kitchen Cabinets, Inc. v. Bruns, 312 So.2d 769 (Fla. 3d DCA 1975). There, the final contractor's affidavit was delivered three days prior to the final hearing. With the final contractor's affidavit was a motion for leave to amend the complaint to reflect compliance with the mechanic's lien law. The defendant moved to dismiss the complaint for non-compliance in that the affidavit had not been delivered to him at least five days before suit was filed. The trial court denied the motion for leave to amend, granted the motion to dismiss the complaint without prejudice and discharged the notice of lis pendens. The Third District held that the denial of the motion for leave to amend the complaint and the dismissal of the complaint without prejudice were both proper since:

> Mardan's proposed amendment to add the allegation that an affidavit had been supplied was futile since the affidavit was not timely.

The court does not say whether the affidavit was untimely because it was not given five days prior to filing the complaint or five days prior to filing a motion for leave to amend the complaint, or that the affidavit was not timely because it was

not given during the life of the lien.

Mardan can be put in its proper perspective by Walter Harvey Corp. v. Cohen-Ager, Inc., 317 So.2d 775 (Fla. 3d DCA 1975), issued just two months after Mardan. In light of Walter Harvey Corp. the only logical construction of Mardan is that the affidavit was not given during the life of the lien. In Walter Harvey Corp., the only final contractor's affidavit that was attempted was a sworn statement attached to the complaint served on the owner. The Third District held that the sworn statement attached to the complaint was sufficient to comply with the statute.

The Third District also recognized that there were exceptions to the five day requirement. In Tomorrow's Choice, Inc. v. Bassing Co., Inc., 343 So.2d 70 (Fla. 3d DCA 1977), the final contractor's affidavit was delivered four days before filing suit instead of five. Because the owner admitted service of the affidavit "pursuant to the statute" and counterclaimed in the suit, the court determined that it had jurisdiction to complete the cause, affirming the foreclosure of the lien in favor of the contractor. In Falovitch v. Gunn & Gunn Construction Co., 348 So.2d 560 (Fla. 3d DCA 1977), a final contractor's affidavit was never supplied. Worthy of note in the decision is that the Third District stated "no motion was made to amend the complaint to [allege the delivery of the affidavit.]" Because the final contractor's affidavit was never given, the judgment for the contractor was vacated with instructions to

enter judgment for the owner.

In Oppenheim v. Newport Systems Development Corporation, 348 So.2d 328 (Fla. 3d DCA 1977), the plaintiff was an architect seeking to foreclose his claim of lien against the owner's property. The answer pleaded as an affirmative defense that the architect had failed to comply with the mechanic's lien law by failing to give a final contractor's affidavit. The Third District harkened back to Hardee v. Richardson, 47 So.2d 520 (Fla. 1950), to distinguish the situation where the owner had filed an answer to the complaint as opposed to a motion to dismiss. For reasons best known to it, the Third District did not deal with Moore v. Crum, 68 So.2d 379 (Fla. 1953), extending Hardee to the situation where a motion to dismiss is filed.

The Third District stated, at 330:

> However, when that defect or omission was raised as a defense in answer to the complaint, the architect's failure to have given the sworn statement was not, ipso facto, ground for dismissal of the action to enforce the lien and was not ground for entry of a summary judgment in favor of the defendant, when the plaintiff alleged that there were no unpaid subcontractors, or other liens against the property, and no evidence to the contrary was submitted by the defendant. Where the evidence as to that issue was lacking or inconclusive on the motion for summary judgment, the issue was one for proof at trial.
>
> This is so because if the plaintiff's allegation of absence of unpaid subcontractor's or other lien claimants should be established at trial, the protection sought to be conferred on the owner in that regard by a preliminary sworn statement to that effect by the plaintiff would be accomplished.

LAW APPLIED TO OUR FACTS

As previously noted in the statement of the case and facts, HOLDING ELECTRIC, INC. filed its claim of lien on July 1, 1985, prior to the purchase of the condominium unit by Respondent. HOLDING ELECTRIC, INC. filed a second claim of lien (being an amendment of the first) on August 29, 1985. On January 20, 1986, well within one year from the date of originally recording the claim of lien, HOLDING ELECTRIC, INC. served the final contractor's affidavit. Accordingly, on the basis of the long established law of Florida, the dismissal of Petitioner's complaint, with prejudice, was in error. The application of Mardan Kitchen Cabinets, Inc. v. Bruns, was probably misplaced. But, to the extent that it is now being interpreted by the Third District as standing for the proposition that the failure to serve the final contractor's affidavit five days prior to instituting suit is a total bar to the action and not curable by subsequent action, the Third District is in direct conflict with the decisions of this court and with the decisions of all other district courts of the state, including its own decisions.

This court should resolve that conflict by providing that the failure to timely serve a contractor's affidavit is an error which may be cured by subsequent action.

CONCLUSION

The decision under review is in direct conflict with the earlier decisions of this court and with decisions of all appellate districts including the Third District from which this

decision emmanated. The decision of the Third District should be quashed, the basis for the Third District's decision, to wit: Mardan, should be explained to apply only to those circumstances where a final contractor's affidavit was served more than one year after the recordation of the claim of lien, and this case should be remanded to the trial court with instructions to proceed on the second amended complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U. S. Mail this 1st day of December, 1987, to JOHN W. CONLIN, ESQUIRE, P.O. Box 97, Marathon, Florida 33050 and W. WYNDHAM GEYER, JR. ESQUIRE, Ruden Barnett, McClosky, Schuster & Russell, P.A., One Corporate Plaza, Penthouse B, 110 East Broward Boulevard, P.O. Box 1900, Fort Lauderdale, Florida 33302.

GOSSETT, McDONALD, GOSSETT
& CRAWFORD, P.A.
Attorneys for ASSOCIATED
SUBCONTRACTORS OF AMERICA
3595 Sheridan St., Suite 204
Hollywood, Florida 33021
(305) 983-2828
Dade: 621-2828
Broward: 764-2828
Florida Bar #210811

By: Ronald P. Gossett
RONALD P. GOSSETT
For the Firm

B:B-HOL/B.5