

SUPREME COURT OF FLORIDA

Case No. 71,387

Third District Court of  
Appeal

No. 87-108

HOLDING ELECTRIC, INC.,

Petitioner

v.

LINDA M. ROBERTS

Respondent

---

INITIAL BRIEF OF PETITIONER

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STATUTES

Section 713.01 Fla. Stat.  
Section 713.06 Fla. Stat.  
Section 768.28 Fla. Stat.

FACTS AND STATEMENT OF CASE

The Petitioner, Holding Electric, Inc., is a Florida Corporation having its principal place of business in Marathon, Monroe County, Florida. It is a duly licensed electrical contractor and is involved in the electrical contracting business, performing all phases and types of electrical work, ranging from large contracts to small jobs.

On 6 April 1984, the Petitioner and Bonefish Yacht Club, Ltd., ("Bonefish"), entered into a contract in which the Petitioner agreed to perform electrical services and agreed to sell electrical materials to Bonefish. Bonefish was the owner and developer of a condominium complex located in an area of Monroe County known as Coco Plum Subdivision. A copy of said contract is contained in the Appendix hereto and marked Petitioner's Exhibit '1'.

Unfortunately, Bonefish failed to pay Petitioner despite full performance by Petitioner. There is a balance due the Petitioner by Bonefish in the amount of \$9,500.00 plus interest.

Petitioner filed a Claim of Lien (a copy of which is contained in the Appendix hereto and marked Petitioner's Exhibit '2') against the property owned and being developed by Bonefish on 1 July 1985. This lien was recorded in Official Records Book 946, page 1180 of the Public Records of Monroe County, Florida. There was a problem with the legal description contained in that Claim of Lien, and as a result, Petitioner filed a second Claim of Lien on 29 August

1985, which lien is recorded in Official Records Book 951, page 1845 of the public Records of Monroe County, Florida (a copy of this lien is contained in the Appendix hereto and marked Petitioner's Exhibit '3').

On or about 18 December 1986, the Petitioner filed a Complaint with the Monroe County Circuit Court seeking foreclosure of its lien against the real property described in the two Claims of Lien previously recorded in the Public Records of Monroe County, Florida.

Subsequent to the Complaint for Foreclosure of its liens by the Petitioner, a Motion to Dismiss was filed by counsel for Bonefish alleging that Petitioner had failed to comply with Section 713.06(3)(d)1 of the Florida Statutes, which statute requires that a contractor shall serve upon the owner of the property at least five (5) days prior to instituting an action to foreclose its liens, an Affidavit in which the contractor must set forth the payment status of all of its lienors under its contract as of the date of the Affidavit.

Petitioner realized that, through inadvertence on its part, the Affidavit had not been delivered to the owner.

On 20 January 1986, Petitioner mailed to Bonefish the prescribed "Affidavit of Contractor", in which Plaintiff represented that 'all persons, laborers, materialmen and other possible lienholders under its contract or supervision have been

paid in full (a copy of that Affidavit is contained in the Appendix hereto and marked Exhibit '4'). Subsequently, Petitioner filed a Motion to Amend his Complaint alleging delivery of the Affidavit of Contractor to the owner.

On 6 February 1986, the Monroe County Circuit Court, after notice and hearing, with no objection by Bonefish, entered its Order Granting Petitioner Leave to file an Amended Complaint pleading the delivery of the Affidavit to Contractor. (A copy of that Order is contained in the Appendix hereto, and marked Exhibit '5').

In the meantime, Bonefish had sold several of its condominiums, and had also filed for protection under Chapter 11 of the U.S. Bankruptcy Code. Petitioner then filed a Motion to again amend his Complaint seeking leave to amend so as to add, as additional party defendant, Linda M. Roberts, one of the purchasers of the condominiums. That Order Granting Leave to Amend was entered by the same trial Court.

Subsequent to the filing and service of the Second Amended Complaint, counsel for Linda M. Roberts, a condominium purchaser, filed another Motion to Dismiss, again alleging Petitioner's failure to comply with Section 713.06(3)(d) 1 Fla. Stat. After notice and hearing on the Motion, the Monroe County Circuit Court dismissed Petitioner's Second Amended Complaint as to Linda

Roberts, without leave to amend. (A copy of this Order is contained in the Appendix hereto and marked Exhibit '6').

From the Order Dismissing the Second Amended Complaint without leave to amend, the Petitioner then appealed to the Third District Court of Appeal.

Following oral argument before the Third District Court of Appeal the presiding panel of the Court requested en banc review to consider departing from the prior decision of that Court in Mardan Kitchen Cabinets, Inc. v. Burns, 321 So.2d 769 (Fla. 3d DCA 1975). and to adopt McMahan Construction Co., Inc. v. Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984).

The entire Third District Court as a whole apparently did not agree to the presiding panel's request for en banc consideration of the question, and the Third District was therefore required to follow the Mardan (supra) decision and to affirm the trial court's order of dismissal.

The Third District Court of Appeal then certified the decision to be in direct conflict with McMahan (supra). Petitioner then invoked the discretionary jurisdiction of this Supreme Court, and has requested this Court to review the Third District decision.

### SUMMARY OF ARGUMENT

Appellant would argue that the Trial Court erred in dismissing its Second Amended Complaint, without leave to amend, because it had previously allowed Petitioner to amend its Complaint to plead the timely delivery of the Affidavit of Contractor pursuant to 713(3)(d)1. Fla. Stat.

Although Petitioner did not deliver its Affidavit of Contractor 5 days prior to instituting its lien enforcement action, it did deliver the Affidavit 5 days prior to filing its Amended Complaint, after leave to amend was granted.

Based on the cases cited herein, it contends that its delivery of the Affidavit 5 days prior to filing its Amended Complaint cured the original defect and placed Petitioner properly before the Court.

Petitioner also contends that Section 713.06(3)(d) has no applicability to the Respondent. She is not an "owner" as defined by the Statute, and she certainly has no "contract", as defined by the Statute, with Petitioner.

On the other hand, if the Court believes that this Section of the mechanics' lien law does apply to the Respondent, then Petitioner contends that, as to the Respondent, Petitioner has complied with 713.06(3)(d), as it did deliver the statutorily required Affidavit of Contractor more than 5 days prior to instituting its action against Respondent.



I. ARGUMENT ON ISSUE ONE

THE PETITIONER CURED ITS FAILURE TO DELIVER ITS CONTRACTOR'S AFFIDAVIT 5 DAYS BEFORE INSTITUTION OF THIS CASE BY DELIVERING IT 5 DAYS BEFORE AMENDING ITS COMPLAINT.

Section 713.06(3)(d) 1, Fla. Stat. is one of several Florida Statutes on mechanics' liens. The sub-section of the Statute in question follows:

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

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 and the amount due or to be 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, \*\*\*. (Emphasis Added).

Admittedly, the Petitioner, the contractor, did not execute the Affidavit called for and deliver it to the owner at least five (5) days before instituting this action to enforce its lien.

The main question therefore is whether the failure on the part of the Petitioner to execute and deliver its Contractor's Affidavit at least five (5) days before instituting its lien enforcement action is fatal to its attempt to enforce its lien rights.

Petitioner contends that its failure to deliver the Affidavit five (5) days before instituting its action is not fatal.

The trial Court dismissed Petitioner's Second Amended Complaint as to the Respondent, Roberts, based upon Mardan Kitchen Cabinets, Inc. v. Burns, 321 So.2d 769 (Fla. 3d DCA 1975). Counsel for Appellee also cited Gold v M and G Services, Inc. 491 So.2d 1297 (Fla. 3d DCA 1986).

The Mardan (supra) case involves an absolute failure to deliver the statutorily required Affidavit until three (3) days before trial. Apparently in the Gold, (supra), case the Affidavit was never delivered as the Judgment was entered by default.

A cursory reading of both of these cases could produce the decision of the lower Court. However, these cases must be read in the light of other cases from other appellate districts such as McMahan Construction Co., Inc. v Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984), Shores of Indian River, et al 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), Askew v County of Volusia, 457 So.2d 233 (Fla. 5th DCA 1984). Also the 3rd District cases should be read in the light of another 3rd District case, Dukauskas v Metropolitan Dade Co. 378 So.2d 74 (Fla. 3rd DCA 1979); finally the cases should be read in the light of the Supreme Court case of Commercial Carriers Corporation, et al v Indian River Co. and Dade Co., 371 So.2d 1010 (1979).

In Commercial Carriers Corporation, we had a fact situation involving governmental immunity and tort liability. In that case, the Court dealt with a notice statute, Section 768.28(6) Fla. Stat.

The statute requires timely notice to be given to the governmental defendant and to the Department of Insurance when tort liability was sought to be imposed against a governmental defendant. The statutory notice had to be given prior to institution of the action. In both of the cases involved in that decision, there was no allegation of compliance with the statutory notice requirements. The statutory notice was a jurisdictional prerequisite, just as the statutory Affidavit is a jurisdictional requirement in the mechanics' lien statute in the case at bar.

The trial Court dismissed the Complaints with prejudice. The Supreme Court held that:

"Nonetheless, failure of the pleadings in this regard does not call for dismissal with prejudice. In view of our holdings herein, the Third Party Complaint in each case should have been dismissed with leave to amend."

Section 768.28(6)(a), Fla. Stat. states:

"An action may not be instituted on a claim against the State or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, present such claim in writing to the Department of Insurance, within three years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing.\*\*\*" (Emphasis added)

"(b) for purposes of this section, the requirements of notice to the agency and denial of the claim are conditions precedent to maintaining an action\*\*\*."

Section 713.06(d) 1, Fla. Stat. contains similar jurisdictional language:

"The contractor shall give to the owner an affidavit,\*\*\*. The contractor shall execute the affidavit and deliver it to the owner at least five days before instituting an action as a prerequisite to the institution of any action to enforce his lien under this chapter,\*\*\*." (Emphasis added).

Both statutes contain similar language stating that the required notice is necessary prior to institution of an action.

"Compliance with that subsection of the statute is clearly a condition precedent to maintaining a suit." Commercial Carriers Corporation v. Indian River Co., (supra).

Despite the language of Section 768.28(6), our Supreme Court in the Commercial Carrier case nevertheless remanded the case to the Trial Court with instructions to grant the Plaintiffs leave to amend their complaints.

"Nonetheless, failure of the pleadings in this regard does not call for dismissal with prejudice. In view of our holding herein, the Third Party Complaint in each case should have been dismissed with leave to amend." Commercial Carriers Corporation v. Indian River Co., (supra).

In a Third District Case, Dukanauskas v. Metropolitan Dade County, 378 So.2d 74 (Fla. 3rd DCA 1979), the Court noted the Commercial Carrier case in a footnote, but distinguished it from the Dukanauskas case because an amendment therein would have been futile, since three years had already elapsed, and Plaintiff could never have complied with the statute.

In Askew v County of Volusia, 457 So.2d 233 (Fla. 5th DCA 1984), the same governmental defendant-tort liability statute was

involved. The statutory notice was given after the filing of the original Complaint. The Plaintiff filed an Amended Complaint after proper notice was given, in which amended Complaint, the Plaintiff alleged proper notice. The trial Court nonetheless dismissed the Complaint with prejudice. The 5th District Court went on to say on page 235:

"In the instant case, the notice was properly given within the three year time limit. The Court should have either allowed an amendment of the previously filed Complaint to properly allege notice, or certainly allowed the newly filed Complaint to stand, since all the conditions precedent had then occurred and were properly alleged.\*\*\*"

In these governmental immunity-tort liability cases, the Court was dealing with a three year statute of limitations. In the case at bar and in mechanics' lien cases, the Courts deal with, in effect, a one year statute of limitations.

The Askew Court went on to overrule its prior case of Saleh v. Watkins, 415 So.2d 858 (Fla. 5th DCA 1982), which case dealt with the same problem and same Statute as the case at bar.

The Askew Court said:

The language of that statute and the instant statute is logically indistinguishable. For that reason, we have considered this conflict en banc, and recede from our holding in Saleh. See Commercial Carriers.

Subsequent to the 5th District's Askew, (supra), decision, the 5th District had an opportunity to deal with the issue involved in this appeal.

In McMahan Construction Co., Inc. v Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984), a similar fact situation as in this case was presented to the 5th District Court of Appeal. The lower Court dismissed Appellant's (McMahan) original Complaint to foreclose its lien for failure to deliver to the owner the required Affidavit five (5) days before filing its action. The trial Court also denied McMahan's Motion to File a Second Amended Complaint in which it alleged that the Affidavit had then been filed. The 5th District reversed the trial Court and stated as follows on page 1004 after discussing the Askew case, (supra), and the 3rd District's Mardan, case, (supra):

Saleh followed Mardan Kitchen Cabinets, Inc. v. Bruns, and held that the affidavit had to be delivered prior to the time the suit was filed. If it was not, then the Trial Court had no recourse but to dismiss the mechanic's lien foreclosure suit or enter judgment for the owner.

We receded from that view in Askew. Applying the concept of Askew to this case, the filing of the Affidavit belatedly was not fatal to the mechanics' lien foreclosure count. Since McMahan alleged the Affidavit was filed five (5) days before the amendment was sought, the trial Court should have allowed the Second Amended Complaint to be filed."

The 4th District Court of Appeals has seemingly followed the guidance of the 5th District in its McMahan case, (supra) in Shores of Indian River, et al v Gart Urban Associates, 478 So.2d 893 (Fla. 4th DCA 1985) in a per curiam decision:

"We deny the petitions for writ of certiorari on the authority of McMahan Construction Company v Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984), which decision we adopt and approve. We believe the facts of that case, as well as the similar facts involved herein, are distinguished from prior cases on the issue of the filing of a contractor's affidavit as a condition to maintaining an action for

foreclosure of a mechanics' lien. See, e.g., Leader Mortgage Co. v Rickards Electric Service, Inc., 340 So.2nd 1202 (Fla. 4th DCA 1977)."

The 4th District again had an opportunity to rule on this issue in Bishop Signs, Inc. v Magee, 494 So.2nd 532 (Fla. 4th DCA 1986). In that case, however, again the Appellant contractor failed to ever tender its Affidavit prior to filing its appeal. The Court correctly ruled that the Appellant's failure to comply with the statute must result in dismissal.

However, the 4th District again cited with approval its McMahan case by saying:

"This case has been pending since the summer of 1981. There was no contention that Appellant has ever sought leave to amend to further excuse compliance with the statute, or that it has ever sought to tender an Affidavit prior to this appeal. Therefore, McMahan Construction Co. v Carol's Care Center, Inc., relied upon by Appellant, is inapplicable."

In the case before this Court, the facts are certainly similar to the facts in McMahan, (supra). Petitioner filed its Complaint to enforce its lien against the condominium development owned by the Owner, Bonefish Yacht Harbor, Ltd., on 18 December 1985. Petitioner's failure to timely deliver the prescribed Affidavit was brought to its attention by a Motion to Dismiss filed by Bonefish. On 20 January 1986, long before the one year period was to expire, Appellant delivered to Bonefish the statutorily required Contractor's Affidavit. A Motion was then filed with the Court seeking leave to amend its Complaint to allege proper

delivery of the Affidavit. After notice and hearing, and hearing no objection by Bonefish, the Court granted leave to Petitioner to file its Amended Complaint alleging delivery of the Affidavit. This Order was dated 6 February 1986 and on 7 February 1986, Petitioner filed its Amended Complaint alleging compliance with Section 713(3)(d) 1 of the Florida Statutes. No subsequent objection was ever made by the owner of the property, Bonefish.

However, subsequently thereto, a mortgage foreclosure action was instituted by mortgagees of Bonefish. Bonefish also filed for protection under Chapter 11 of the United States Bankruptcy Code. Petitioner then had no other alternative but to proceed against subsequent purchasers of Bonefish's condominiums and, pursuant to leave of the trial Court, the Petitioner filed a Second Amended Complaint in which individual subsequent purchasers, including Respondent, were added as necessary parties to the action. In the Second Amended Complaint, Petitioner again pled proper compliance with the statutory delivery of its Affidavit to the owner (Bonefish).

Counsel for Respondent, Linda M. Roberts, then filed her Motion to Dismiss based upon failure to comply with Section 713(3)(d) 1. The Court granted Respondent's Motion.

In this case, the circumstances rendered the trial Court's dismissal extraordinarily inequitable. Long before the Respondent (Roberts) became involved in this case, Petitioner could have



simply voluntarily dismissed its action and filed a new original action against all of the defendants herein and in its Complaint, it could have certainly alleged timely compliance with the statute. However, relying on the previous Order of the trial Court, (See Order Granting Leave to Appeal dated 6 February 1986), Petitioner was lulled into a false sense of security and did not elect this course of action. Instead, it became trapped by the subsequent Motion to Dismiss of Respondent after the one year limitation period had expired.

Be that as it may, the facts of this case are strikingly similar to the facts in McMahan, (supra). Except for a different statute being involved, the facts are also similar to the facts in Askew, (supra) and are also certainly similar to the salient facts in the Commercial Carrier Corporation Supreme Court case, (supra).

Again, to cite Commercial Carrier Corporation:

"\*\*\*, the Third Party Complaint in each case should have been dismissed with leave to amend."

In effect, the trial Court in its 6 February 1986 Order followed Commercial Carrier Corporation, by granting Petitioner "leave to file an Amended Complaint pleading the delivery of the Affidavit to Contractor".

In Commercial Carrier (supra), this venerable Court saw through the form of the matter and looked only at the substance

involved. Let us assume in this case that the trial court had granted Bonefish's Motion to Dismiss and the trial court had actually dismissed Petitioner's original Complaint without leave to amend. Because several months still remained in the one year limitation period, during which Petitioner had the right to file an action to foreclose its lien, Petitioner could have then simply secured the Affidavit on Bonefish, and then filed another action against the same owner, Bonefish, making the same allegations it had in the previous Complaint, but now it would have alleged that it had timely served the statutory "Affidavit of Contractor". If that scenario had occurred, are the parties in any different situation than they were immediately after the trial court allowed Petitioner to amend its Complaint pleading delivery of the statutory Affidavit.

Obviously, the parties, and especially the Owner, would have been in the exact same situation in either series of events.

The only difference would have been that the Petitioner would have had to incur a second set of court costs and Sheriff's service of process fees for again starting the same case and again serving the same Defendants. The Commercial Carrier (supra) Court clearly saw that it was strictly "form over substance", and the same reasoning should apply in this case.

## II. ARGUMENT ON ISSUE TWO

THE RESPONDENT HAS NO STANDING TO CLAIM LACK OF TIMELY DELIVERY OF THE AFFIDAVIT AS THE STATUTE DOES NOT APPLY TO HER.

Section 713.01 contains the definitions to be used throughout the mechanics' liens Statute. Section 713.01(12) defines "owner":

Owner means a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property. \*\*\* (Emphasis supplied)

Section 713.01(4) defines a "Direct Contract":

"Direct Contract" means a contract herein defined between Owner and any other person.

Section 713.01(1) defines a "Contract":

"Contract" means an agreement for improving real property,\*\*\*.

The Respondent certainly did not enter into a contract with Bonefish for the improvement of real property, but purchased an improved condominium from Bonefish; nor did Respondent have any contract for the improvement of real property with the Petitioner.

When the owner acquired title to her condominium, it was clearly a matter of public record that not one, but two liens had been filed against her condominium by the Petitioner.

Section 713.06(3)(d) is the applicable Section of the mechanics' lien Statute involved in this case.

When the final payment under a direct contract becomes due the contractor:

1. The contractor shall give to the owner an Affidavit stating,\*\*\*. 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.\*\*\* (Emphasis supplied)

The clear import of the Statute is to protect the owner of the property which has been improved by the contractor. The Respondent is not an "owner" under the Statute, and should not be allowed to bootstrap her way into the "owner's" position. Bonefish is the "Owner" that the Statute talks about. Bonefish had the direct contract with the Petitioner.

III. ARGUMENT ON ISSUE THREE

IF SECTION 713.06(3)(d) APPLIES TO THE RESPONDENT, THEN PETITIONER HAS COMPLIED WITH THE STATUTE.

On the other hand, if Section 713.06(3)(d) applies to the Respondent, then Petitioner has complied with the Statute.

Section 713.06(3)(d) 1 states that:

\*\*\*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\*\*\*.

The Petitioner is seeking to enforce his lien against the Respondent, and, in effect, did not "institute an action the Respondent" until long after delivering the requisite Affidavit to the owner, Bonefish.

In this case, the contractor served the Affidavit on the owner, Bonefish, in January of 1986. The Second Amended Complaint which added the Respondent as a Defendant in this case was not filed until 30 June of 1987, 5 months later.

Petitioner's action against the Respondent was instituted when it filed a Motion seeking permission from the trial court to add the Respondent as a party Defendant to this case, and when Petitioner filed its Second Amended Complaint against the Respondent. New Summons were issued by the Clerk. Respondent was served with Summons and Complaint.

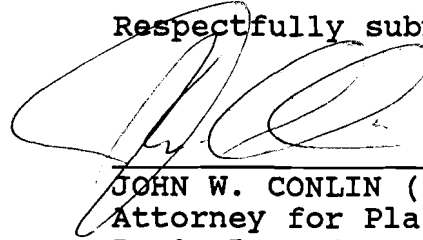
Although the action to enforce Petitioner's lien was instituted against the owner, Bonefish in December of 1986, the action against the Respondent was not initiated until June 1987, when she was added to the cause as a new Defendant. The Affidavit of Contractor was delivered to owner, Bonefish long before that.

If the Respondent is allowed to claim the benefit of Section 713.06(3)(d) 1, then she should also be subject to all of its intricacies.

CONCLUSION

The Plaintiff respectfully requests this Court to reverse the Order of Dismissal of the Trial Court and remand the case for further proceedings.

Respectfully submitted,



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*27 November 1987*