THE SUPREME COURT OF FLORIDA

SKILLED SERVICES CORPORATION,

Appellant.

vs.

RELIANCE INSURANCE COMPANY, and STERLING CONTRACTORS, INC.,

Appellees,

CASE NO. SC 00-61
4DCA CASE NO. 99-00020
BROWARD
L.T. CASE NO. 98-10908 (03)

APPELLEES, RELIANCE INSURANCE COMPANY

AND STERLING CONTRACTORS, INC.

JURISDICTIONAL BRIEF

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STATEMENT OF THE FACTS AND THE CASE

Appellee, STERLING is a general contractor who entered into an agreement, Bid/Contract No. 97-01 with the City of Parkland, Florida for the construction of the Parkland Municipal Complex, In connection with STERLING's agreement with Parkland and Florida Statute §255.05, STERLING, as principal and RELIANCE as surety, executed and delivered a payment bond to Parkland for the improvements.

On or about September 1997, STERLING entered into an agreement with Tech-Con Construction, Inc. ("Tech-Con") as a subcontractor.

Appellant, SKILLED, is a Florida corporation that provides labor to construction projects to work under the direction of the contractors on these projects. On or about October 1, 1997, SKILLED and Tech-Con entered into an agreement whereby SKILLED would provide the services of construction workers to Tech-Con under Tech-Con's direction in connection with Tech-Con's performance of its work on the Parkland Municipal Complex.

The workers on the Parkland Municipal Complex were required to sign a sign-in sheet when they performed work on the complex. SKILLED's workers began working for Tech-Con on the Parkland Municipal Complex on December 5, 1997.

SKILLED served a Notice of Intent to rely upon the bond to STERLING on January 20, 1998 and to RELIANCE on January 21, 1998, past the 45 days allowed to serve this Notice.

On March 30, 1998, Tech-Con filed Chapter 7 bankruptcy. As a result, SKILLED filed a one count complaint seeking damages against STERLING and RELIANCE under the public payment bond. As SKILLED had untimely served its Notice of Intent to rely on the bond, SKILLED asserted in its initial complaint that it was a "laborer" as defined in Florida Statute §7 13.01 (9), and therefore, specifically relieved of any requirement to serve a Notice to Owner/Notice of Intent to Rely under Florida Statute §255.05 (2).

RELIANCE and STERLING filed an Answer and Affirmative Defenses on September 18, 1998 alleging that SKILLED was not a laborer because it furnished labor services of others,

Both sides filed Motions for Summary Judgment.

On November 17, 1998, after the hearing on both motions for summary judgment, the Trial court orally announced by telephone that it was granting STERLING's Motion for Summary Judgment and denying SKILLED's Motion for Summary Judgment.

On November 25, 1998, before a Final Summary Judgment had been entered,

SKILLED served a Motion for Reconsideration or in the alternative, for leave to amend its complaint. On December 7, 1998, the Trial court entered Final Summary Judgment in favor of STERLING and RELIANCE.

SKILLED did not serve a Motion for Rehearing on the Final Summary Judgment.

SKILLED set the Motion for Reconsideration for hearing in violation of the Local Rules. On December 14, 1998, SKILLED advised STERLING and RELIANCE that the hearing on the Motion for Reconsideration had been canceled.

On December 18, 1998, the Trial court denied the Motion for Reconsideration.

SKILLED did not set the Motion to Amend for hearing after December 18, 1998, and the Trial court never ruled on the Motion to Amend. On December 28, 1998, SKILLED filed its Notice of Appeal of the Final Summary Judgment and the Trial court's denial of SKILLED's Motion for Reconsideration.

On December 8, 1999, the Fourth District Court of Appeal entered a written opinion stating that the Trial Court erred in not allowing the Appellant, SKILLED to file an amended complaint. The basis for the Court's ruling was that in the Court's opinion, the Trial Court's failure to rule upon the motion to amend was "tantamount to a denial of the motion, which was an abuse of discretion." (See

Skilled Services Corporation v. Reliance Insurance Company, 1999 WL 115298 (Fla. 4th DCA)) Appellee's filed a motion for certification with this Court and this Jurisdictional Brief follows.

SUMMARY OF THE ARGUMENT

In the instant case, the Fourth District Court of Appeal ruled that the Trial Court committed reversal error by not ruling on the motion to amend. It is respectfully submitted that the Fourth District Court of Appeal misconceived a well established law in this Court that issues not ruled upon by a Trial court would not be addressed on appeal.

In light of the foregoing, Appellees respectfully request that this Court accept jurisdiction in this matter holding that the ruling of the Fourth District Court of Appeal conflicts with this Court on that specific issue.

ARGUMENT

ISSUE ON APPEAL

I. THE RULING OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH RULINGS OF THIS COURT.

On December 8, 1999, the Fourth District Court of Appeal entered an Order stating that the trial court erred in not allowing the Appellant, SKILLED SERVICES CORPORATION ("SKILLED"), to file an Amended Complaint. *Skilled Services Corporation v. Reliance Insurance Company, 1999* WL 115298 (Fla. 4th DCA)

The basis for this Court's ruling was that in this Court's opinion, the trial court's failure to rule on the Motion to Amend was "tantamount to a denial of the motion, which was an abuse of discretion." *Id.*

SKILLED's Motion for Reconsideration or Alternatively for Leave to Amend the Complaint was set for hearing in violation of Local Rule 7, which states in pertinent part:

> "No Petition for Rehearings, Motion for Reconsideration, or like pleading shall be set for oral argument before the Court except upon Special Order and all such requests shall be accompanied by Memorandum of Law. Upon consideration of such matter, the Judge shall either deny the petition or motion, or set the same for oral argument. This order shall not apply to Motions for New Trial in jury verdict cases."

Pursuant to this Rule, the Trial Court properly rejected the improper notice of hearing on the motion for reconsideration. SKILLED had the opportunity to have the Motion to Amend heard before the Trial Court and failed to do so. There was simply no evidence on the record that the Trial Court was even aware of the Motion to Amend, and failed to rule on the motion.

As such, the Fourth District Court's opinion finding that an issue the Trial Court did not rule on, or was not even aware of, can be considered as a basis for reversing a valid judgment conflicts with the law of this Court. The law in Florida annunciated by this Court is clear that an issue not ruled upon by a Trial Court will not be addressed on appeal. See *McGurn* v. *Scott*, *596* So.2d 1042 (Fla. 1992); *Lipe v. City of Miami*, 141 So.2d 738 (Fla. 1962). Hence, the Fourth District Court's ruling expressly and directly conflicts with this Court on the same question of law, and this Court has jurisdiction pursuant to Fla.R.App.P.9.030(a)(2)(a)(IV).

CONCLUSION

In light of the foregoing, Appellees, RELIANCE INSURANCE COMPANY and STERLING CONTRACTORS, INC. respectfully request that this Court retain jurisdiction of this matter pursuant to Fla.R.App.P. 9.030 (a)(2)(a)(IV), and any other further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief was typed in Times New Roman 14 point font and mailed by U.S. Mail to BRUCE E. LOREN, ESQ., 301 Clematis Street, Suite 3000, West Palm Beach, FL 33401 and LEONARD ENGLANDER, ESQ., 721 First Avenue North, P.O. Box 1954, St. Petersburg, FL 3373 1-1954, this 10th day of February, 2000.

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THE SUPREME COURT OF FLORIDA

SKILLED SERVICES CORPORATION,

Appellant.

vs.

RELIANCE INSURANCE COMPANY, and STERLING CONTRACTORS, INC.,

Appellees.
_____/

CASE NO. SC 00-61
4DCA CASE NO. 99-00020
BROWARD
L.T. CASE NO. 98-10908 (03)

APPENDIX TO APPELLEES. RELIANCE INSURANCE COMPANY

AND STERLING CONTRACTORS. INC. JURISDICTIONAL BRIEF

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CERTTFICATE OF SERVICE

1 HEREBY CERTIFY that a true and correct copy of the above and foregoing Appendix to Appellees' Jurisdictional Brief was typed in Times New Roman 14 point font and mailed by U.S. Mail to BRUCE E. LOREN, ESQ., 301 Clematis Street, Suite 3000, West Palm Beach, FL 33401 and LEONARD ENGLANDER, ESQ., 721 First Avenue North, P.O. Box 1954, St. Petersburg, FL 3373 1-1954, this 16th day of February, 2000.

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SKILLED SERVICES CORPORATION, a Florida corporation, Appellant,
v.
RELIANCE INSURANCE COMPANY and Sterling Contractors, Inc., Appellees.

No. **99-0020.**

District Court of Appeal of Florida, Fourth District.

Dec. 8, 1999.

Sub-subcontractor tiled complaint against general contractor and its surety under public payment and performance bond. The Circuit Court, Broward County, Patti Englander Henning, J., granted final summary judgment to general contractor without ruling on sub-subcontractor's motion for leave to file amended complaint, which was filed after trial court orally granted summary judgment to general contractor but before trial court entered written order. Sub-subcontractor appealed. The District Court of Appeal, McCarthy, J., held that trial court had authority to consider motion for leave to file amended complaint.

Reversed and remanded.

PLEADING ⚿**245(7)**
302k245(7)
Trial court had authority to consider motion for leave to amend complaint, which was tiled after trial court had orally granted summary judgment to defendant but before trial court had entered written order of final summary judgment.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patti Englandcr Henning, Judge; L.T. Case No. 98-10908(03).

Leonard S. Englander of Englander & Fischer, P.A., St. Petersburg, for appellant.

Thomas R. Shahady, and John J. Shahady of Houston Shahady & Beilly, P.A., Fort Lauderdale, for appellees.

McCARTHY, TIMOTHY P., Associate Judge.

*I The issue in this case is whether the trial court erred in not allowing appellant to file an amended complaint. We find that the amended complaint should have been allowed and reverse.

Appellant was a sub-sub-contractor which provided a labor force to a sub- contractor for the general contractor, appellee Sterling Contractors, Inc. (Sterling).

Appellant originally filed a one count complaint against the general contractor and its surety under a public payment and performance bond. In its initial complaint, appellant asserted that it was a "laborer" and therefore exempt from the preliminary notices requested by section 255.05(2)(a), Florida Statutes (1997).

The parties filed cross motions for summary judgment. The hearing on these motions was held on November 17, 1998. After argument, the trial court announced in open court that it found that appellant was not a "laborer" as defined in the Florida Construction Lien Law, section 713.01(14), Florida Statutes (1997), and therefore, intended to grant a final summary judgment to appellees and deny appellant's motion for summary judgment. The court's written order of final summary judgment was cntcrcd on December 7, 1998.

On November 25, 1998, after the court's oral pronouncement but before the entry of the executed final summary judgment, appellant filed a Motion for Reconsideration, or Alternatively, for Leave to Amend Complaint. Attached to the motion was appellant's proposed amended complaint which alleged, in the alternative, that Sterling had timely served its notice of intent to rely upon the bond as required by section 255.05(2)(a).

Appellant timely noticed a hearing on its motion. Howcvcr, the court, acting on its own, without a hearing, denied appellant's motion for reconsideration. The court did not rule on appellant's alternate motion for leave to file an amended complaint.

Appellees rely on City of Boca Raton v. Ross Hofmann Associates, Inc., 501 So.2d 72 (Fla. 4th

DCA 1987), and Florida National Bank v. Domanska, 486 So.2d 1384 (Fla. 3d DCA 1986). Both of these cases are inapposite to the case sub judice. In each of these cases, a defendant/appellant challenged an order granting leave to amend which was entered after the entry of a final judgment and after the denial of a motion for rehearing. In City of Boca Raton, this court reversed, holding that a trial court was without authority to permit an amended pleading after the entry of a final judgment and denial of rehearing. See 501So.2d at 72.

Unlike this case, City of Boca Raton did not involve the plaintiff's timely appeal of a final judgment challenging the propriety of a trial court's denial of a motion for leave to file an atnended complaint.

Appellees also rely on DiPaolo v. Rollins Leasing Corp., 700 So.2d 31 (Fla. 5th DCA 1997), in which the court stated its agreement with City of Boca Raton. DiPaolo moved to amend his complaint and add additional counts before the hearing on Rollins's motion for summary judgment. However, DiPaolo then allowed the time for the motion for rehearing and the time for appeal of the final summary judgment to expire without seeking any action on his motion to amend the complaint. See id. at 3 1-32. The fifth district held that "[a] pending motion to amend does not extend the trial court's jurisdiction after entry of final judgment, and the court's reserving consideration of that issue until a later time does not change that fact. " Id. at 32.

*2 Here, the motion to amend was filed before the written final judgment was entered and was timely noticed for a hearing. The court acted on its own without the requested hearing. Appellant timely appealed the final judgment. The court's failure to rule upon the motion to amend was tantamount to denial of the motion, which was an abuse of discretion.

The trial court should have granted appellant's motion for leave to amend its pleadings. The proffered amendment indicates that appellant can state a cause of action. See Hervey v. Alfonso, 650 So.2d 644, 647 (Fla. 2d DCA 1995).

We therefore reverse and remand with instructions to grant appellant's motion to amend the complaint nunc pro tunc to December 17, 1998.

REVERSED AND REMANDED.

POLEN and GROSS, JJ., concur.

END OF DOCUMENT