IN THE COURT OF APPEALS 10/03/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00796 COA

MISSISSIPPI ROOFING SUPPLY, INC.

APPELLANT

v.

LANCO ROOFING EQUIPMENT AND SUPPLY, INC. APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN B. TONEY

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STEVE YOUNGER

ATTORNEY FOR APPELLEES:

GEORGE T. HOLMES

NATURE OF THE CASE: CIVIL (LIEN PRIORITY)

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR LANCO ROOFING EQUIPMENT AND SUPPLY, INC.

BEFORE BRIDGES, P.J., BARBER, PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Both Lanco Roofing Equipment and Supply, Inc. and Mississippi Roofing Supply, Inc. moved for summary judgment, claiming entitlement to funds interpled by National Presto Industries, Inc. Each

movant had a lien; the issue was priority. The trial court determined that Lanco's lien was superior to Mississippi Roofing's and granted summary judgment to Lanco. We affirm.

FACTS

This case involves the transactions of four principal parties: Lanco Roofing and Mississippi Roofing, two building suppliers; Presto, the property owner; and Bob Washington, a contractor. Lanco provided roofing materials to Bob Washington for work he was doing as a contractor on Presto's property. Set out in chronological order, the following occurred. Lanco recorded a materialman's lien in the construction lien records of the Chancery Clerk of Madison County. Mississippi Roofing obtained a judgment against Washington. That judgment was recorded on the judgment rolls of the Circuit Clerk of Madison County. Mississippi Roofing obtained a writ of garnishment against Washington and Presto. Lanco sued Washington to collect the amount represented by its lien against Presto. Presto interpled the funds owed. Mississippi Roofing joined the action to satisfy its judgment from the funds interpled by Presto.

In short, the trial court was faced with a battle between Lanco and Mississippi Roofing over the interpled funds. The trial court found that Lanco's prior materialman's lien took precedence over Mississippi Roofing's judgment lien.

DISCUSSION

On appeal, Mississippi Roofing argues that it has priority over the funds interpled by Presto because Lanco improperly filed its lien. Under this view, Lanco should have filed in the *lis pendens* rolls rather than the construction lien book.

The Mississippi Code provides:

> Every . . . building . . . shall be liable for . . . materials furnished . . . ; and debt for such services or construction shall be a lien thereon. * * * Such lien shall take effect as to . . . encumbrancers for a valuable consideration without notice thereof, . . . from the time of filing . . . notice thereof, in the office of the clerk of the chancery court, as hereinafter stated . . . .

Miss. Code Ann. § 85-7-131 (1972). The Code provides for filing the lien this way:

> Each of the several chancery clerks of this state shall provide in his office . . . a book entitled "Notice of Construction Liens" wherein notices under section 85-7-131 shall be filed and recorded, and such liens . . . shall not take effect unless and until some notation thereof shall be filed and recorded in said book . . . .

Miss. Code Ann. § 85-7-133 (1972). Suit must be brought within twelve months. Miss. Code Ann. § 85-7-141 (1972). Consistent with these provisions, Lanco filed its materialman's lien in the

construction lien records of the Madison County Chancery Clerk. Without more, the issue is simple: whatever other options Lanco might have had, it was also entitled to file in the Construction Lien Book. There is more however. The question exists whether sections 85-7-131 and 85-7-133 only provide the benefit of a lien to those who are in privity with the owner of the subject property:

> The lien declared in section 85-7-131 shall exist in favor of the person employed, or with whom the contract is made to perform such labor or furnish such materials . . . , and when the contract or employment is made by the owner . . . .

Miss. Code. Ann. § 85-7-135 (1972). If the Construction Lien Book is only for filing liens of those in privity with the owner, then Lanco was limited to filing a lien in the *lis pendens* records. Miss. Code Ann. § 85-7-197 (1972).

If there is a privity requirement, Lanco did not validly file its lien. Mississippi Roofing's judgment would have priority and Lanco could not block the execution by garnishment against Presto. We find such an interpretation to be contrary to established law. The Mississippi Supreme Court has instructed that "our present law allows and provides for perfection of the lien of the . . . subcontractor by filing and recording in the Notice of Construction Liens book." *Peoples Bank & Trust Co. v. L & T Developers, Inc.*, 434 So. 2d 699, 706 n.3 (Miss. 1983); *see also* William L. Smith & Boswell Stevens Hazard, *Mississippi Present Law Governing Private Construction Contracts*, 47 Miss. L.J. 437, 440-41 (1976). A "subcontractor" by definition is not in contractual privity with the owner, but is someone who takes from the contractor a specific part of the work. *Frazier v. O'Neal Steel, Inc.*, 223 So. 2d 661, 663 (Miss. 1969). Thus if a subcontractor who is not in privity can file in the Construction Lien Book, the privity restriction has been eliminated.

There is an additional matter which strengthens Lanco's right to use the Construction Lien Book. Presto was served with a stop notice letter by Lanco. Miss. Code Ann. § 85-7-181 (1972). This action gives rise to an obligation on the part of the building owner, i.e. Presto, to materialman Lanco. *Corrugated Indus., Inc. v. Chattanooga Glass Co.*, 317 So. 2d 43, 47 (Miss. 1975). As the supreme court has stated, "No privity exists between an owner and those furnishing material independently to his contractor and no obligation to such a materialman on the part of the owner arises *until after receipt of notice*." Id. (emphasis added). In essence, the filing of the stop-notice subrogates the materialman to the rights of the prime contractor, thereby placing the materialman in constructive privity with the owner by operation of law. Smith & Hazard, *supra* at 452.

Section 85-7-197 provides a materialman with the *option* of filing his claim in the *lis pendens* records. The section does not *require* such a filing to perfect the materialman's interests. Section 85-7-131 presents a second option. Whatever conclusion one might draw from a literal reading of section 85-7-135 (a difficult statute to read literally or otherwise), the supreme court has held that the lien may be acquired by subcontractors. That decision ends the requirement of privity, and at least a materialman of the contractor is no more barred than is a subcontractor in filing in the construction lien records of the county. This perfection preceded Mississippi Roofing's judgment lien and, accordingly, it has priority.

THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY GRANTING SUMMARY JUDGMENT IN FAVOR OF LANCO ROOFING EQUIPMENT AND SUPPLY, INC. IS AFFIRMED AND ALL COSTS OF THIS APPEAL ARE TAXED TO THE

APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.