

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ADVANCED CONSTRUCTION SERVICES,
INC.

Appellant

v.

CUMBERLAND DINING GROUP, INC.,
T/B/D/A/ BAR LOUIE RESTAURANT,
GUMBERG ASSOCIATES-CRANBERRY
MALL L.P. AND STANLEY R. GUMBERG,
G.P.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 567 WDA 2012

Appeal from the Order Entered February 29, 2012
In the Court of Common Pleas of Butler County
Civil Division at No.: AD 09 70093

BEFORE: DONOHUE, J., SHOGAN, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED NOVEMBER 22, 2013

Advanced Construction Services, Inc. ("Advanced Construction") appeals the trial court's February 29, 2012 order. That order granted preliminary objections filed by Gumberg Associates-Cranberry Mall, L.P., and Stanley Gumberg, G.P. (collectively, "Gumberg"), on the basis that Advanced Construction's service of notice of a mechanic's lien was defective and dismissed Advanced Construction's mechanics' lien complaint.¹ We affirm.

¹ Our review of the record indicates that Cumberland Dining Group, Inc., no longer exists as a business entity.

Gumberg Associates-Cranberry Mall, L.P. owned a strip mall located at 20111 Route 19, Cranberry Township, Pennsylvania ("the property"). Stanley Gumberg, now deceased, was the general partner of Gumberg Associates. In 2008, Gumberg leased a portion of the property to Cumberland Dining Group, Inc. ("Cumberland Dining"), to construct and operate a Bar Louie restaurant at that location.

On July 23, 2008, Cumberland Dining entered into a written agreement with Advanced Construction, whereby Advanced Construction agreed to perform all of the necessary services to construct the Bar Louie restaurant on the property. In exchange, Cumberland Dining agreed to pay to Advanced Construction a total contract price of \$769,897.00. Advanced Construction performed fully under the contract. However, Cumberland Dining paid Advanced Construction only \$760,231.31. Thus, Advanced Construction was owed \$9,665.69 under the terms of the contract.

Advanced Construction made reasonable attempts to secure payment in full from Cumberland Dining. As of July 31, 2009, Cumberland Dining remained in default for the \$9,665.69. Thus, on that date, Advanced Construction filed a "Statement of Mechanics' Lien" with the prothonotary in the Court of Common Pleas of Butler County. Attached to that statement, and marked as "Exhibit A," was a copy of the deed to the property. The deed listed Gumberg's address as 1051 Brinton Road, Pittsburgh, PA 15221-4599. Nonetheless, Advanced Construction, through counsel, prepared a "Notice of Filing of Mechanics' Lien" ("the notice"), which listed the

addresses for Cumberland Dining Group, Inc., Bar Louie restaurant, Gumberg Associates—Cranberry Mall L.P, and Stanley Gumberg, G.P., as 20111 Route 19, Cranberry Township, PA 16066, *i.e.*, the property's address. In an August 3, 2009 letter drafted by a paralegal at the law firm representing Advanced Construction, the Butler County Sheriff's Office was directed to serve the notice on each defendant at the property. The Sheriff's Office further was informed in the letter that "if you are unable to make service upon the person in charge, the property may be posted." Letter, 8/3/2009, ¶2.

On August 5, 2009, a deputy sheriff executed four affidavits wherein the deputy sheriff certified that he had served the notice for each individual defendant on a man named Rich Hellwig at the property. In each of the four affidavits, one for each listed defendant, the deputy sheriff stated only that Mr. Hellwig was the "General Manager of the defendant." Affidavits, 8/5/2009, ¶2. There was no indication in the affidavit that Mr. Hellwig attested to being a representative for, or otherwise connected to, any defendant other than Bar Louie Restaurant. As it turns out, Mr. Hellwig does not work for Gumberg, was not an agent of Gumberg's, and has never been known by or associated with anyone from Gumberg. Preliminary Objections, 9/12/2011, ¶¶10-11.

Gumberg never received the notice from Mr. Hellwig. In fact, Gumberg did not receive notice of the mechanics' lien until approximately two years later when Advanced Construction filed a complaint in mechanics'

lien on July 28, 2011. On September 12, 2011, in response to the complaint, Gumberg filed preliminary objections, which sought dismissal of the mechanics' lien due to Advanced Construction's failure to serve Gumberg properly with notice of the lien. On October 13, 2011, Advanced Construction filed a response and an accompanying brief in opposition to Gumberg's preliminary objections.

On February 29, 2012, the trial court, having considered the written pleadings and briefs as well as arguments that were presented in open court, entered an order granting Gumberg's preliminary objections and dismissing Advanced Construction's mechanics' lien against Gumberg. On March 20, 2012, Advanced Construction filed a notice of appeal. In response, in an order entered on April 11, 2012, the trial court directed Advanced Construction to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On May 1, 2012, Advanced Construction timely complied. On June 12, 2012, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Advanced Construction raises the following issues for our review:

- A. Whether the trial court erred in determining that [Gumberg] could not properly be served on real property, located in Butler County, where [Gumberg] was the deeded owner and its general partner was Stanley R. Gumberg, G.P.?
- B. Whether the trial court erred in determining that [Advanced Construction] was required to attempt service at an address in Allegheny County?
- C. Whether [Advanced Construction's] written instructions to the sheriff of Butler County to attempt personal service on

- [Gumberg], and if unsuccessful, to post the property is authorized by the Mechanics' Lien Law, 49 P.S. 1502?
- D. Whether [Advanced Construction's] complaint in mechanics' lien, when mailed to [Gumberg] at the exact same address where the sheriff of Butler County was directed to attempt personal service, provided actual notice of the claim to [Gumberg]?
 - E. Whether [Gumberg] proved, rather than alleged, actual prejudice?
 - F. Whether [Advanced Construction] timely filed its mechanics' lien claim and thereby tolled the statutory time period for filing such claims?
 - G. Whether the sheriff's return of service on [Gumberg] identified Richard Hellwig as the "person in charge?"
 - H. Whether [Advanced Construction] did anything to stall in its tracks the legal machinery set in motion by filing a statement of mechanics' lien against the deeded owner and landlord of the mall property: [Gumberg], **McCreesh v. City of Philadelphia**, 888 A.2d 664 (Pa. 2005); **Walker v. Highlands Hospital**, 2001 Pa. D & C, LEXIS 369 (C.C.P. West. Cty 2011)?
 - I. Whether the trial court should take the draconian measure of dismissing [Advanced Construction's] mechanics' lien claim due [to] the failure of a public official, the sheriff of Butler County, to follow [Advanced Construction's] specific directions for service on [Gumberg]?

Brief for Advanced Construction at 7-8 (some grammatical modifications made).

Despite raising nine distinct claims, Advanced Construction consolidates these claims into a single argument. This practice violates Pa.R.A.P. 2119(a), which states that "[t]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part -- in distinctive type or in type distinctively displayed -- the

particular point treated therein.” **Id.** We may quash an appeal for clear violations of the Rules of Appellate Procedure. **See Commonwealth v. Stafford**, 749 A.2d 489, 493 (Pa. Super. 2000). However, by itself, Appellant’s violation of Rule 2119 does not preclude appellate review of the listed issues. Thus, we will not quash Advanced Construction’s appeal on that basis. **Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc.**, 916 A.2d 686, 689 n.6 (Pa. Super. 2007).

However, our decision not to quash the brief in its entirety does not mean that we will review each of the nine listed issues independently. Advanced Construction’s brief contains other defects that render our review exceedingly difficult. For instance, Advanced Construction’s argument does not proceed in the same order in which the issues are listed. Advanced Construction presents us with a disjointed argument that impairs our ability to determine which of the issues raised in the questions presented actually are developed and discussed in the argument. For instance, issues D and E are mentioned only in passing at the end of the argument, and are not developed or supported by pertinent citations to legal authorities, which is another requirement of Pa.R.A.P. 2119(a). This failure necessarily results in waiver of those particular arguments. **Retzger v. UPMC Shadyside**, 991 A.2d 915, 932 (Pa. Super. 2010); **Creazzo v. Medtronic**, 903 A.2d 24, 28 (Pa. Super. 2006).

The remaining issues are so intertwined with each other that we have no choice but to resolve Advanced Construction’s unitary argument with an

in-kind discussion of the main issue in the case: whether service of the notice of the mechanics' lien was defective to such a degree that the trial court properly granted Gumberg's preliminary objections and dismissed the lien *in toto* against Gumberg.²

Our standard of review of an order sustaining preliminary objections to a mechanics' lien claim is well-settled:

[We] will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion. When sustaining the trial court's ruling will result in the denial of a claim or a dismissal of suit, preliminary objections will be sustained only where the case is "free and clear of doubt."

Regency Inves., Inc. v. Inlander Ltd., 855 A.2d 75, 77 (Pa. Super. 2004) (quoting **Clemleddy Constr. Inc. v. Yorston**, 810 A.2d 693, 696 (Pa. Super. 2002)).

A mechanics' lien is an "extraordinary remedy" that "should only be afforded to [contractors or] subcontractors who judiciously adhere to the requirements of the Mechanics' Lien Law." **Phila. Constr. Servs., LLC v. Domb**, 903 A.2d 1262, 1267 (Pa. 2006).

The Mechanics' Lien statute provides an expeditious method to obtain a lien at very little cost to the claimant. Therefore, it is the claimant's principal responsibility to ensure timely service of the claim. If a Mechanics' Lien claim is not timely perfected,

² To the extent that our discussion does not specifically address any of Appellant's remaining issues as stated, we find those issues to be waived for lack of compliance with Pa.R.A.P. 2119(a).

however, the claimant still has an adequate remedy in a suit for monetary damages arising out of a breach of contract. The advantage of a Mechanics' Lien is that the lien takes effect sooner and assumes priority over other liens. By contrast, a judgment lien takes effect and priority on the date of entry of judgment. **Thus, a claimant who desires a Mechanics' Lien must be vigilant in adhering to the service requirements of the statute.**

Regency Inves., 855 A.2d at 80 (emphasis added). Indeed, it is well-settled that strict compliance with the notice and service requirements is essential to effectuate a valid claim. **Castle Pre-Cast Superior Walls of Delaware, Inc. v. Strauss-Hammer**, 610 A.2d 503, 504 (Pa. Super. 1992); **Denlinger, Inc. v. Agresta**, 714 A.2d 1048, 1052 (Pa. Super. 1998). "Service requirements under Pennsylvania's Mechanics' Lien law are strictly construed such that a complaint will be stricken if the statutory service requirements are not met[.]" **Regency Invs.**, 855 A.2d at 77. We have recognized that the doctrine of substantial compliance may temper the strict construction of the Mechanics' Lien law. **Castle Pre-Cast**, 610 A.2d at 504. However, this doctrine only applies to the form of the notice, not the actual service requirements mandated by the statute with which a claimant must comply strictly. **Regency Inves.**, 855 A.2d at 77 (citing **Tesaro v. Baird**, 335 A.2d 792, 796 (Pa. Super. 1975)).

The Mechanics' Lien Law sets forth the notice and service requirements to perfect a lien as follows:

§ 1502. Filing and notice of filing of claim

(a) Perfection of Lien. To perfect a Lien, every claimant must:

- (1) file a claim with the prothonotary as provided by this act within four (4) months after the completion of his work; and
 - (2) serve written notice of such filing upon the owner within one (1) month after filing, giving the court term and number and date of filing of the claim. An affidavit of service of notice, or the appearance of service, shall be filed within twenty (20) days after service setting forth the date and manner of service. Failure to serve such notice or to file the affidavit or acceptance of service within the times specified shall be sufficient ground for striking off the claim.
- (b) Venue; property in more than one county.** Where the improvement is located in more than one county, the claim may be filed in any one or more of said counties, but shall be effective only as to the part of the property in the county in which it has been filed.
- (c) Manner of service.** Service of the notice of filing of claim shall be made by an adult in the same manner as a writ of summons in assumpsit, or if service cannot be so made then by posting upon a conspicuous public part of the improvement.

49 P.S. § 1502.

In ***Clemleddy***, we held as follows:

We interpret Pennsylvania's Mechanics' Lien Law to require service of a notice of filing of claim be made in person by the sheriff to the extent practicable. **See** 49 P.S. § 1502(c). Once the claimant establishes that personal service has not been successfully effectuated, the statute expressly permits posting as an alternative method of service. **See** 49 P.S. § 1502(c).

The statutory language supports our interpretation. Section 1502(c) requires service to "be made by an adult in the same manner as a writ of summons in assumpsit." 49 P.S. § 1502(c). The Pennsylvania Rules of Civil Procedure recognize claims asserted in assumpsit to be civil actions. **See** Pa.R.C.P. 1001 (stating that "[a]ll claims heretofore asserted in assumpsit or trespass shall be asserted in one form of action to be known as 'civil action'"). Consequently, a writ of summons in assumpsit

must be served in the same manner as service of process in a civil action.

Service of process in a civil action is prescribed by Rule 400 of the Pennsylvania Rules of Civil Procedure. **See** Pa.R.C.P. 400. It states, in pertinent part:

Rule 400. Person to make service.

- (a) Except as provided in subdivisions (b) and (c) and in Rules 400.1 and 1930.4, **original process shall be served within the Commonwealth only by the sheriff.**

Pa.R.C.P. 400(a) (emphasis added).

Consequently, we interpret Section 1502(c)'s requirement of personal service to "be made by an adult in the same manner as a writ of summons in assumpsit" to mean that the notice of filing of claim in a mechanics' lien case must be served by the sheriff.

Clemleddy, 810 A.2d at 696-97.

Moreover, "[t]he manner of service of a writ of summons in assumpsit is governed by Pa.R.C.P. 402." **Castle Pre-Cast**, 610 A.2d at 505. Thus, a sheriff serving a notice of a mechanics' lien must perfect service according to Rule 402, which provides as follows:

- (a) Original process may be served
 - (1) by handing a copy to the defendant; or
 - (2) by handing a copy
 - (i) at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or
 - (ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides; or

(iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.

Pa.R.C.P. 402.

These well-established principles present a clear picture of what Advanced Construction should have done to perfect service of the notice. Advanced Construction was obligated to direct a sheriff to hand a copy of the notice directly to Gumberg, to an adult at Gumberg's residence, or to Gumberg's authorized agent in charge at any of Gumberg's offices or usual places of business. A fair review of the facts of this case reveals that Advanced Construction failed properly to serve Gumberg.

Advanced Construction sent the Butler County Sheriff's Office a letter requesting that the sheriff serve the notice on all of the listed defendants. The letter directed that each defendant be served with the notice at the same location: 20111 Route 19, Cranberry Township, Pennsylvania. The letter did not list the names of any authorized representatives for the defendants, nor did the letter indicate to the sheriff that the defendants were separate entities with distinct ownership, management, or agents. The sheriff merely was sent to one location to serve each defendant, which is precisely what the deputy sheriff did. In the affidavits, the deputy sheriff certified that he served all four notices on the same person, Mr. Hellwig. However, Advanced Construction concedes that Mr. Hellwig was not a representative or authorized agent in charge of Gumberg's, and not authorized to accept service on Gumberg's behalf. **See** Brief for Advanced

Construction at 17. Mr. Hellwig was the manager of the Bar Louie Restaurant, and had absolutely no connection to Gumberg. Predictably, Mr. Hellwig, having no relationship with or duty to Gumberg, never passed the notice on to any Gumberg representative. Thus, service upon Mr. Hellwig of the notice clearly was inadequate service as to Gumberg under Rule 402.

Advanced Construction contends that, because Gumberg Associates-Cranberry Mall was a limited partnership, the propriety of the service of the notice is governed by Pa.R.C.P. 423, not Rule 402. In passing and without any citation to any supporting cases, Advanced Construction notes that the property was "likely" the usual place of business of Gumberg Associates-Cranberry Mall and "certainly" the regular place of business for Stanley Gumberg. Brief for Advanced Construction at 15. While this undeveloped argument barely warrants our attention, we make the following observations: Advanced Construction solely relies upon subsection (3) of Rule 423, which permits service on "the manager, clerk or other person for the time being in charge of any regular place of business or activity of the partnership or association." Pa.R.C.P. 423(3). Advanced Construction's reliance upon this subsection fails for the same reason that service was improper under Rule 402: Mr. Hellwig was not "the manager, clerk or other person . . . in charge" of the property for purposes of serving notice upon Gumberg. Also, Advanced Construction knew the location of Gumberg's office and usual place of business from the outset. Indeed, attached to the notice and statement of the mechanics' lien, the initial document filed in this

case, was a copy of the deed granting the mall property to Gumberg. Gumberg's address was listed on the deed as 1051 Brinton Road, Pittsburgh, PA 15221-4599. Advanced Construction ignored this information and directed the sheriff to serve Gumberg at the Cranberry Township property rather than Gumberg's known regular place of business in Pittsburgh.

Throughout its brief, Advanced Construction argues that service should not be deemed to be defective because it relied upon the sheriff's affidavits that service properly was effectuated upon Gumberg. Additionally, Advanced Construction notes that it had no reason to believe that the deputy sheriff did not follow Advanced Construction's service instructions. These points are directed towards what we discern as the crux of Advanced Construction's argument, which is that Advanced Construction acted in good faith in serving the notice upon Gumberg and, therefore, the mechanics' lien should not have been dismissed because of the defective service. To this end, Advanced Construction relies upon our Supreme Court's 2005 decision in **McCreesh v. City of Philadelphia**, 888 A.2d 664 (Pa. 2005). Regardless of whether Advanced Construction acted in good faith, **McCreesh** does not provide the relief that Advanced Construction seeks.

In **McCreesh**, our Supreme Court granted review to "clarify what constitutes a good faith effort by a plaintiff to effectuate notice to a defendant of the commencement of an action." **Id.** at 665. Clarification was necessary because this Court and Pennsylvania's Commonwealth Court had established two different interpretations of what constituted good faith.

In **Lamp v. Heyman**, 366 A.2d 882 (Pa. 1976), our Supreme Court held that “a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion.” **Id.** at 889. In **Farinacci v. Beaver County Industrial Development Authority**, 511 A.2d 757 (Pa. 1986), the Supreme Court stated that “**Lamp** requires of plaintiffs a good-faith effort to effectuate notice of commencement of the action.” **Id.** at 759. These two statements came to be known as the **Lamp-Farinacci** rule. The Commonwealth Court interpreted this rule to require plaintiffs to comply strictly with the Rules of Civil Procedure to demonstrate good faith. **McCreesh**, 888 A.2d at 666 (citing **Teamann v. Zafris**, 811 A.2d 52, 63 (Pa. Cmwlth. 2002)). However, this Court adopted “a more flexible approach, excusing plaintiffs’ initial procedurally defective service where the defendant **has actual notice** of the commencement of litigation and is not otherwise prejudiced.” **McCreesh**, 888 A.2d at 666 (emphasis added) (citing **Leidich v. Franklin**, 575 A.2d 914 (Pa. Super. 1990)).

Ultimately, our Supreme Court adopted the more flexible approach espoused by **Leidich** and progeny. That approach “allows for the continued validity of the writ despite non-compliance with the rules so long as the defendant received actual notice and was not prejudiced.” **McCreesh**, 888 A.2d at 670. In doing so, the Court noted that “[n]either our cases nor our rules contemplate punishing a plaintiff for technical missteps where he has satisfied the purpose of the statute of limitations by supplying a defendant

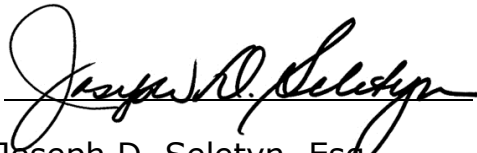
with actual notice.” **Id.** at 674. Thus, the Court adopted “the logic of the **Leidich** line of cases, which, applying **Lamp**, would dismiss only those claims where plaintiffs have demonstrated an intent to stall the judicial machinery or where plaintiffs’ failure to comply with the Rules of Civil Procedure has prejudiced defendant.” **Id.**

McCreesh does not control the case *sub judice*, for two reasons. First, **McCreesh** was not a mechanics’ lien case, which, for the reasons stated above, requires strict compliance with the statutory mandates. Our Supreme Court has not abandoned this requirement in the mechanics’ lien context, nor has it extended the holding in **McCreesh** to encompass mechanics’ lien cases. Second, even if **McCreesh** were applicable in mechanics’ lien cases, the prerequisite to **McCreesh**’s flexible good faith approach was not met in this case. That is, **McCreesh** only forgives plaintiffs’ good-faith technical defects when the defendant otherwise has **actual notice** of the action. Instantly, it was the notice itself that was not served in accordance with the Rules of Civil Procedure. Despite what appears to have been a good-faith effort by Advanced Construction, Gumberg did not receive actual notice of the mechanics’ lien until two years after the notice was filed with the prothonotary in the court of common pleas. Without actual notice, **McCreesh**’s flexible approach has no applicability. Hence, **McCreesh** does not save Advanced Construction from the service defects at issue.

Our mechanics' lien jurisprudence requires that we review service of the notice of a mechanics' lien for strict compliance with the notice provisions of the Mechanics' Lien Law, 49 P.S. § 1502. Advanced Construction did not serve Gumberg or an authorized agent of Gumberg. Additionally, Advanced Construction has not demonstrated sufficiently to this Court that the property was Gumberg's office or usual place of business. Consequently, the trial court's order granting Gumberg's preliminary objections and dismissing the mechanics' lien was not erroneous, and, we conclude, was free and clear of doubt.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/22/2013