UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

GRAND SOLEIL-NATCHEZ, LLC,	**CASE NO. 11-01632-NPO**
DEBTOR.	**CHAPTER 7**
GOOD HOPE CONSTRUCTION, INC., FARMER ELECTRICAL SERVICE COMPANY, INC., AND KETCO, INC. D/B/A KETCO ADV. & SPEC.	**PLAINTIFFS**
OPTION SUPPLY, INC., BADGER HEATING AND AIR CONDITIONING, INC., AND WOLF ENTERPRISES, INC.	**INTERVENOR PLAINTIFFS**
	CONSOLIDATED
VS.	**ADV. PROC. NO. 12-00013-NPO**
RJB FINANCING, LLC, ROBERT J. BERARD, PARAMOUNT FARMS, INC., BIG RIVER ENTERPRISES, LLC, CHARLES CATO, WILLIAM MARVIN CATO, EMERALD STAR CASINO & RESORTS, INC., EMERALD STAR PROPERTIES, LLC, ESC HOLDINGS, LLC, GRAND SOLEIL-NATCHEZ, LLC, AND W.G. YATES & SONS CONSTRUCTION COMPANY	**DEFENDANTS**

MEMORANDUM OPINION ON RJB FINANCING, LLC'S MOTION TO DISMISS INTERVENTION COMPLAINT OF BADGER HEATING AND AIR CONDITIONING, INC. AND WOLF ENTERPRISES, INC.

This matter came before the Court for hearing on October 17, 2012, (the "Hearing") on (1) RJB Financing, LLC's Motion to Dismiss Intervention Complaint of Badger Heating and Air Conditioning, Inc. and Wolf Enterprises, Inc. (the "Motion") (Adv. Dkt. 73)[1] filed by RJB Financing,

[1] Citations to the record are as follows: (1) citations to docket entries in the adversary proceeding are cited as "(Adv. Dkt. ____)"; and (2) citations to docket entries in the main bankruptcy case, Case No. 11-01632-NPO, as cited as "(Dkt. ____)".

LLC ("RJB"), (2) the Joinder to RJB Financing, LLC's Motion to Dismiss Intervention Complaint of Badger Heating and Air Conditioning, Inc. and Wolf Enterprises, Inc. (the "Joinder") (Adv. Dkt. 76), filed by Robert J. Berard and Paramount Farms, Inc., (3) the Debtor's Joinder in RJB Financing, LLC's Motion to Dismiss Intervention Complaint of Badger Heating and Air Conditioning, Inc. and Wolf Enterprises, Inc. [Dkt. #73] (Adv. Dkt. 80) filed by the Debtor, Grand Soleil-Natchez, LLC ("Grand Soleil"), and (4) the Response of Badger Heating & Air Conditioning, Inc., and Wolf Enterprises, Inc., to RJB Financing's Motion to Dismiss (Dkt. #73) and to the Joinder of Other Parties Thereto (Dkt #'s 76 & 80) (the "Response") (Adv. Dkt. 95) filed by Badger Heating & Air Conditioning, Inc. ("Badger") and Wolf Enterprises, Inc. ("Wolf"), in the above-referenced adversary proceeding (the "Adversary").

Prior to the Hearing, Grand Soleil's bankruptcy case was converted from a chapter 11 case to a chapter 7 case (Dkt. 433), and Stephen Smith was appointed the chapter 7 case trustee (the "Trustee"). At the Hearing, Kristina M. Johnson represented RJB; Douglas C. Noble represented Robert J. Berard and Paramount Farms, Inc., Richard C. Bradley, III represented Badger and Wolf; and Robert Alan Byrd represented the Trustee. At the start of the Hearing, the Court substituted the Trustee for Grand Soleil as the proper party in interest in the Adversary (Adv. Dkt. 116) and granted the Trustee's request to withdraw the Debtor's Joinder in RJB Financing, LLC's Motion to Dismiss Intervention Complaint of Badger Heating and Air Conditioning, Inc. and Wolf Enterprises, Inc. [Dkt. #73] (Adv. Dkt. 115). After considering the pleadings, the exhibits, and the arguments presented at the Hearing, the Court rendered its decision from the bench and granted the Motion and

Joinder. This Opinion memorializes and supplements the Court's bench ruling.[2]

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(K). Notice of the Motion and Joinder was proper under the circumstances.

Facts

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure, RJB seeks the dismissal of the Intervention Complaint of Badger Heating and Air Conditioning, Inc., and Wolf Enterprises, Inc. (the "Intervention Complaint") (Adv. Dkt. 55) for failure to state a claim for relief. RJB argues that Badger and Wolf lost their lien rights when they failed to file an action within the one-year statute of limitations set forth in Mississippi's Construction Lien Law, MISS. CODE ANN. § 85-7-141.

Generally, in ruling on a motion to dismiss, a court may not look beyond the pleadings without converting the 12(b)(6) motion into one for summary judgment. Cinel v. Connick, 15 F.3d 1338, 1341 (5th Cir. 1994). However, a court may consider documents attached to the motion to dismiss if those documents "are referred to in the plaintiff's complaint and are central to the plaintiff's claim." Scanlan v. Tex. A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003) (citation omitted). Also, a court may consider matters of which it may take judicial notice. Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996). For example, a court may take judicial notice of matters of public record in deciding a motion to dismiss. Papasan v. Allain, 478 U.S. 265, 269

[2] The following constitutes the findings of fact and conclusions of law of the court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

n.1 (1986).

Without converting the Motion into a motion for summary judgment, the Court considers the exhibits presented by RJB at the Hearing, most of which were also attached to the Motion, as the exhibits all are either matters of public record or documents that are referred to in the Intervention Complaint and are central to the lien claims of Badger and Wolf. Wilson v. Kimberly-Clark Corp., 254 Fed. Appx. 280, 286 (5th Cir. 2007) (unpublished); Bank of Abbeville & Trust Co. v. Commonwealth Land Title Ins. Co., 201 Fed. Appx. 988, 991-92 (5th Cir. 2006) (unpublished); Burton v. Coahoma Comty. Coll., No. 2:11CV129, 2012 WL 2254169, at *1-2 (N.D. Miss. June 15, 2012); Martin v. Rainbow Casino, No. 5:11CV142, 2012 WL 1883673, at *1 (S.D. Miss. May 22, 2012); Gulf Coast Bank & Trust Co. v. Stinson, No. 2:11CV88, 2012 WL 38713, at* 2 (S.D. Miss. Jan. 9, 2012); Shakir v. Chase Home Fin., No. 2:10CV153, 2011 WL 4386303, at *2 (N.D. Miss. Aug. 29, 2011); Carter v. Epps, No. 4:07CV79, 2008 WL 623403, at *2 (N.D. Miss. March 3, 2008). Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of the proceedings and records of the Circuit Court of Adams County, Mississippi, in Good Hope Construction, LLC v. Big River Enterprises, LLC, Cause No. 09-KV-0128 (the "Adams County Suit") (Adv. Dkt. 73-1). *See* Jones v. Ivy, No. 4:07CV9-P-A, 2007 WL 474944 (N.D. Miss. Feb. 9, 2007) (a court may take "judicial notice of prior proceedings involving the plaintiff"). The facts below are derived from the pleadings filed in the Adversary, the documents attached to the Motion, the exhibits introduced at the Hearing, the proofs of claims filed in the main bankruptcy case, and the pleadings filed in the Adams County Suit.

1. On January 6, 2009, Good Hope Construction, LLC ("Good Hope") filed a notice of a construction lien pursuant to MISS. CODE ANN. § 85-7-131 in the Chancery Clerk's Office of

Adams County, Mississippi, in the amount of $1,100,380.64, "for all the services, labor, equipment and material furnished on behalf of [Grand Soleil] in the construction, alteration, and repair of the buildings and other improvements" of the Ramada Inn Hilltop, a hotel property located in Natchez, Mississippi (the "Ramada Inn") (Adv. Dkt. 73-1). Good Hope filed an amended notice on February 23, 2009 (Adv. Dkt. 73-1).

2. Badger, Wolf, and several other entities also filed construction liens on the Ramada Inn. Wolf filed a Notice of Lien by Contractor (the "Wolf Lien Notice") (Adv. Dkt. 73-2) in the amount of $553,188.36 for services, labor, equipment and material on February 18, 2009. (Adv. Dkt. 73-2). Badger filed a Construction Lien Notice (the "Badger Lien Notice") (Adv. Dkt. 55-1) in the amount of $155,579.07 on February 20, 2009.

3. On December 8, 2009, Good Hope filed a Complaint (the "Lien Complaint") (Adv. Dkt. 73-1) seeking to foreclose its construction lien in the Adams County Suit against the Ramada Inn. Good Hope named as defendants Grand Soleil (the reputed owner of the Ramada Inn), and 20 other entities, including Badger and Wolf. All of the named defendants allegedly had an interest in, or lien against the Ramada Inn. (Adv. Dkt. 73-1).

4. On February 16, 2010, Mark P. Wolf, who is president of Wolf and who is not an attorney, filed a *pro se* Answer to Complaint and Counter-Claim (the "Lien Counterclaim") (Adv. Dkt. 73-2) on behalf of Wolf. In the Lien Counterclaim, Wolf alleged that it had properly filed a notice of its construction lien against the Ramada Inn, it was owed $553,188.36, and was entitled to a judgment of foreclosure and sale in that amount.

5. On May 3, 2010, a summons and copy of the Lien Complaint was served upon Badger. (Adv. Dkt. 73-3). According to the public docket of the Adams County Suit, Badger did

not answer or otherwise respond to the Lien Complaint (Adv. Dkt. 73-3).

6. On May 5, 2011, Good Hope and two other creditors filed an involuntary petition for relief against Grand Soleil. (Dkt. 1). An Agreed Order Granting Involuntary Petition and Converting Case to Chapter 11 was entered in August 10, 2011 (Dkt. 43). More recently, the Court entered an Order Granting United States Trustee's Motion to Convert (Dkt. 433), converting the chapter 11 case to a chapter 7 case on September 24, 2012.

7. On February 15, 2012, Good Hope and other creditors filed a Complaint (the "Adversary Complaint") (Adv. Dkt. 1) in the Adversary seeking a determination of the validity, priority and security of liens against the Ramada Inn. This Adversary was consolidated with a separate but related adversary proceeding (Adv. Proc. No. 12-00014-NPO) on May 2, 2012 (Adv. Dkt. 20).

8. On May 8, 2012, Badger and Wolf filed a Motion to Intervene in Adversary Proceeding (Adv. Dkt. 22), which the Court granted on June 26, 2012 (Adv. Dkt. 45).

9. On July 19, 2012, Badger and Wolf filed the Intervention Complaint.

10. On August 20, 2012, RJB filed the Motion seeking dismissal of the Intervention Complaint on the ground that the liens of Badger and Wolf had expired and were no longer valid. Badger and Wolf filed the joint Response on September 17, 2012.

Discussion

A. Rule 12(b)(6) Dismissal Standard

The Supreme Court noted in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), that pleading standards that apply to a Rule 12(b)(6) motion to dismiss arise out of the requirement in Rule 8(a)(2) of the Federal Rules of Civil Procedure that the plaintiff must file "a short and plain

statement of the claim showing that the pleader is entitled to relief." To survive such a motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Id. at 570. Previously, courts had followed a notice-pleading standard based on an interpretation of Conley v. Gibson, 355 U.S. 41 (1957), as requiring facts showing only the possibility of a right to relief. In Conley, the Supreme Court held that a complaint should not be dismissed at the pleading stage "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim," Conley, 355 U.S. at 45-46. The Supreme Court in Twombly concluded that courts had interpreted the "no set of facts" language in Conley too literally. Twombly, 550 U.S. at 561-62.

In Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), the Supreme Court described application of the "plausibility" standard in Twombly as requiring a two-part analysis. First, a court should identify those allegations in the complaint that unlike factual allegations, are not entitled to the assumption of truth. Iqbal, 129 S. Ct. at 1949-50. A pleading that includes "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. In other words, in its evaluation of a pleading, a court should ignore altogether any legal conclusions. Second, a court should determine whether the non-conclusory, factual allegations in the complaint plausibly suggest a claim for relief. Iqbal, 129 S. Ct. at 1950. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). Twombly, 550 U.S. at 555. Although Rule 8 does not require "detailed factual allegations," a complaint must provide the plaintiff's grounds for entitlement to relief including factual allegations that when assumed to be true, nudge the claim across the line from conceivable to plausible. This task is context-specific.

B. Mississippi's Construction Lien Law

A resolution of the issues raised in the Motion requires that the Court construe and apply Mississippi's Construction Lien Law, MISS. CODE ANN. § 85-7-131 to § 85-7-157. In this task, the Court is guided by the general rules of statutory construction in Mississippi. Great Am. Ins. Co. of N.Y. v. Lowry Dev., LLC, 576 F.3d 251, 257 (5th Cir. 2009). The Court starts its statutory interpretation by reviewing the plain language of the statute, known as the "plain meaning rule." *See* Lawson v. Honeywell Int'l, Inc., 75 So. 3d 1024, 1027 n.4 (Miss. 2011) (debating whether "the plain meaning rule" is a rule of statutory construction or a preliminary requirement before resorting to rules of statutory construction). By statute, Mississippi mandates that "[a]ll words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning." MISS. CODE ANN. § 1-3-65.

In Mississippi, "[e]very house, building, . . . or structure of any kind" is subject to a lien "for labor done or materials furnished . . . and debt for such services or construction shall be a lien thereon." MISS. CODE ANN. § 85-7-131. The lien arises only where "the work is contracted for by the owner or by a person 'authorized, either expressly or impliedly, by the owner.'" Brown v. Gravlee Lumber Co., 341 So. 2d 907, 908 (Miss. 1977), *citing* MISS. CODE ANN. § 85-7-135. The Mississippi Supreme Court has noted that "there is no natural law of materialman's liens," and claimants can have lien rights "only to the extent that they have brought themselves within the terms of [MISS. CODE ANN. § 85-7-131]." Riley Bldg. Suppliers, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 508 (Miss. 1987). The priority of a properly perfected construction lien is set forth in MISS. CODE ANN. § 85-7-131:

> Such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or

notice thereof, in the office of the clerk of the chancery court.

MISS. CODE ANN. § 85-7-131.

The means of perfecting a lien appear in MISS. CODE ANN. § 85-7-133. In order to perfect a lien, a claimant may file either the contract or a notice of the lien in the office of the Chancery Clerk in the county where the property is located. MISS. CODE ANN. § 85-7-133. The lien "shall not take effect unless and until some notation thereof shall be filed and recorded." MISS. CODE ANN. § 85-7-133. Here, it is undisputed that Badger and Wolf properly and timely filed notices of their construction liens.

The perfection of a lien, however, is only the first step in a two-step process. Once a lien claimant has satisfied the perfection step, it must then commence an action to enforce the lien in the circuit or county court in which some or all of the property is located. There is a relatively short period of limitations for doing so. "Any person entitled to and desiring to have the benefit of such lien shall commence his suit . . . within twelve (12) months next after the time when the money due and claimed by the suit became due and payable following the day on which the last of the labor was performed or material . . . was supplied by the person bringing the action." MISS. CODE ANN. § 85-7-141. Otherwise, the lien expires and is no longer valid. King v. Hankins, 209 So. 2d 190 (Miss.1968) (lien of contractor who filed notice of lien but took no other steps to protect its interest until two years later, was barred by the one-year limitations period). Section 85-7-141 sets forth the allegations that must be stated in the lien complaint, including (1) a description of the property upon which the lien exists, (2) the nature of the contract and indebtedness and the amount of the indebtedness, and (3) the amount and kind of labor performed and/or materials furnished, the prices of the material and that time that the labor was performed. A claimant that prevails in an action to enforce its lien is entitled to an order directing the sale of the subject property. MISS. CODE ANN.

§ 85-7-151. The proceeds from the sale of the property are then disbursed in accordance with MISS. CODE ANN. § 85-7-155 and MISS. CODE ANN. § 85-7-263.

The issue here is whether Badger and Wolf timely commenced an action to enforce their liens. Notably, the limitations period begins to run from the date payment became due, regardless of when the notice of lien or contract was filed. Billups v. Becker's Welding & Machine Co., 189 So. 526, 528 (Miss. 1939) (holding that if the time of payment is not fixed by contract and if there is a continuous delivery of material, the limitations period begins to run from the date of the delivery of the last lot of materials). Badger and Wolf contend that the Adams County Suit satisfied the one-year statute of limitations for both of their liens. The Court addresses this contention first.

C. Adams County Suit

Badger and Wolf argue in the Response that "[w]hen one lien holder has filed an action to enforce a construction lien and has joined the other lien holders as parties to that action, the statute does not require that those other lien holders file their own separate, respective lien actions and add the other known lien holders." (Response at 3). Thus, according to Badger and Wolf, when Good Hope filed the Lien Complaint on December 8, 2009, and named Badger and Wolf as defendants, Good Hope tolled the statute of limitations for the liens of Badger, Wolf, and, assumably, for the liens of all other defendants named in the lawsuit. The fact that Badger, who was properly served with process, never made an appearance in the Adams County Suit, and the fact that Wolf did not make an appearance until February 16, 2010, when it filed its Lien Counterclaim, matter not, according to Badger and Wolf. In support of their interpretation of Mississippi's Construction Lien Law, Badger and Wolf point to the overall "architecture" of the statute, which contemplates the joinder in one lawsuit of all persons claiming an interest in the same real property. The joinder provision referred to by Badger and Wolf appears in MISS. CODE ANN. § 85-7-143, which states:

> [A]ll persons claiming liens on the same property, by virtue of this chapter, shall be made parties to the suit; and should any necessary or proper party be omitted, he may be brought in by amendment, on his own application or that of any other party interested; and claims of several parties having liens on the same property may be joined in the same action.

MISS. CODE ANN. § 85-7-143. Without the joinder provision, say Badger and Wolf, courts would be inundated with multiple lawsuits seeking the foreclosure of the same real property, a waste of judicial resources. They embrace this position in paragraph 4 of the Intervention Complaint, in which they alleged:

> [A]s required by [85-7-143] in effect at the time that Good Hope filed the Construction Lien Lawsuit that "[a]ll persons having an interest in the controversy and all persons claiming liens on the same property, by virtue of [Chapter 7 of Title 85 of the Mississippi Code], shall be made parties to the suit," Good Hope joined Badger and Wolf as parties to the Construction Lien Lawsuit.

(Compl. ¶ 4). They do not specify in the Intervention Complaint when the last payment to Badger or Wolf became due for purposes of the one-year statute of limitations.

The Court agrees with Badger and Wolf that the plain language of MISS. CODE ANN. § 85-7-143 renders certain lienholders "necessary" parties in a suit to enforce a construction lien. Indeed, the failure to join an alleged lienholder could render the foreclosure of a construction lien ineffective as to that lienholder. *See* Parsons v. Foster, 122 So. 387 (Miss. 1929) (holder of deed of trust who was not made a party to an action to enforce a lien upon a lot and building could enjoin sale of that property by lien claimant). It is a stretch, however, to interpret MISS. CODE ANN. § 85-7-143 as Badger and Wolf do. Simply put, there is no language in MISS. CODE ANN. § 85-7-143 that renders the one-year period of limitations in MISS. CODE ANN. § 85-7-141 inapplicable to all lienholders except the one who filed the suit. When read together, MISS. CODE ANN. § 85-7-141 and MISS. CODE ANN. § 85-7-143 do not remove the time limits for any lienholder. Moreover, Badger and Wolf do not cite any authority in the Response that supports their interpretation of MISS. CODE

ANN. § 85-7-143. At the Hearing, counsel for Badger and Wolf candidly admitted there was no such authority.

Other jurisdictions interpreting their own versions of construction lien statutes have reached divergent views on this issue. For example, in Isle of Wight Materials Co. v. Cowling Bros., Inc., 431 S.E.2d 42 (Va. 1993), the Supreme Court of Virginia interpreted the plain language of Virginia's mechanic's lien law, VA. CODE § 43-17 and VA. CODE § 43-22, as requiring *each* lienor to take affirmative action to assert its lien within the limitations period. "Merely being named as a defendant in an enforcement action of another lienor is not the equivalent of either filing an independent suit or intervening in the suit of another." Id. at 44. Similarly, the Washington Court of Appeals in Van Wolvelaere v. Weathervane Window Co., 177 P.3d 750 (Wash Ct. App. 2008), ruled that a claimant had failed to comply with the limitations period set forth in Washington's Mechanics' and Materialmen's Liens Statute, WASH. REV. CODE § 60.04.141, even though another lien claimant had timely filed its lawsuit. On the other hand, the Wisconsin Court of Appeals in Carolina Builders Corp. v. Dietzman, 739 N.W.2d 53 (Wis. Ct. App. 2007), held that under Wisconsin's construction lien law, WIS. STAT. §§ 779.01-17, if one construction lien claimant brings an action within the statutory time period, the rights of all lien claimants joined in the action are preserved, regardless of whether they are named as plaintiffs or defendants.

The above three cases, Isle of Wight , Weathervane, and Dietzman, demonstrate a variance in the language of construction lien statutes. Each statute must be construed pursuant to its own terms. Mississippi's Construction Lien Law resembles the statutes in Virginia and Washington, in that MISS. CODE ANN. § 85-7-141 states tha.t each person "shall commence his suit." This language differs from the language in the Wisconsin statute, "[N]o action to enforce a lien . . . shall be maintained . . . unless within 2 years from the date of filing a claim for lien an action is brought."

WIS. STAT. § 779.06.

Badger and Wolf maintain in the Response that the Court's reading of the Construction Lien Law will result in multiple lawsuits and will eviscerate the joinder provision in MISS. CODE ANN. § 85-7-143. The Court finds that such a result is unlikely. An alleged lienholder named as a defendant in a construction lien lawsuit may assert a counterclaim or cross-claim to enforce its lien in the same action. Why else did Wolf file the Lien Counterclaim if not to assert its separate lien? How else could Wolf comply with MISS. CODE ANN. § 85-7-141, which requires a lien claimant to include certain allegations in its lien complaint?

In short, the Court finds that Mississippi's Construction Lien Law must be construed according to its own terms and, to that end, finds that the filing of the Lien Complaint by Good Hope did not toll the statute of limitations as to the liens of Badger and Wolf. The Court next considers whether Badger and Wolf took action to preserve their rights in a timely manner. This analysis requires the Court to address the validity of the liens of Badger and Wolf separately.

D. Badger

RJB contends in the Motion that the limitations period began to run against Badger on February 9, 2009, and, therefore, expired on February 9, 2010. RJB picks February 9, 2009, because that is the date the Badger Lien Notice stated that it had "furnished the last of the items" and is also the date shown in the proof of claim (Cl. 24-1) filed by Badger in the main bankruptcy case. Badger does not dispute this allegation.

The record reflects that Badger did not take any action to enforce its lien until it filed the Intervention Complaint on July 19, 2012. By then, the lien had expired. Therefore, the Court finds that Badger's lien claim is time barred and should be dismissed with prejudice. Because the Court reaches this result, it is unnecessary for the Court to address RJB's alternate argument that

Mississippi's Door Closing Statute, MISS. CODE ANN. § 79-4-15.02(a), requires dismissal of Badger's claim in the Intervention Complaint. The Court next turns to the validity of Wolf's lien.

E. Wolf

RJB contends that the one-year statute of limitations began to run against Wolf on January, 30, 2009, and, therefore, expired on January 30, 2010, weeks before the Lien Counterclaim was filed on February 16, 2010, and more than two years before the Intervention Complaint was filed on July 19, 2012. RJB picks January 30, 2009, because the invoices attached to the Wolf Lien Notice indicate that the last day Wolf performed any work on the Ramada Inn was December 31, 2008. If so, then January 30, 2009, was the date the debt "became due and payable," assuming a payment term of 30 days. *See* Central Grain & Supply Co., Inc. v. Jesco, Inc., 410 So. 2d 879 (Miss. 1982) (holding that plaintiff was not entitled to materialman's lien where declaration to establish lien was not filed in court within one year after the indebtedness became due). These same invoices are attached to the proof of claim (the "POC") (Cl. 26-1) filed by Wolf in Grand Soleil's bankruptcy case.

At the Hearing, the Court noted two discrepancies in the record. First, according to the Wolf Lien Notice, Wolf was owed $553,188.36 as of February 17, 2009, and, more important, that Wolf "continues to perform under its agreement as of the date of this notice," which was February 17, 2009. If so, then the statute of limitations did not begin to run any earlier than February 17, 2009, and did not expire until one year later on February 17, 2010, which is one day *after* Wolf filed the Lien Counterclaim on February 16, 2010.

Second, the Court noted at the Hearing a discrepancy between the indebtedness claimed by Wolf in the Lien Counterclaim and in its proof of claim In the Wolf Lien Notice, Wolf alleged that after it "finished its work," it was owed $553,188.36, whereas in its POC, Wolf alleged a debt in

excess of this amount. The difference in amounts suggests that Wolf may have provided labor, material, equipment, and services after December 31, 2008.

At the Hearing, Wolf could not explain these discrepancies, and RJB urged the Court to resolve them by disregarding paragraph 5 of the Wolf Lien Notice as "implausible." In the Intervention Complaint, Wolf's allegations about the timeliness of its action to enforce its lien focused solely upon the effect of Good Hope's filing of the Lien Complaint in the Adams County Suit. There are no allegations in the Intervention Complaint regarding the effect of Wolf's filing of the Lien Counterclaim. In that regard, Wolf did not allege in the Intervention Complaint when it last provided labor, materials, equipment, or services, or when the last payment became due. In the absence of such allegations, the Court finds that the Intervention Complaint fails to state a claim for relief and should be dismissed based upon the statute of limitations. In light of the discrepancies in the record noted previously, the Court further finds that Wolf should be granted an opportunity to amend the Intervention Complaint to demonstrate that its claim falls within the one-year limitations period. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002) (when a complaint fails to state a claim for relief, the courts generally should give the plaintiff at least one opportunity to amend the complaint before dismissing the action with prejudice.)

RJB raises two additional arguments in support of its limitations defense against Wolf. The Court does not resolve these issues at this time but discusses them briefly to provide guidance to the parties in the event it becomes necessary to do so. RJB's first argument is that the Lien Counterclaim in the Adams County Suit was filed by Mark P. Wolf, who is not an attorney. In Mississippi, a corporation must be represented by a licensed attorney and cannot appear *pro se* through an officer or shareholder. *See* Miss. Unif. Cir. & Cty. R. 1.06; Miss. Local Bankr. R. 1002-1(a)(2); 28 U.S.C. § 1654. For this reason, RJB contends that the Lien Counterclaim should

be ignored for purposes of MISS. CODE ANN. § 85-7-141. Without the Lien Counterclaim, Wolf's lien suffers the same fate as Badger's: because more than two years passed before Wolf filed the Intervention Complaint, Wolf's lien is time barred.

RJB admits that in ongoing cases "courts tend to allow the *pro se* corporation a limited period of time to obtain counsel" and cure the defect in its pleading. (Mot. at 11) (citing Donovan v. Road Rangers Cty. Junction, Inc., 736 F.2d 1004 (5th Cir. 1984)). RJB, however, cites a footnote in Arceneaux v. Everson, No. 1:04CV99, 2004 WL 1926123 (S.D. Miss. July 12, 2004), in which Judge Guirola noted that a court may dismiss claims asserted in a complaint by a *pro se* corporation. Id. at *1 n.1.

Judge Guirola, however, did not say in Arceneaux that a court may dismiss claims filed by a *pro se* corporation without notice and an opportunity to correct the deficiency. Indeed, according to the Fifth Circuit in Memon v. Allied Domecq QSR, 385 F.3d 871, 873 (5th Cir. 2004), "[i]n virtually every case in which a district court dismissed the claims (or struck the pleadings) of a corporation that appeared without counsel, the court expressly warned the corporation that it must retain counsel or formally ordered it to do so before dismissing the case."

RJB's second argument is that because Wolf is a foreign corporation and does not have a certificate of authority to do business in Mississippi, Wolf's claim in the Intervention Complaint is barred by the Door-Closing Statute, MISS. CODE ANN. § 79-4-15.02(a). Section 79-4-15.02(a) states that "[a] foreign corporation transacting business in the state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority. *See* Cone Mills Corp. v. Hurdle, 369 F. Supp. 426 (N.D. Miss. 1974) (holding that "any court in this state" includes actions in federal district courts in Mississippi).

Wolf does not dispute the fact that it did not have a certificate of authority to do business in

Mississippi when it filed the Lien Counterclaim or the Intervention Complaint. Wolf argues instead that the Door-Closing Statute does not deprive a defendant of the right to present compulsory counterclaims and third-party complaints. Envtl. Coatings, Inc., v. Baltimore Paint & Chem. Co., 617 F.2d 110 (5th Cir. 1980).

The Court's concern as to both of RJB's arguments is that Wolf apparently was not given notice in the Adams County Suit that the Lien Counterclaim was defective, either because it was filed *pro se* or because it was filed by an unregistered, foreign corporation. ITL Int'l, Inc. v. Constenla S.A., 669 F.3d 493, 497 (5th Cir. 2012). Although both alleged defects are easily curable, it does not appear that Wolf was provided an opportunity to file a motion to amend the Lien Counterclaim in the Adams County Suit prior to the initiation of Grand Soleil's involuntary bankruptcy case.

Conclusion

In conclusion, the court grants the Motion and Joinder against Badger based upon the statute of limitations and dismisses Badger's claim in the Intervention Complaint with prejudice. The Court grants the Motion and Joinder against Wolf based upon the statute of limitations, but dismisses Wolf's claim in the Intervention Complaint without prejudice. The Court grants Wolf leave to amend the Intervention Complaint within fourteen (14) days from the date of this Opinion to allege facts that demonstrate that the Lien Counterclaim was timely filed. The Court grants RJB fourteen (14) days from the date Wolf files it amendment to file a responsive pleadings and/or renew the Motion.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: October 23, 2012