

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LINDE CORPORATION,	:	NO. 13 - 01,163
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
BLACK BEAR PROPERTY, LP, BLACK BEAR	:	
HOLDINGS, LLC, STEWART E. DIBBLE, PENN	:	
CENTRAL CORPORATION and BLACK BEAR, LLC,	:	
Defendants	:	Preliminary Objections

OPINION AND ORDER

Before the court are preliminary objections filed by Defendant Penn Central Corporation on October 8, 2013, and preliminary objections to those objections filed by Plaintiff on October 28, 2013. Argument was heard December 2, 2013.

Plaintiff filed a Mechanic’s Lien Claim on May 16, 2013, and a Complaint to Obtain Judgment and to Enforce Mechanic’s Lien Claim on September 6, 2013. In the Claim, Plaintiff contends it provided labor and materials to perform various work on certain property owned by Defendants pursuant to a contract with Defendant Black Bear, LLC, that it completed the work in a timely and workmanlike manner, that proper notice of the claim had been given and that Plaintiff is owed \$216,074.38. In the Complaint, Plaintiff avers proper service of the Claim and seeks judgment thereon. In their preliminary objections, Defendant Penn Central Corporation asserts lack of proper service of the notice, Claim and Complaint, and also that it owns only sub-surface rights and reservations and that it was not the beneficiary of any surface improvements and therefore cannot be subject to the Claim. In their objections, Plaintiff contends Defendant¹ may not rely on facts not of record in asserting non-ownership, and that the court must find proper service based on their allegation to that effect in the Complaint.

The court will address the service issue first, as lack of proper service means that this court has no jurisdiction over the person of the defendant and may not proceed further. See Sharp v. Valley Forge Medical Center & Heart Hospital, Inc., 221 A.2d 185 (Pa. 1966). In that

¹ From this point on in this opinion, the court will refer to Defendant Penn Central Corporation simply as “Defendant”, for ease of reference.

regard, service of both the Mechanic's Lien Claim and the Complaint are governed by the Rules of Civil Procedure. Regency Investments, Inc. vs. Inlander Limited, 855 A.2d 75 (Pa. Super. 2004). Rule 400 requires personal service on a Pennsylvania corporation and Rule 404 allows service by mail on a foreign corporation. Pa.R.C.P. 400 and 404. Rule 404 specifies that service by mail is to be made in accordance with Rule 403. Rule 403 specifies that the form of mail used must require a receipt signed by the defendant or his authorized agent, and the Note thereto explains that the rule is referring to the United States Postal Service's "restricted delivery" procedures. Pa.R.C.P. 403. It is this requirement which Defendant alleges Plaintiff did not comply with.²

According to the Affidavit of Service of Notice of Claim & Mechanic's Lien Claim filed by Plaintiff's counsel on May 29, 2013, the Claim was served on Defendant "via Certified Mail, Return Receipt Requested" on May 24, 2013. A copy of the receipt is attached as Exhibit "A" to the Affidavit and shows that it was not sent restricted delivery, and the signer did not indicate that he or she was an authorized agent of the addressee. And, according to the Affidavit of Service of Complaint to Obtain Judgment and to Enforce Mechanic's Lien Claim filed by Plaintiff's counsel on September 23, 2013, the Complaint was served on Defendant "via Certified Mail, Return Receipt Requested" on September 16, 2013. A copy of the receipt is attached as Exhibit "A" to the Affidavit and shows that it was not sent restricted delivery, and the signer did not indicate that he or she was an authorized agent of the addressee. Clearly, service of these documents was not in compliance with the Rules of Civil Procedure.

Plaintiff argues nonetheless that since Defendant had actual notice, shown by counsel's entry of appearance and the filing of the instant preliminary objections, and since no default judgment has been taken, Defendant has suffered no prejudice and the Claim and Complaint need not be dismissed. In support of this argument, Plaintiff cites McCreesh v. City of Philadelphia, 888 A.2d 664, 674 (Pa.2005), where the Court held that "only those claims

² Although Defendant also objects to service of the notice of intention to file the claim, the court will not address service of the notice of intention to file the claim, as the Mechanic's Lien Law allows service of the notice of claim to be made by first class, registered or certified mail on the owner or his agent, 49 P.S. Section 1501(d), and does not require restricted delivery. And, although Defendant also contends the mailing to "Penn Central Corporation c/o Great American Insurance" did not constitute service on the "owner", contending that Great American Insurance is not a successor in interest or a new entity name for Penn Central Corporation, the court finds it unnecessary to reach that issue.

where a plaintiff has demonstrated an intent to stall the judicial machinery or where plaintiff's failure to comply with the Rules of Civil Procedure has prejudiced defendant" should be dismissed. Plaintiff's reliance on McCreesh is misplaced, however. In adopting this "more flexible approach", Id. at p.666, the Court observed in a footnote that

in every case applying Lamp, including the case sub judice, the plaintiff eventually complied with the Rules of Civil Procedure and formally served the defendant with process. Indeed, *without this eventual service jurisdiction could never attach*, and any particular case would never be litigated through the courts. See Sharp v. Valley Forge Med. Center & Heart Hosp., Inc., 422 Pa. 124, 221 A.2d 185, 187 (Pa. 1966) ("The rules relating to service of process must be strictly followed, and jurisdiction of the court over the person of the defendant is dependent upon proper service having been made"). The question in these cases is whether a plaintiff's claim will be dismissed because the plaintiff's initial attempts at service do not technically comply with the rules. *We do not address the situation where a plaintiff never complies with the Rules of Civil Procedure relating to service.*

Id. (emphasis added). Here, Plaintiff has never complied with the service requirements of the Rules.

Pursuant to 49 P.S. Section 1502(a)(2), "[f]ailure to serve [the required] notice ... within [one month after filing] shall be sufficient ground for striking off the claim". Thus, the Claim must be stricken as against Defendant Penn Central Corporation. And, the court never having obtained jurisdiction over the person of Defendant through proper service of the Complaint, the Complaint must also be dismissed as against Defendant Penn Central Corporation. The more flexible approach adopted by the Court in McCreesh does not apply to save either.³

Inasmuch as the Claim and Complaint will be dismissed as against Defendant Penn Central Corporation for lack of proper service, the court will not address Defendant's argument that it owns only sub-surface rights and reservations and that it was not the beneficiary of any surface improvements and therefore cannot be subject to the Claim.

³ Plaintiff also contends the court cannot go beyond the face of the Complaint and must find proper service of the Claim based on their allegation to that effect in the Complaint. There is no presumption as to the validity of service, however; "the return [of service] is required to set forth service *in conformance with the rules*". Sharp v. Valley Forge Medical Center & Heart Hospital, Inc., 221 A.2d 185, 187 (Pa. 1966)(emphasis added). Here, the return shows service which was not in conformance with the rules.

ORDER

AND NOW, this 4th day of December 2013, for the foregoing reasons, Plaintiff's preliminary objections are overruled. Defendant Penn Central Corporation's preliminary objections are SUSTAINED in part and the Mechanic's Lien Claim filed May 16, 2013, is STRICKEN as to Defendant Penn Central Corporation only.

Further, the Complaint filed September 6, 2013, is DISMISSED as to Defendant Penn Central Corporation only.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Prothonotary
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Scott T. Williams, Esq.
J. Michael Wiley, Esq.
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Hon. Dudley Anderson