



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTIANA MALL, LLC,

Defendant Below,
Appellant/Cross-Appellee,

v.

No. 552,2013

EMORY HILL & COMPANY,

Plaintiff Below,
Appellee/Cross-Appellant.

**EMORY HILL AND COMPANY'S REPLY BRIEF ON
CROSS-APPEAL AS THE CROSS-APPELLANT**

COHEN, SEGLIAS, PALLAS,
GREENHALL & FURMAN, P.C.

Scott T. Earle, Esquire (Bar No. 4541)
Nemours Building, Suite 1130
1007 North Orange Street
Wilmington, DE 19801
(302) 425-5089
FAX: (302) 425-5097
Searle@cohenseglias.com
*Attorneys for Plaintiff Below,
Appellee/Cross-Appellant
Emory Hill and Company*

DATED: March 17, 2014

Transaction I.D. No. _____

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	3
I. THE TRIAL COURT COMMITTED ABUSE OF DISCRETION BY FINDING THAT CHRISTIANA MALL’S CONDUCT WAS NEGLECT OF A REASONABLY PRUDENT PERSON UNDER THE CIRCUMSTANCES.....	3
A. Christiana Mall’s Reliance On Mr. Shafkowitz Was Not A Reasonable Mistake.....	4
B. The Trial Court Failed To Consider MRF Atlantic’s Conduct In The Excusable Neglect Analysis Was An Abuse of Discretion.....	10
II. THE TRIAL COURT COMMITTED ABUSE OF DISCRETION BY FINDING THAT CHRISTIANA MALL ESTABLISHED A MERITORIOUS DEFENSE TO THE CLAIM OF <i>QUANTUM</i> <i>MERUIT</i>	12
CONCLUSION.....	17

TABLE OF CITATIONS

Cases

<i>A Child's Dream, Inc. v. Mills</i> , 765 A.2d 950; 2000 WL 1862240, *1-*2 (Del. 2000).....	12
<i>Battaglia v. Wilmington Sav. Fund Soc'y</i> , 379 A.2d 1132, 1135 (Del. 1977)	5, 14
<i>Cohen v. Brandywine Raceway Ass'n</i> , 238 A.2d 320 (Del. Super. Ct. 1968).....	5
<i>In re Asbestos Litig.</i> , (AADG, Inc.), 2007 WL 2410879, *4 (Del. Super.).....	18
<i>Lee v. Charter Commc'ns VI, LLC</i> , 2008 WL 73720, *2 (Del. Super.).....	9
<i>Monroe v. State</i> , 652 A.2d 560 (Del. 1995).....	16
<i>Murphy v. State</i> , 632 A.2d 1150, 1152 (Del. 1993)	18
<i>Nagle v. Alspach</i> , 8 F.3d 141, 144 (3 rd Cir. 1993).....	18
<i>Sans v. McKnight Constr. Co.</i> , 304 A.2D 339 (Del. Super. 1973).....	15
<i>Vechemy v. McCade</i> , 100 A.2d 460 (Del. Super. 1953)	5
<i>Watson v. Simmons</i> , 2009 WL 1231145, *2 (Del. Super.)	5, 9, 12, 13

Statutes

25 <i>Del. C.</i> § 2712(b)(8).....	13
-------------------------------------	----

Rules

<i>Prof. Cond. R.</i> 1.6	6
<i>Prof. Cond. R.</i> 1.7	6
<i>Rule</i> 60(b)	2
<i>Super. Ct. Civ. R.</i> 59(e).....	14
<i>Supr. Ct. R.</i> 8.....	14

INTRODUCTION

The trial court failed to conduct sufficient analysis as to whether it was reasonable for Christiana Mall, LLC (“Christiana Mall”) to rely solely on David M. Shafkowitz, Esquire (“Mr. Shafkowitz”) to protect its interests, notwithstanding the interplay between Mr. Fruz, LLC (“Mr. Fruz”) and Christiana Mall. Mr. Shafkowitz was counsel for the co-defendant Mr. Fruz. Mr. Fruz had no obligation to defend and indemnify Christiana Mall. The tenant, MRF Atlantic, had the duty to defend and indemnify Christiana Mall; and there is no evidence that MRF Atlantic, LLC (“MRF Atlantic”) took any steps to protect the interest of Christiana Mall. The trial court and Christiana Mall only addressed the interplay between Mr. Fruz and Christiana Mall, but did not address whether Christiana Mall’s reliance on Mr. Shafkowitz was reasonable.

Christiana Mall’s failure to engage its Delaware local counsel is not excusable. Mr. Shafkowitz is a Pennsylvania lawyer, practicing as a sole general practitioner, doing business as the Law Offices of David M. Shafkowitz. Mr. Shafkowitz’s law offices are located in Conshohocken, Pennsylvania. There is no evidence that Mr. Shafkowitz was licensed to practice law in the State of Delaware. There is no evidence that Mr. Shafkowitz stated that he represented the interests of Christiana Mall. Christiana Mall willfully chose not to seek the advise of counsel upon receiving the suit papers. The case law is clear that failure to retain

counsel is not excusable. Mechanics' lien law is very state specific, and Delaware counsel was needed to properly protect the interests of Christiana Mall.

The trial court failed to conduct sufficient analysis as to whether Christiana Mall established a meritorious defense to the claim of *quantum meruit/valebant*. The trial court merely concluded that Christiana Mall had set forth a meritorious defense on the grounds that Christiana Mall was not on notice that it may have to pay for the labor and materials furnished to Mr. Fruz's structure, noting that Christiana Mall may not be successful in its defense. The finding is clearly erroneous because Christiana Mall admitted that the labor and material were furnished on the credit of the structure when it admitted to the merits of the mechanics' lien.

Furthermore, the labor and materials were furnished in accordance with Christiana Mall's design criteria. The subcontract between Emory Hill and Company ("Emory Hill") and Mr. Fruz specifically provided for the imposition of mechanics' liens and Christiana Mall gave written authorization for the work. Christiana Mall has the burden to establish a meritorious defense to the claim of *quantum meruit/valebant* under Rule 60(b). Christiana Mall has not offered a scintilla of evidence in support of its position that it was not on notice that it may have to pay for the labor and materials furnished to the structure by Emory Hill.

ARGUMENT

A. THE TRIAL COURT COMMITTED ABUSE OF DISCRETION BY FINDING THAT CHRISTIANA MALL'S CONDUCT WAS NEGLIGENCE OF A REASONABLY PRUDENT PERSON UNDER THE CIRCUMSTANCES

First, the trial court committed abuse of discretion when finding excusable neglect on behalf of Christiana Mall for two principal reasons. First, the trial court failed to address whether Christiana Mall's reliance on Mr. Shafkowitz's representations was a reasonable mistake, notwithstanding the nature of the representations. Mr. Shafkowitz is a sole general practitioner admitted to the practice of law in Pennsylvania, and only represented the interests of Mr. Fruze, a co-defendant with adverse interests to Christiana Mall.

Second, even if Christiana Mall's reliance on Mr. Shafkowitz could be found to be a reasonable mistake based upon its reliance on MRF Atlantic to defend and indemnify it, then the trial court committed abuse of discretion by failing to take into consideration the conduct of MRF Atlantic when determining excusable neglect. The record is devoid of any evidence that MRF Atlantic took any steps to protect the interests of Christiana Mall.

A. Christiana Mall's Reliance On Mr. Shafkowitz Was Not A Reasonable Mistake

The issue before the trial court was whether Christiana Mall's reliance on Mr. Shafkowitz's assurances constituted excusable neglect, rather than mere neglect or indifference. Excusable neglect is defined as "neglect which might have been the act of a reasonable prudent person under the circumstances." *Watson v. Simmons*, 2009 WL 1231145, *2 (Del. Super.) (citing *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977).) Mere neglect without a valid reason does not constitute excusable neglect, *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320 (Del. Super. Ct. 1968), nor does mere indifference. *Vechery v. McCade*, 100 A.2d 460 (Del. Super. 1953).

As the trial court stated, the determinative issue was whether it "was reasonable for Francone to rely on Shafkowitz's assurances, especially after Shafkowitz failed to respond to Francone's December 11, 2012" (Op. Jurden, p. 10). Christiana Mall points out the following in its reply brief:

The interplay between Christiana, the tenant, and Mr. Shafkowitz was fully set out in two affidavits prepared by the only representative of Christiana that dealt directly with the tenant and Mr. Shafkowitz about the Superior Court action." (Christiana Mall's Reply, p. 11).

Christiana Mall's statement above is flawed for two reasons. First, Mr. Fruz was not the tenant. MRF Atlantic was the tenant with the contractual obligation to defend and indemnify Christiana Mall (B192), not Mr. Fruz (B145-149). There is

no evidence that MRF Atlantic took any steps to protect Christiana Mall. Second, the analysis regarding the interplay between the parties still does not address whether it was reasonable for Christiana Mall to forgo engaging its Delaware counsel and rely solely on the assurances of its co-defendant's counsel, Mr. Shafkowitz.

The record shows that Mr. Shafkowitz only represented the interests of Mr. Fruz. (B283) Mr. Fruz is a Pennsylvania limited liability company that sought Chapter 7 bankruptcy protection during the proceedings below. (B145-B149). Mr. Fruz was the co-defendant below that contracted with Emory Hill for the construction work for the benefit of tenant (B28). Although they are affiliated entities, MRF Atlantic and Mr. Fruz are separate and distinct legal entities. (See lease agreement at B191 and the suggestion of bankruptcy at B145-149.)

In its reply, Christiana Mall points out that the trial court found that "Christiana's failures were ultimately based upon Mr. Fruz's agreement to defend and Shafkowitz's representations" (Op. Jurden, p. 12). This finding is erroneous, however, because MRF Atlantic had the obligation to defend and indemnify Christiana Mall, not Mr. Fruz. (B207, Article 20 Lease). MRF Atlantic was not a party to the proceedings below. (B19.) The record is devoid of any evidence that MRF Atlantic took any steps to protect the interests of Christiana

Mall. Therefore, Christiana Mall's position and the trial court's finding identified above are flawed.

If the proceedings below would have continued in their normal course, either Christiana Mall, or MRF Atlantic as indemnitor of Christiana Mall, would have had to answer the allegations of the complaint asserted against Christiana Mall by Emory Hill. In addition, Christiana Mall, or MRF Atlantic as Christiana Mall's indemnitor, would have had to assert a cross-claim of equitable indemnification against Mr. Fruz. MRF Atlantic, however, was in breach of the lease agreement at the time, creating a current conflict of interest. (B165, Mot. to Vacate ¶20). Thus, Mr. Shafkowitz could not have simultaneously represented both Christiana Mall's and Mr. Fruz's interests. *Prof. Cond. R. 1.7*. Furthermore, Mr. Shafkowitz could not disclose any adverse material about Mr. Fruz to Christiana Mall, such as Mr. Fruz's subsequent decision to seek bankruptcy protection. *Prof. Cond. R. 1.6*. Christiana Mall should have engaged counsel to address these issues but it willfully chose not to, in the hopes the matter would resolve itself.

Christiana Mall's decision to rely solely on the assurances of its co-defendant's counsel is highly unusual, especially considering the property interest involved. Reasonably prudent defendants carefully document extensions of time in writing with counsel for the plaintiff. A reasonably prudent defendant, under similar circumstances as Christiana Mall, would have made an effort to verify the

extension of time with plaintiff's counsel, not rely on second-hand information from an adverse co-defendant.

Christiana Mall could have easily verified the extension of time by using its general counsel's office to contact counsel of Emory Hill. In the alternative, Christiana Mall could have simply required Mr. Shafkowitz to forward written confirmation of the extension of time that it received from Emory Hill. Christiana Mall did neither. It made no effort to verify the extension of time or even inquire about the length of the extension allegedly secured for it by its co-defendant Mr. Fruz. A reasonable defendant relying on a co-defendant to defend and indemnify under a contractual provision must make reasonable efforts to ensure their rights are being adequately protected. *Lee v. Charter Commc'ns VI, LLC*, 2008 WL 73720, *2 (Del. Super.). Christiana Mall made no such effort. *See id.*

Christiana Mall's failure to retain counsel is likewise not excusable. "The case law makes clear that it is unreasonable not to seek counsel upon receiving notice of a complaint." *Watson v. Simmons*, 2009 WL 1231145, *3 FN12 & 14 (Del. Super.) (citations omitted). Mr. Shafkowitz was not Christiana Mall's counsel. Nor is there any evidence that Mr. Shafkowitz represented MRF Atlantic. The record is devoid of any evidence that Christiana Mall received notice that MRF Atlantic retained counsel to represent its interests in the proceedings below. No counsel entered their appearance on behalf of Christiana Mall for nearly eighty

(80) days from November 7, 2012 (B101, NCC Sheriff's Aff.) until February 14, 2013 (B143), and only after default judgment was entered against it.

Christiana Mall's misplaced reliance upon MRF Atlantic to defend it was not excusable neglect. Mr. Fruz was facing claims in an amount in excess of One-Hundred Eighty-Seven Thousand, Nine Hundred Eighty-Four Dollars and Eighty-Four Cents (\$187,984.84) for the non-payment of the construction work. (B26). This is a substantial claim for a small business selling frozen yogurt in the mall. Mere common sense should have alerted Christiana Mall that MRF Atlantic would have difficulty defending a claim of this size, especially in light of the fact that MRF Atlantic had breached the lease agreement. (B165, Mot. to Vacate ¶20). More importantly, because Christiana Mall authorized the work and the lien was subject to the fee simple interest of the structure, the tenant had no ownership interest in the structure and, accordingly, had very little interest to defend the action on behalf of Christiana Mall.

As one might say, Christiana Mall "bought the Brooklyn Bridge". Christiana Mall demonstrated an extreme level of naivety, gullibility and just plain indifference to these proceedings. Christiana Mall is owned by Fortune 500 trust company, General Growth Properties ("GGP"), that has an office of general counsel and a legal department headed by Mr. Francone. (B248, Francone Aff. ¶1). An entity with this level of sophistication and resources should not have

engaged in such foolish behavior. GGP engaged in this reckless behavior for the only apparent purpose of avoiding the legal costs associated with engaging its local counsel. The purposeful avoidance of legal costs in defending this action is not excusable.

Furthermore, the trial court's decision in this matter has negative policy implications. Based upon the trial court's ruling, it is excusable conduct of a party, relying on a co-defendant to defend and indemnify it, to "wash its hands" of its obligations to the court, fail to monitor the docket in the proceedings, fail to verify extensions of time with plaintiff's counsel, and fail to ensure that it is properly represented. Defendant's relying on an obligation of a co-defendant to defend should take active measures to ensure that their rights are being properly protected.

More problematic, the trial court's decision may result in future defendants being harmed by failing to properly retain Delaware counsel upon receiving suit papers. The retention of a Delaware lawyer was needed to properly protect Christiana Mall's interests in this matter. State mechanics' lien law is very state specific. Upon receiving notice of the default judgment, the general counsel's office of GGP (the managing entity of Christiana Mall) did not believe the payment of the labor and materials was the responsibility of Christiana Mall. (B278, ¶6). The representative expressed that the matter was not Christiana Mall's problem. (*Id.*) In some jurisdictions, only the leasehold is lienable, and in these

jurisdictions Christiana Mall would have been correct. Because Christiana Mall gave written permission for the work, however, in the State of Delaware the mechanics' lien may be imposed against the fee simple interest of the structure. Christiana Mall would have known this if it properly retained Delaware counsel to protect its interests upon receiving the suit papers.

B. The Trial Court Failed To Consider MRF Atlantic's Conduct In The Excusable Neglect Analysis Was An Abuse of Discretion

If Christiana Mall's conduct constitutes excusable neglect based upon its misplaced reliance on MRF Atlantic to defend and indemnify it pursuant to the lease, the trial court also was required to consider MRF Atlantic's conduct when determining excusable neglect. Christiana Mall cannot argue on one hand that its conduct constitutes excusable neglect because it completely relied on MRF Atlantic to defend and indemnify it pursuant to the lease and, on the other hand, argue that MRF Atlantic's conduct should be completely excluded from the excusable neglect analysis.

When deciding to set aside a judgment pursuant to Rule 60(b), this Court has held that trial courts also shall consider the indemnitor's conduct in its excusable neglect analysis. *A Child's Dream, Inc. v. Mills*, 765 A.2d 950; 2000 WL 1862240, *1-*2 (Del. 2000). Because Christiana Mall did not advance any evidence to show that MRF Atlantic's conduct could constitute excusable neglect, the trial court's finding of excusable neglect is defective. *Id.*

In *Watson v. Simmons*, the defendants mistakenly believed that they had an on-going extension of time, and relied on the indemnifying-entity to attend to the suit. 2009 WL 1231145, *1-*3 (Del. Super. 2009). The indemnifying insurance adjuster “relied on the possibility of settlement,” rather than forwarding the suit papers on to defense counsel. *Id.* The trial court found that “[b]ecause the Court can find that defendants’ insurer’s conduct in failing to process the complaint was the result of inexcusable neglect, the Court need not address whether ” the defendants’ conduct was excusable. *Id.* at 3.

In the case below, Christiana Mall completely relied upon MRF Atlantic and/or Mr. Fruz to protect its interests. There is no evidence the indemnifying MRF Atlantic made any efforts to protect the interests of Christiana Mall. Mr. Fruz was given notice on two separate occasions that default judgment was imminent, and it made no effort to defend. (B288, B290-294). As in *Watson*, the trial court should have conducted an analysis as to whether MRF Atlantic’s and/or Mr. Fruz’s conduct was excusable under the circumstances. If the trial court had conducted this analysis, there is no possibility that it would have found excusable neglect under the circumstances considering the conduct of Mr. Fruz.

For the reasons stated herein, this Court should reverse the trial court’s finding of excusable neglect.

II. THE TRIAL COURT COMMITTED ABUSE OF DISCRETION BY FINDING THAT CHRISTIANA MALL ESTABLISHED A MERITORIOUS DEFENSE TO THE CLAIM OF *QUANTUM MERUIT*

The trial court's finding that Christiana Mall established a meritorious defense to the claim of *quantum meruit/valebant* on the grounds that the labor and materials were not furnished under circumstances that provided Christiana Mall notice that it might be obligated to pay for them is clearly erroneous. It is undisputed that Christiana Mall authorized the work and that the labor and materials were furnished on the credit of the structure. Therefore, Christiana Mall was clearly on notice that it may be obligated to pay for the labor and materials.

Christiana Mall has the burden to show that, if relief is granted, the outcome of the action may be different from what it will be, if the default judgment is permitted to stand. *Battaglia v. Wilmington Savings Fund Socety*, 379 A.2d 1132, 1135 (Del. 1977). To satisfy this burden, Christiana Mall was required to establish that it has a meritorious defense to the claim of *quantum meruit/valebant*. *Id.* The issue that Christiana Mall did not establish a meritorious defense to the claim of *quantum meruit/valebant*, however, was properly raised and preserved below by Emory Hill in its response. (B261-64).

The problematic portion of the trial opinion reads as follows:

Plaintiff correctly notes that recovery under a claim of quantum meruit is for the reasonable value of services, not the value of the benefit received. This argument, however, does not address

Christiana's assertion that it was not reasonable for Emory Hill to expect Christiana to pay for fit-out work for a tenant's frozen yogurt stand.

(Op. Jurden, p. 14 (emphasis added).)

Christiana Mall's argument that "it was not reasonable for Emory Hill to expect Christiana to pay for [the] fit-out work" is not supported by the record. . Under Delaware law, the mere furnishing of labor and materials to a structure is *prima facie* evidence that the labor and materials were furnished on the credit of the structure. *Sans v. McKnight Constr. Co.*, 304 A.2D 339 (Del. Super. 1973). The subcontract between Emory Hill and Mr. Fruz specifically provided for the imposition of a mechanics' lien (B304 Subcontract § A.4.2.5) and Christiana Mall provided written authorization for the work (B194, 300 Lease Art. 2.).

Additionally, Christiana Mall admitted that it has no defenses to the merits of the mechanics' lien claim (Op. Jurden, p 18, FN96, FN97.) In light of this admission, Christiana Mall has conceded that the labor and materials were furnished on the credit of the structure. 25 *Del. C.* § 2712(b)(8). And, because the labor and materials were furnished on the credit of the structure, the labor and materials were furnished with the expectation that Christiana Mall would pay for them. Furthermore, the burden is on Christiana Mall to establish a meritorious defense to the claim, and it failed to point to any evidence in the record to support its position. In fact, Christiana Mall ignored the substantive portion of this

argument in its answering brief, addressing only the waiver issue. The trial court's finding on this issue is clearly erroneous and should be overturned.

The trial court, however, did not have the benefit of a proper response from Emory Hill on this issue. Counsel for Christiana Mall improperly raised this issue for the first time in its reply. Emory Hill would have raised the issue of waiver in a *Motion for Reargument* under *Super. Ct. Civ. R. 59(e)* had it not been the prevailing party below. This Court should address the issue of waiver in these proceedings in the interest of justice, as Emory Hill was deprived of the opportunity to provide a written response below. *Supr. Ct. R. 8; Monroe v. State*, 652 A.2d 560 (Del. 1995).

Christiana Mall initially made the argument that the claim of *quantum meruit/valebant* could be defeated on the grounds that Christiana Mall did not retain the benefit of the construction work. (B5 Doc. No. 27). The trial court gave Christiana Mall leave to supplement the record on this issue. (B317-320 May 15, 2012 Tr. 11:21-14:11). Christiana Mall submitted two additional affidavits to supplement the record: the supplemental Francone affidavit and the Chambliss affidavit. (B326, B329-332). The reply filed by Christiana Mall in the below proceedings was not the first and only filing by Christiana Mall after the trial court supplementation of the record, the affidavits were filed to supplement the record. (Christiana Mall's Reply on Appeal, p. 14).

Emory Hill requested an opportunity to respond to the additional evidence submitted by Christiana Mall. (B333). Emory Hill's request to file a response was granted by the trial court. (B335). In its response, Emory Hill argued that *quantum meruit/valebant* is measured by benefit received, not the benefit retained, and that the additional affidavits submitted by Christiana Mall did nothing to advance Christiana Mall's position. (B342). The trial court ultimately ruled in favor of Emory Hill on this issue. (Op. Jurden, p. 14).

Christiana Mall then requested leave to file a reply (B334), which was granted by the trial court. (B336). Christiana Mall raised additional arguments in its reply, abandoning its initial position. (B364, 368-369). Christiana Mall's reply was filed approximately six weeks after Emory Hill's response, as admitted by Christiana Mall. (Christiana Mall's Reply on Appeal, p. 14). The law is clear that if a party fails to raise an issue in its initial moving papers or briefing, that party is later precluded from raising the issue. *Nagle v. Alspach*, 8 F.3d 141, 144 (3rd Cir. 1993); *see also In re Asbestos Litig.*, (AADG, Inc.), 2007 WL 2410879, *4 (Del. Super.) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

Christiana Mall waived the expectation of payment argument ultimately relied upon by the trial court below by not raising it in its initial motion papers or when the trial court granted it a second opportunity to supplement the record. It was inappropriate for Christiana Mall to raise additional issues after Emory Hill

filed its response. Emory Hill intended to address the new issues raised by Christiana Mall's reply at oral argument, but the trial court's questioning was very focused and Emory Hill did not get the opportunity. In addition, Emory Hill was the prevailing party below. Emory Hill was unduly prejudiced by not being afforded the opportunity to submit a written response.

For the reasons stated herein, this Court should reverse the trial court's finding that Christiana Mall established a meritorious defense to the claim of *quantum meruit/valbant*.

CONCLUSION

For the reasons stated herein, Emory Hill and Company respectfully requests that This Honorable Court reverse the trial court's findings of excusable neglect and a meritorious defense of the claim of *quantum meruit*.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS,
GREENHALL & FURMAN, P.C.



Scott T. Earle, Esquire (Bar No. 4541)
Nemours Building, Suite 1130
1007 North Orange Street
Wilmington, DE 19801
(302) 425-5089
FAX: (302) 425-5097
Searle@cohenseglias.com
*Attorneys for Plaintiff Below,
Appellee/Cross-Appellant
Emory Hill and Company*

DATED: March 17, 2014