EFiled: Feb 07 2014 09:08AM EST
Filing ID 54958666
Case Number 552,2013

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.	:	

AMENDED APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL OF EMORY HILL AND COMPANY

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: February 6, 2014

Transaction I.D. No. _____

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

Cases

Statutes

Rules

Treatises

NATURE OF PROCEEDINGS

This is an appeal and cross-appeal of the attached opinion issued by The Honorable Jan R. Jurden, Superior Court, New Castle County, Delaware, in *Emory Hill and Company v. MrFruz LLC*, C.A. No. 12L-10-021 ("Mechanics' Lien Action"), denying a motion to vacate the default judgment entered in the proceedings below. The appellant and cross-appellee and defendant-below, Christiana Mall, LLC ("Christiana Mall"), appeals the trial court's finding of substantial prejudice. The appellee and cross-appellant and plaintiff-below, Emory Hill and Company ("Emory Hill"), appeals the trial court's finding of excusable neglect and a meritorious defense with respect to the claim of *quantum meruit*.

This case arises out of a mechanics' lien imposed on a portion of the Christiana Mall by Emory Hill, a general contractor, to recover funds for the non-payment of labor and materials furnished to the structure as part of the tenant fit-out for the co-defendant Mr. Fruz LLC ("Mr. Fruz"). Mr. Fruz, through the entity MRF Atlantic, Inc. ("MRF Atlantic"), purportedly intended to operate a frozen yogurt franchise at the location. The construction was completed with the knowledge and written permission of Christiana Mall.

On October 17, 2012, Emory Hill filed a complaint asserting a statement of mechanics' lien *in rem* against the structure and claims of *quantum meruit*

and unjust enrichment *in personam* against Christiana Mall ("Complaint"). (B12-B96.) Christiana Mall's registered agent was served with the suit papers on November 7, 2012. (B101.) Christiana Mall was required to respond to the complaint by November 27, 2012. Because Christiana Mall did not respond to the complaint, failed to have its counsel enter his or her appearance in the proceedings, and did not request an extension of time, Emory Hill directed the New Castle County Prothonotary to enter default judgment against Christiana Mall on January 30, 2013 (the "Default Judgment"). (B128-142.)

On April 26, 2013, Christiana Mall moved to vacate the default judgment on the grounds of excusable neglect pursuant to *Super. Ct. Civ. R.* 60(b)(1) and a void judgment (b)(4) ("Christiana Mall's Motion to Vacate"). (B151-B247.) Christiana Mall filed the first affidavit of Frank Francone on May 8, 2013 (the "Francone Affidavit"). (B248-50). Emory Hill filed a response to Christiana Mall's Motion to Vacate on May 10, 2013 ("Emory Hill's Response"). (B251-306.) The trial court held a hearing on May 15, 2013 (the "May 15, 2013 Hearing"). (B307-324.) The trial court reserved decision (B325) and permitted Christiana Mall leave to supplement its motion. (B317-318, Tr. 11:7-14-11.) On June 6, 2013, Christiana Mall supplemented its motion to vacate with two affidavits: Steven Chambliss (B326-328) and Frank Francone (B329-332) (the "Francone Supplemental Affidavit."). Emory Hill filed a supplement response

on June 21, 2013 ("Emory Hill's Supplement Response") (B337-363) and Christiana Mall filed a reply on June 28, 2013 ("Reply") (B364-376). A second hearing was held on August 21, 2013 (the "Aug. 21, 2013 Hearing"). (B378-404). The trial court issued its opinion on September 24, 2013, denying Christiana Mall's Motion to Vacate. A copy of the opinion is attached hereto as **Exhibit A**.

Christiana Mall filed a notice of appeal in these proceedings on October 11, 2013. Emory Hill filed a notice of cross-appeal on October 22, 2013. Christiana Mall filed its opening brief on January 2, 2014. This is Emory Hill's answering brief and opening brief on cross-appeal.

SUMMARY OF ARGUMENT

I. Denied. The trial court did not abuse its discretion when it found that substantial prejudice would result to Emory Hill if it were to set aside the default judgment. Christiana Mall admitted that it had no defenses to the merits of the mechanics' lien. Emory Hill was deprived of the opportunity to review Christiana Mall's answers to the allegations of the complaint, its affirmative defenses and its affidavit of defense prior to the expiration of the 120-day statute of limitations. The loss of this opportunity materially affected Emory Hill's ability to prosecute the statement of mechanics' lien asserted in the proceedings below, as the time period to amend has expired. This Court should affirm the trial court's finding of substantial prejudice.

II. Denied. The trial court did not abuse its discretion or commit an error of law in its application of *Super. Ct. Civ. R.* 12(a) and 25 *Del. C.* § 2716. The application of these provisions was among many factors the trial court considered when it determined that the balance of equities weighed in favor of Emory Hill, and decided not to vacate the default judgment. The application of 25 *Del. C.* § 2716 does require the defendant to set forth its defenses and a condition of facts in support thereof in sufficient detail so that a trial court could determine the validity of the defenses. This Court should affirm the trial court's finding of substantial prejudice.

III. The trial court abused its discretion when it found that Christiana Mall's neglect in answering the complaint in the proceedings below constituted excusable neglect. Although the trial court has much latitude in deciding Rule 60(b) applications, Christiana Mall never retained counsel to protect its interests in the proceedings below. Christiana Mall relied solely on the representations of its co-defendant's out-of-state counsel and the interests of the co-defendants were adverse. The trial courts have consistently found that failure to consult counsel upon receiving suit papers constitutes inexcusable neglect. This Court should reverse and overrule the trial court's finding of excusable neglect.

IV. The trial court committed abuse of discretion when it found that Christiana Mall established a meritorious defense to Emory Hill's claim of *quantum meruit*. The trial court abused its discretion by considering issues raised by Christiana Mall for the first time in a reply brief, precluding Emory Hill from providing an adequate response. Notwithstanding that Christiana Mall waived these arguments by not asserting them in their moving papers, the record shows that there was not a contract between Emory Hill and Christiana Mall and that the labor and materials were furnished with the full knowledge and permission of Christiana Mall. This Court should reverse and overrule the trial court's finding that Christiana Mall had a meritorious defense to the claim of *quantum meruit*.

V. The trial court committed an error of law for which this court has *de novo* review for failing to consider the conduct of Mr. Fruz as the indemnitor when conducting its analysis of excusable neglect under the principles of *A Child's Dream, Inc. v. Mill*, 2000 WL 1862240 (Del. Supr.). This Court should reverse and overrule the trial court's finding of excusable neglect. In the alternative, this Court should reverse and remand, directing the trial court to conduct an analysis as suggested herein.

STATEMENT OF FACTS

Emory Hill is a general contractor that asserted a mechanics' lien upon a portion of Christiana Mall for the non-payment of certain labor and materials which Emory Hill furnished to the structure as part of a tenant fit-out for the co-defendant Mr. Fruz. The labor and materials were furnished to the structure with Christiana Mall's written authorization and the work was completed in accordance with Christiana Mall's design criteria. (B194, 300; *See* Art. 2 of Lease). Although the work was successfully completed, Emory Hill was not paid for its work. The tenant, Mr. Fruz, is presently insolvent and has sought protection under Chapter 7 of the United States Bankruptcy Code. (B145-B149). Christiana Mall was properly served with the Complaint and failed to timely respond per the rules of the court. This resulted in the default judgment which is the subject matter of this appeal.

The Nature Of The Labor And Material Furnished

As part of the tenant fit-out, Emory Hill installed new HVAC and plumbing systems to the structure. (B358, Liberato Aff. ¶2). The installation of these new systems included the construction of a new commercial electrical panel and bathroom. (*Id.*). Emory Hill also updated the air conditioning and fire sprinkler systems, connected the leased premises to the outside electrical and plumbing services, and installed electrical lighting and fixtures into the

structure. (*Id.*; B358, Liberato Aff. ¶2.) This work was performed in accordance with Christiana Mall's design criteria as set forth in Article 2 of the lease between Christiana Mall and MRF Atlantic ("Lease"). (B194, 300; *See* Art. 2 of Lease). MRF Atlantic is an affiliated entity of Mr. Fruz and both are believed to be owned by an individual named Mr. Michael Geonnotti. (B172, 283.)

Christiana Mall required Emory Hill to furnish a deposit in the amount of $5,000.00 to be returned upon completion of the work and payment of the subcontractors who worked on the project. (B359, Liberato Aff. ¶4.) Emory Hill properly completed the work, and none of the subcontractors asserted mechanics' liens against the structure. (*Id.*) Christiana Mall has not returned the deposit amount to Emory Hill. (*Id.*) Emory Hill furnished the work with the expectation that it would be paid in full. (*Id.*) The agreement between Emory Hill and Mr. Fruz specifically provided for Emory Hill's right to assert a mechanics' lien[1]. (B304 Lease § A.4.2.5.) Emory Hill fully expected to be paid by Mr. Fruz, and if it were not paid by Mr. Fruz, Emory Hill expected to be paid by Christiana Mall. (B304 Lease § A.4.2.5; B359, Liberato Aff. ¶4.)

[1] Section A.4.2.5 of the agreement between Emory Hill and Mr. Fruz states: "If a Claim relates to or is the subject of a mechanics' lien, the party asserting such Claim may proceed in accordance with the applicable law to comply with the lien notice of filing deadlines prior to initial resolution of the Claim".

The Complaint And Statement Of Mechanics' Lien

Emory Hill filed the Complaint on October 17, 2012. (B19, Compl.) Emory Hill asserted a statement of mechanics' lien (*in rem*) against the structure in Count I of the Complaint. (*Id.* Compl. ¶9). The structure consisted of the portion of Christiana Mall where the Yogen Früz franchise was located. (*Id.*). The legal description of the structure was attached to the Complaint as Exhibit C. (*Id.*) (B80-93). The Complaint stated that Christiana Mall was the owner of the structure and that Christiana Mall gave written permission for the work. (B20, Compl.¶3).

The Complaint also stated that the labor and materials were furnished under contract between Emory Hill and Mr. Fruz. (B20, Comp. ¶3, 4.) A copy of the contract was attached to the Complaint as Exhibit A. (*Id.*) (B27-75). In addition, in the statement of mechanics' lien, Emory Hill asserted the claims of *Quantum Meruit/Valebant* under Count IV and unjust enrichment under Count V *in personam* against Christiana Mall. (B25-26, Compl. ¶24-30). Emory Hill asserted the claim of breach of contract under Count II and the claim of failure to make prompt payment pursuant to 6 *Del. C.* § 3507 under Count III against Mr. Fruz. (B23-B24). The claims were supported by separate wherefore clauses, each having independent demands for damages. (B22, 24, 25, 26).

The Complaint stated that final payment, including retainage, was due to Emory Hill on September 30, 2012. (B21, Compl. ¶8). Based on this date, Emory Hill could have moved to amend the Complaint on or before January 28, 2013. (Op. Br. pg. 5). The date of January 28, 2013 was prior to the expiration of the 120-day statute of limitations codified in 25 *Del. C.* § 2711(b). (*Id.*). The Affidavit of Michael J. Eshleman in support of the mechanics' lien stated:

> "I have reviewed the attached Complaint and Statement of Claim for Mechanics' Lien and the incorporated exhibits and the facts set forth therein are true and correct **to the best of my knowledge**."

(B95, Eshleman Aff. ¶2 (emphasis added)).

Emory Hill could have moved to amend the Complaint for the purpose of removing the superfluous language "to the best of my knowledge" on or before January 28, 2013. (Op. Br. pg. 5).

Service Of Process And Time Periods To Respond

The praecipe attached to the Complaint directed the Sheriff of New Castle County ("NCC Sheriff") to serve the suit papers on Christiana Mall's registered agent and to post the notice to lien holders and tenants having an interest in real estate ("Notice to Lien Holders") on the common entrance of the Yogen Früz franchise. (B13-14.) In addition, the original praecipe directed the Sheriff of New Castle County to serve the suit papers on Delaware's Secretary of State to

consummate service on Mr. Fruz.[2] (B13-14.) A revised praecipe was filed directing the Sheriff of Kent County, rather than the Sheriff of New Castle County, to serve the Delaware Secretary of State with the suit papers for Mr. Fruz. (B97-98.) The summons and suit papers were issued for service by the Prothonotary of Superior Court, New Castle County ("Prothonotary") on November 2, 2012. (B99.)

Christiana Mall's registered agent was served with the suit papers on November 7, 2012. (B101, NCC Sheriff's Aff.) The Notice to Lien Holders was posted upon the Yogen Früz franchise on November 9, 2012. (B102, 150; 169). Christiana Mall was required to respond to the Complaint on or before November 27, 2012. (*Super. Ct. Civ. R. 12).* Christiana Mall never filed a response, nor did it request an extension of time to file a response to the Complaint. (B277-78 Earle Aff.)

The Delaware Secretary of State was served with Mr. Fruz's suit papers on December 10, 2012. (B106 Kent County Sheriff Aff.) Mr. Fruz was required to respond to the Complaint on or before December 31, 2012. (*Super. Ct. Civ. R.* 12.) Counsel for Emory Hill sent Mr. Fruz's Pennsylvania counsel, David M. Shafkowitz ("Mr. Shafkowitz"), an e-mail (B288) and a certified letter (B290-

---

[2] Mr. Fruz was a foreign limited liability company not registered to do business in the State of Delaware; therefore, service of process was consummated pursuant to 6 *Del. C.* § 18-910.

91) notifying Mr. Shafkowitz that Mr. Fruz was served with the suit papers and was required to respond to the Complaint on or before December 31, 2012. Mr. Fruz never filed a response to the Complaint. (B277-78 Earle Aff.) On January 30, 2013, Emory Hill directed the Prothonotary of the New Castle County Superior Court to enter default judgments against both Christiana Mall and Mr. Fruz. (B128-130).

Christiana Mall's Actions Prior To The Entry Of The Default Judgments

On November 9, 2012, Christiana Mall sent a letter to MRF Atlantic requesting that MRF Atlantic defend and indemnify Christiana Mall. (B171-72). Michael Geonnotti signed that tender letter on November 14, 2012. (B172). No counsel entered their appearance on behalf of Christiana Mall, Mr. Fruz, or MRF Atlantic. (B1-11). No counsel was retained to defend Christiana Mall or Mr. Fruz in the proceedings. Counsel for Christiana Mall only entered their appearance in the proceedings when the default judgment was entered. (*Id.*)

Christiana Mall is managed by General Growth Properties ("GGP"). (B248, Francone Aff. ¶1.) GGP is a real estate investment trust listed on the New York Stock Exchange: GGP has a general counsel and a legal department. (B248, Francone Aff. ¶1.) Christiana Mall did not have GGP's general counsel or a representative of the legal department confirm an extension of time to answer the Complaint. (B351-52 Resp. Interg. No. 7). No notice of assignment

of counsel was sent to Christiana Mall notifying it that counsel was retained to defend Christiana Mall in the Mechanics' Lien Action.

Christiana Mall solely relied upon Mr. Shafkowitz to protect its interests in the Mechanics' Lien Action. (*Id;* B329 Francone Supp. Aff. ¶3). Mr. Shafkowitz is a lawyer licensed to practice law in the Commonwealth of Pennsylvania. (B175) Mr. Shafkowitz is a sole practitioner who does business as the Law Offices of David M. Shafkowitz. (*Id.*) Mr. Shafkowitz's offices are located at 730 East Elm Street, Conshohocken, Pennsylvania 19428. (*Id.*) Mr. Shafkowitz does not maintain an office or practice law in the State of Delaware. (*Id.*) The record is devoid of any evidence establishing that Mr. Shafkowitz was engaged by or represented Christiana Mall. (B277-78, B283.) Mr. Frank Francone, Developer Manager-Legal of GGP ("Mr. Francone"), stated he believed that Mr. Shafkowitz was protecting its interests in the Mechanics' Lien Action. (B329 Francone Supp. Aff. ¶3)

On the day Christiana Mall's answer was due, November 27, 2012, Mr. Francone, by way of e-mail to Mr. Shafkowitz, inquired about the status of the matter:

> How is this matter progressing? I received a note from our JV Partner asking for an update?

(B175).

Shortly, thereafter, Mr. Shafkowitz responded:

> Looks like they are reviewing our settlement proposal. He granted the necessary extensions of time to answer. If we do not have it resolved shortly I expect to have it removed for an arbitration. I will keep you posted.

(B174).

On December 11, 2012, Mr. Francone, by way of a second e-mail to Mr. Shafkowitz, inquired about the matter:

> Please provide an update for the Emory Hill-Mr. Fruzz [sic] matter. Also, attached invoices appear to be outstanding and may lead to future liens.

(B174).

In the next e-mail in the chain, dated February 13, 2012 , more than two months later, Mr. Francone demands that the "Default Judgment be dismissed immediately." (B174.) In this e-mail Mr. Francone quotes Mr. Shafkowitz's language in the November 27, 2012 e-mail and represents that this was Mr. Shafkowitz's "last correspondence regarding the matter." (*Id.*)

The record shows that Mr. Shafkowitz never responded to the inquiry that Mr. Francone made on December 11, 2012. (B174; B330 Francone Sup Aff. ¶5.) In a supplemental affidavit, requested by the Court, Mr. Francone explains that he did not follow-up with the non-response because he was heavily involved

with projects and then left for vacation on December 21, 2012.[3] (B330 Francone Sup Aff. ¶5.) Mr. Francone speculates that when he returned from vacation on January 10, 2013, he called Mr. Shafkowitz to inquire about the matter. (B331). Christiana Mall's counsel admits, however, that Mr. Francone "cannot say for sure" whether he ever made this phone call to Mr. Shafkowitz in January. (B366, Christiana's Reply pg. 3.)

In addition, the Francone Supplemental Affidavit contradicts the prior Francone Affidavit (B154 Mot. Vacate ¶6; Francone Aff. B248-50) and Christiana Mall's interrogatory responses (B351-52, Resp. Interg. No. 7, 8, 9). Mr. Francone previously affirmed that he never received a response to the inquiry he made to Mr. Shafkowitz on December 11, 2012. (B154 Mot. to Vacate ¶6; B248 Francone Aff. ¶2.) Christiana Mall does not identify Mr. Francone's alleged phone conversation with Mr. Shafkowitz in its responses to Emory Hill's interrogatory requests. (B351-52, Resp. Interg. No. 7, 8, 9). Interrogatory No. 9 specifically required Christiana Mall to identify all communications about the status of the proceedings, including telephone calls. (B352 Resp. Interg. No. 9).

---

[3] The trial court requested a supplemental affidavit from Mr. Francone stating the reason why he did not follow-up when Mr. Shafkowitz did not respond to the inquiry he made on December 11, 2012. (B312-13, Hr. May 15, 2013. Tr. 6:17-7:2.)

Emory Hill's Actions Prior To Entry Of The Default Judgments

On December 11, 2012, counsel for Emory Hill sent an e-mail to Mr. Shafkowitz notifying him that Mr. Fruz was served with the suit papers on December 10, 2012, and that Mr. Fruz must answer the Complaint on or before December 31, 2012. (B288.) In this e-mail, counsel for Emory Hill also attempted to provide the customary courtesy notice of a pending default judgment to Christiana Mall. (B288.) No counsel entered their appearance on behalf of Christiana Mall nor did Christiana Mall provide any type of point of contact to counsel for Emory Hill. The December 11, 2012 e-mail reads as follows:

> The Christiana Mall LLC, the owner, has been served and has not yet answered the Complaint and Statement of Mechanics' Lien and **the time period for the owner to answer is now past due. The owner has never requested an extension of time to answer. Please advise through your client that the owner is required to answer the complaint, otherwise, default judgment will be taken against the owner.**

[B288 (emphasis added.)]

Prior to this exchange, on November 21, 2012, Mr. Shafkowitz requested an extension of time to answer the Complaint on behalf of Mr. Fruz (B285). Counsel for Emory Hill informed Mr. Shafkowitz that Mr. Fruz may have an extension of time, but an extension was not necessary, because Mr. Fruz had not yet been served with the Complaint. (B285.) Counsel for Emory Hill stated he would notify Mr. Shafkowitz when Mr. Fruz was required to answer the

Complaint. (*Id.*). The e-mail was clear to reflect only an extension for Mr. Fruz. (*Id.*). The November 21, 2012 e-mail reads as follows:

> This e-mail confirms **that Mr. Fruz** has an extension to answer the complaint and no default judgment will be taken **against Mr. Fruz**. In fact, **I am awaiting service upon the Secretary of State for Mr. Fruz so your clock has not even started to run yet. Certainly, I will notify you with respect to your client's time to answer.**

(B285 (emphasis added.)

Neither Mr. Fruz nor Christiana Mall answered the Complaint. (B1-11). Prior to directing the Prothonotary to enter the default judgments against the defendants, Emory Hill's counsel sent a certified letter, return receipt requested, to Mr. Shafkowitz notifying him that default judgment would be entered against Mr. Fruz. (B290-94). After receiving confirmation that the letter was received, Emory Hill directed the Prothonotary to enter the default judgments against defendants. (B293; B128-130.)

Relevant Facts After Entry Of The Default Judgments

Christiana Mall learned of the default judgment on February 13, 2012. (B174.) During a fortuitous phone call by and among James Harker, a real estate lawyer, Dean Lusky, a title agent, and counsel for Emory Hill, Dean Lusky informed counsel for Emory Hill that Larry Tarabicos once represented Christiana Mall in real estate transactions. (B277-78). Counsel for Emory Hill contacted Larry Tarabicos and informed him about the default judgment taken

against Christiana Mall. (*Id.*) Emory Hill forwarded a copy of the default judgment to Larry Tarabicos. (B298.) Counsel for Emory Hill was contacted by a legal representative of Christiana Mall who inquired whether the matter had settled and stated that this was not Christiana Mall's problem or its legal responsibility. (B277-78.) The next day, on February 14, 2013, counsel for Christiana Mall entered its appearance. (B3 Doc. No. 13.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT SUBSTANTIAL PREJUDICE WOULD RESULT TO EMORY HILL IF IT WERE TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST CHRISTIANA MALL.

1. Question Presented

Whether the Superior Court abused its discretion when it held that Emory Hill would be substantially prejudiced if Christiana Mall were granted relief from the default judgment because Christiana Mall's failure to timely answer deprived Emory Hill of the opportunity to review Christiana Mall's answer, its affirmative defenses, and its affidavit of defense, and correct a minor technical defect, in light of Christiana Mall's admission that it has no defenses to the merits of the mechanics' lien.

2. Scope of Review

A motion to set aside a default judgment is addressed by the sound discretion of the trial court and should not be disturbed on appeal, unless this Court finds that the trial court abused its discretion. *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977); *see also, Hardy v. Harvell*, 2006 WL 3095947 (Del. Supr.).

3. Merits of the Argument

The trial court's finding that Emory Hill would suffer substantial prejudice if the default judgment were set aside was based upon sound reasoning

and should be affirmed by this Court. The trial court considered the nature of Christiana Mall's defenses and determined that the defendant's technical defenses could have been defeated by amendment of the pleadings prior to the running of the statute of limitations period. The trial court was faced with the unusual circumstances that if it were to set aside the default judgment entered against Christiana Mall, it would have deprived Emory Hill of its opportunity to try the case on the merits. In light of the admission of Christiana Mall that it had no defenses to the merits of the mechanics' lien, the trial court correctly weighed the equities in favor of Emory Hill, and denied Christiana Mall's Motion to Vacate.

The passage of time that impairs the nonmoving party's ability to present the merits of his or her claims has been found to constitute substantial prejudice. *Ravine v. Ravine*, 2006 WL 453213 (Del. Supr.). The United States Courts of Appeals, Third Circuit, in *Hritz v. Woma Corp.* has described delay caused by the defendant's failure to participate in the legal proceedings, which results in the loss of plaintiff's claim, as the "gravest prejudice." 732 F.2d 1178, 1182 (3rd Cir. 1984). The Third Circuit also recognized in *Hritz*, that events leading up to the default judgment are also considered in the delay analysis. *Hritz*, 732 F.2d at 1181-82.

In *Hritz*, the plaintiff filed the complaint one day prior to the expiration of the statute of limitations to bring a claim against a possible co-defendant. *Hritz.*, 732 F.2d at 1181-82. Because the defendant did not answer the plaintiff's inquiries prior to the filing of the complaint and failed to timely answer the allegations in the complaint, the plaintiff was delayed in ascertaining the correct manufacturer of the machine that caused the injury. *Id.* The Third Circuit recognized the missed opportunity to name a co-defendant as substantially prejudicial to the plaintiff and remanded the case back to the district court for further proceedings. *Id.* When making this determination, the Third Circuit considered the events leading up to the filing of the complaint, as well as the events leading up to the default judgment. *Id.*

Similarly, the Superior Court in *Williams v. Delcollo Elec., Inc.* found substantial prejudice where delay caused by the defendant's failure to answer the complaint resulted in the expiration of a statute of limitations against a co-defendant. 576 A.2d 683, 687 (Del. Super. 1989). In *Williams v. Delcollo Elec., Inc.*, Delcollo intended to assert the defense of agency that could have completely defeated plaintiff's claim. *Id.* at 688. Due to the expiration of the statute of limitations, Plaintiff was unable to amend the complaint to add a co-defendant who was a subcontractor of Delcollo. *Id.* To remedy the prejudice, the court required Delcollo to waive any possible defense based upon agency

and to stipulate and acknowledge the responsibility of all of the subcontractors on the job site. *Id.*

In this case, Emory Hill's ability to fully litigate its mechanics' lien claim was materially impaired on account of Christiana Mall's failure to timely participate in the litigation. Emory Hill lost its opportunity to review Christiana Mall's responses to the allegations of the complaint, its affirmative defenses, and its affidavit of defense, and amend the complaint in response. Motions to amend a complaint in response to answers and affirmative defenses are commonplace and are freely granted by trial courts to facilitate judgments on the merits. *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 72 (Del. 1993). Emory Hill's lost opportunity to amend the complaint is analogous to substantial prejudice recognized in *Hritz* and *Williams*, where the passage of time also precluded the plaintiffs in those cases the opportunity to amend the complaint to add a responsible party.

Christiana Mall was properly served with the suit papers on November 7, 2012. (B101). Accordingly, Christiana Mall would have been required to respond to the Complaint on or before November 27, 2012. (*Super. Ct. Civ. R.* 12). Emory Hill pled that the final payment, including retainage, was due to Emory Hill on September 30, 2012. (*Compl.* ¶8.) Thus, Emory Hill would have had the opportunity to move to amend the complaint up to and including

Monday, January 28, 2013 (*i.e.*, 120 days from September 30, 2012). *Frick Elec. Heating and Air Conditioning, Inc. v. Selbyville Bay Dev., LLC,* 2008 WL 1724253, 3 (Del. Super.). Thus, if Christiana Mall had timely answered, Emory Hill would have had, as the trial court recognized, more than two months to review Christiana Mall's answers to the allegations, its affirmative defenses, its affidavit of defense, and its own pleadings for the purpose of amending the Complaint. (Op. Jurden pg. 17.) This opportunity is now lost to time. Christiana Mall attempts to disguise this lost opportunity by claiming it had an extension of time to answer the Complaint, but this is not supported by the record, nor was it recognized by the trial court.[4]

The trial court did not solely rely on the application of 25 *Del. C.* § 2716 as Christiana Mall contends. The application of 25 *Del. C.* § 2716 was one factor among many relied upon by the trial court when it balanced the equities in favor of Emory Hill. (Op. Jurden pgs. 18-19 FN97.) The trial court also considered the nature of the alleged technical defenses asserted by Christiana

---

[4] Christiana Mall represents that it had an extension of time to answer the Complaint until December 31, 2012 while Emory Hill and Mr. Fruz engaged in on-going settlement negotiations. (Opening Br. pg. 7, 15) This is not true. Christiana Mall was required to answer the Complaint on November 27, 2012 (B101) as evidenced by the return of service affidavit and the correspondence between the parties (B288; B290-91.) Emory Hill provided courtesy notice of its intention to take default judgment on December 11, 2012 (B288) and, again, on January 16, 2013. (B290-91). The settlement discussions are part of the record and consist of one e-mail exchange. (B288.)

Mall, the fact that the delay was solely attributable to Christiana Mall's own negligence, and the admission by Christiana Mall that it had no defenses to the merits of the mechanics' lien. (Op. Jurden pgs. 17-19 FN96, 97)

Christiana Mall asserted the following defenses: (1) the start date was improper because it related to demolition work (B161, Mot. ¶14.); (2) failure to identify the owner of the structure (B161, Mot. ¶15); (3) failure to properly identify the structure (B162 Mot. 16); (4) the affidavit pursuant to 25 *Del. C.* § 271(c) is defective for the insertion of the word "to the best of my knowledge" (B163 Mot. ¶17); (5) failure to identify the parties to the contract (B163 Mot. ¶18.); and (6) failure to set out each demand by affidavit pursuant to 25 *Del. C.* § 2725(a) (B164 Mot. ¶19.) (*See* Op. Jurden pg. 12 FN12.)

The defenses of Christiana Mall are addressed below. As for argument 1 above, the complaint stated that the commencement date was April 16, 2012 (B21 Compl. ¶6-7.) The work supporting the commencement date included demolition, framing, millwork, plumbing and electrical work, the installation of fixtures, flooring, tile, an HVAC system, and other construction. (B21 Compl. ¶6-7.) Because a commencement date was specifically pled, the statement of mechanics' lien is valid, as it provides sufficient notice. *Ewing v. Bice,* 2001 WL 880120, *3 (Del. Super.). Nevertheless, the commencement date was proper in the matter. Emory Hill was a "person" entitled to a mechanics' lien under the

statute because it furnished work for the construction of a building. [5] Emory Hill's work improved the structure, and was not work incident to demolition. (*Id.*)

With respect to Christiana Mall's argument 2, the Complaint identified Christiana Mall as the owner of the structure. (B20 Compl. ¶3.) With regard to argument 3, the Complaint identified the structure by its Tax Parcel No. and its legal description. (B21 Compl. ¶9) The legal description was attached to the Complaint as Exhibit C. (*Id.*) The structure is located upon a single tax parcel, has one owner and cannot be reasonably apportioned. *Wilmington Trust Co. v. Branmar, Inc.*, 353 A.2d 212 (Del. Super. 1976).

With regard to argument 5, Mr. Fruz and Emory Hill were identified as the parties to the contract. (*Id.*) The contract was attached and incorporated into the Complaint as Exhibit A. (*Id.*) Mr. Fruz was identified as the tenant of the structure and Emory Hill was identified as the general contractor. (B19-20

---

[5] Emory Hill is a "person" entitled to a mechanics' lien because it furnished labor and materials under contract for the "erection, construction and repair" of a building. Emory Hill was not a "person" that furnished labor incident to demolition under contract who is not entitled to a mechanics' lien. *Browning-Ferris, Inc. v. Rockford Enters, Inc.*, 642 A.2d 820, 829 (Del. Super. Ct. 1993) (holding that waste disposal company was not a "person" under the purview of the mechanics' lien statute as merely provided labor incident to demolition under its contract). *But see*, *Commonweatlth Constr. Co. v. Cornerstone Fellowship Baptist Church*, 2006 WL 2567916, *16 (Del. Super.) (noting the demolition work is not ordinarily subject to a mechanics' lien *in dicta* but rejecting the defense because it was not raised in the pretrial stipulation).

Compl ¶¶1, 2, 3, 4.) With respect to the argument, the statement of mechanics' lien and the *in personam* counts have independent wherefore clauses, each with a separate demand. 25 *Del. C.* § 2725(a). Even if a separate affidavit was required pursuant to 25 *Del. C.* § 2725(a), one could have been easily provided subsequently, as it in no way changes the statement of mechanics' lien. *Deluca v. Martelli*, 200 A.2d 825, 827 (Del. Super. 1964); *Harrogate Constr. Co. v. Joseph Haas Co.*, 250 A.2d 376 (Del. Super. 1969).

With respect to Christiana Mall's argument 4, Emory Hill concedes that Christiana Mall had a meritorious defense to the statement of mechanics' lien, as noted by the trial court, due to the insertion of the language "to the best of my knowledge" in the affidavit.[6] Emory Hill disputes that the phrase qualifies the

---

[6] *Atlantic Millwork Corp. v. Harrington*, 2002 WL 31045223 (Del. Super.) and *American East Explosives v. Eastern States Develp. Co.*, 2001 WL 492074, *2 (Del. Super.). The terms "to the best of my knowledge," however, do not limit the meaning of the phrase as a witness may only testify to his or her knowledge pursuant *Del. R. Evid.* 602. The legislature did not expressly exclude this language. On the other hand, the terms "belief" or "upon information and belief" may constitute limiting language as a "belief" is not necessarily based on a witness's knowledge. *Compare Oscar George v. Potts,* 115 A. 2d 479 (Del. 1955); *Graybar Elect. Co., Inc. v. Musref Bellevue Parkway, LP*, 2012 WL 4108108, (Del. Super.); *A. Ralph Woodrow, Inc. v. Hudanish*, Del.Super., C.A. No. 4457, 1975, Taylor, J. (1978) (Letter Op.), aff'd, 385 A.2d 144 (1978); *Construction by Franco v. Reed*, 1994 WL 750306, Silverman, J. (Del. Super.); *Builders' Choice, Inc. v. Venzon*, 1995 WL 264593, Quillen, J. (Del. Super.) (Letter Op.). Strict construction does require unreasonable or unwarranted application. *Rockland Builders, Inc. v. Endowment Manag., LLC,* 2006 WL 2053418, *3 (Del Super.) (*citing In re Delaware Lumber & Millwork, Inc.*, 1997 WL 528249, *4 (Del. Super.).

affidavit. (*Id.*) This technical defense could have been easily identified and corrected upon a precursory review of the affidavit upon review of Christiana Mall's answer, its affirmative defenses and its affidavit of defense. Christiana Mall would have had, at a minimum, stated that the affidavit was defective to satisfy its requirements under 25 *Del. C.* § 2716. Even Christiana Mall's mere participation in the litigation could have prompted inquiry and afforded Emory Hill the opportunity to amend.

Christiana Mall does not dispute that the labor and materials were furnished to its structure with its written permission. Christiana Mall does not dispute the amount owed to Emory Hill. Christiana Mall does not claim that the work was defective. In fact, as the trial court recognized, Christiana Mall admitted that it has no defenses to the merits of the mechanics' lien. Therefore, when balancing the equities involved, it was wholly appropriate and just for the trial court to deny Christiana Mall's motion to vacate. *Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345, 353 (Del. 1953) (vacating a default judgment is based upon equitable principles and an appeal is to the conscience of the court).

II. THE TRIAL COURT DID NOT FIND THAT CHRISTIANA MALL WAS REQUIRED TO DISCLOSE ITS LEGAL ANALYSIS OF THE PLEADING PURSUANT TO 25 *DEL. C.* § 2716.

1. Questions Presented

Whether the Superior Court abused its discretion when it held that Emory Hill would be substantially prejudiced if Christiana Mall was granted relief from the default judgment because Christiana Mall's failure to timely answer the complaint deprived Emory Hill of the opportunity to review Christiana Mall's defenses and condition of facts set forth in its affidavit of defense as required by 25 *Del. C.* § 2716, its answer, and affirmative defenses, and move to amend a minor technical defect in the mechanics' lien, in light of Christiana Mall's admission that it has no defenses to the merits of the mechanics' lien.

2. Scope of Review

A motion to set aside a default judgment is addressed by the sound discretion of the trial court and should not be disturbed on appeal unless this Court finds that the trial court abused its discretion. *Battaglia v. Wilmington Savings Fund Society*, 379 A.2d 1132, 1135 (Del. 1977); *see also, Hardy v. Harvell*, 930 A.2d 928 (Del. 2007).

3. Merits of the Argument

Christiana Mall suggests an affidavit of defense that merely states that the defendant "verily believes it has a defense to the whole or part of such cause of

action", without more, is sufficient to comply with its obligation under 25 *Del. C.* § 2716. This is not a correct application of 25 *Del. C.* § 2716. Christiana Mall would have had to plead sufficient facts in its affidavit of defense, so that the trial court could have determined that it had a valid defense to the imposition of the mechanics' lien. Among other things, this would have prompted inquiry by Emory Hill, enabling it to discover the alleged defect and to correct the technicality through amendment. This loss of opportunity materially affected Emory Hill's ability to prosecute its mechanics' lien claim.

The affidavit of defense must set forth a condition of facts, so that the trial court can form an opinion in regard to the legality and sufficiency of the defenses. *Victor B. Woolley, Practice in Civil Actions And Proceedings in the Law Courts of State of Delaware*, Vol I, pg. 199. (1906). "The affidavit should state [sufficient] facts [to make a] *prima facie* showing [of] a good defense, an omission of essential facts or a manifest evasiveness will render the affidavit insufficient." *Hence Hardware Co. v. Howard*, 199 A.2d 26, 28 (Super. Ct. 1939). The evidence that supports the defenses does not need to be revealed. *Frantz v. Templeman Oil Corp.*, 134 A. 47, 48 (Super. Ct. 1926). An affidavit of defense which merely states a conclusion of law without any supporting facts is insufficient. *Hence Hardware Co.*, 199 A.2d at 28.

Christiana Mall suggests that it could have "filed an answer and affidavit of defense which did not expose the defects, and argue for dismissal of the lien claim on a motion for summary judgment filed after the time to amend had expired." (An. Brief pg. 22.) If Christiana Mall had filed a defective affidavit of defense as it suggests, Emory Hill would have had the opportunity to move for default judgment pursuant to 25 *Del. C.* § 2716. The loss of this opportunity to take advantage of this mechanism to thwart the defective affidavit of defense also constitutes substantial prejudice.

Christiana Mall is not asking the Court to vacate the default judgment so it can litigate the claims on their merits. It is asking this Court to vacate the default judgment so that it can engage in gamesmanship and surreptitious litigation. In fact, Christiana Mall admits it has no defenses to the merits of the mechanics' lien claim. (Op. Jurden pgs. 17-19 FN 96, 97). Christiana Mall's defenses are based solely upon technicalities – which could have been addressed through amendment -- and Christiana Mall should not be awarded for its negligence. Rule 60(b) is based upon equitable principles: there is no basis in equity to vacate a default judgment when the defendant admits to the merits of the claim. *Kaiser-Frazer Corp.*, 101 A.2d at 353.

Emory Hill was deprived of the opportunity to review Christiana Mall's defenses and the condition of facts in support thereof in its affidavit of defense,

its answer and its affirmative defenses prior to its time period to move to amend the Complaint had expired. The loss of opportunity to review these responses against its pleadings, in light of the nature of the defects alleged by Christiana Mall, materially impaired Emory Hill's ability to litigate its mechanics' lien claim.

As previously discussed, this alone did not support the trial court's finding that the equities favored Emory Hill. It was one factor among many considered by the trial court. The trial court did not consider the application of 25 *Del. C.* § 2716 in a vacuum. Even Christiana Mall's mere participation in the litigation could have sparked inquiry by Emory Hill. Christiana Mall should not be rewarded for its negligence. This Court should not disturb the trial court's finding of substantial prejudice, as the decision was based upon sound reasoning and the appropriate weighing of the equities involved.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN FINDING CHRISTIANA MALL'S FAILURE TO RESPOND TO COMPLAINT CONSTITUTED EXCUSABLE NEGLECT.

1. Question Presented

Whether the trial court abused its discretion by finding that the failure of Christiana Mall to respond to the complaint constituted excusable neglect under the circumstances where Christiana Mall solely relied upon the representations of its co-defendant's counsel, a Pennsylvania lawyer, not admitted to practice in the State of Delaware, did not receive notice of assignment of counsel to defend its interests in the Mechanics' Lien Action, and did not consult its own counsel until after default judgment was entered against it. **This question was preserved below in Emory Hill's Response. (B257-62).**

2. Scope of Review

A motion to set aside a default judgment is addressed by the sound discretion of the trial court and should not be disturbed on appeal unless this Court finds that the trial court abused its discretion. *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977); *see also, Hardy v. Harvell*, 930 A.2d 928 (Del. 2007).

3. Merits of the Argument

The trial court abused its discretion by failing to conduct any analysis as to whether it was reasonable for Christiana Mall to rely solely upon the

representations of its co-defendant's counsel, a Pennsylvania lawyer, to protect its interest in the Mechanics' Lien Action, notwithstanding the alleged representations of Mr. Shafkowitz. Mr. Shafkowitz only represented the interests of Mr. Fruz. Christiana Mall never received notice of assignment of counsel to defend its interest in the Mechanics' Lien Action, nor did Christiana Mall engage its own counsel until after the default judgment was entered against it.

The trial court was required to make a factual determination as to whether it was reasonable for Christiana Mall, under the circumstances, to solely rely upon the representations of its co-defendant's counsel, especially in light of the adverse interests of Mr. Fruz and Christiana Mall. *See Battaglia v. Wilmington Sav. Fund Soc'y,* 379 A.2d 1132, 1135 n. 4 (Del. 1977). The trial court was required to examine all of the facts when making its determination as to whether Christiana Mall acted reasonably. *Pinkett v. Valley Forge Inc. Co.*, 1989 WL 135750, *3 (Del. Super.). The trial courts have consistently held that when parties fail to consult counsel there can be no excusable neglect.[7] Trial courts also have found that parties who fail to follow-up as to whether their rights are

[7] *See Fin & Brokerage Servs. Inc. v. Robinson Ins. Assoc, Inc.*, 1990 WL 1990 WL 199503, at *4 (Del. Super.); *Murzyn v. Locke*, 2006 WL 1195628, *2 (Del. Super.); *Watson v. Simmons*, 2009 WL 1231145, at *2 (Del. Super.); *Keith v. Melvin J. Jeseph Constr. Co.*, 451 A.2d 842, 846 (Del. Super. 1982); *Concors Supply Co., Inc. v. Berger*, 1998 WL 120437, *2 (Del. Super.).

being properly defended does not constitute excusable neglect. *State Farm & Casualty Ins. Co.*, 2009 WL 81290, *2 (Del. Super.). Christiana Mall failed to do both in this case.

Although it had Delaware counsel readily available, Christiana Mall chose not to consult its counsel about the matter. Instead, Christiana Mall left its entire defense in the hands of MRF Atlantic. Neither counsel for Christiana Mall nor Mr. Fruz entered their appearance in the Mechanics' Lien Action until after the default judgments. Christiana Mall's willful choice not to engage its Delaware counsel, ostensibly for the only purpose of avoiding *de minims* legal costs, does not constitute excusable neglect. *Vechery v. McCade*, 100 A.2d 460 (Del. Super. 1953).

Christiana Mall tendered its defense to its tenant MRF Atlantic pursuant to the terms of the Lease. MRF Atlantic and Mr. Fruz are affiliated entities, both having the same principal owner -- Mr. Geonnotti. Mr. Geonnotti accepted Christiana Mall's tender of defense on behalf of MRF Atlantic. The record is devoid of any evidence, however, that Christiana Mall received notice of assignment of counsel to defend the claims asserted against it in the Mechanics' Lien Action.

Mr. Shafkowitz was Mr. Fruz's local Pennsylvania lawyer, outwardly engaged by Mr. Fruz for the purpose of reaching a settlement with Emory Hill.

The record is devoid of any evidence that Mr. Shafkowitz represented the interests of Christiana Mall. Mr. Shafkowitz was not admitted to practice law in the State of Delaware. At all relevant times, prior to the entry of the default judgments, Christiana Mall was engaging in communications with its co-defendant's Pennsylvania counsel, Mr. Shafkowitz, while being unrepresented.

More problematic, prior to the entry of default judgments, Christiana Mall admitted that "[s]ince before the entry of default, MRF Atlantic has been in breach of the lease agreement and Christiana Mall terminated the lease effective March 9, 2013." (B165, Mot. to Vacate ¶20.) Because MRF Atlantic was in breach of the Lease and there was a mechanics' lien imposed on its property, Christiana Mall should have had grave concerns about MRF Atlantic's ability to defend the action on its behalf. Furthermore, had the litigation proceeded as it should have, Christiana Mall would have had to assert claims against MRF Atlantic and/or Mr. Fruz for breach of contract, indemnification and other claims. Mr. Fruz's and Christiana Mall's interests were directly adverse. *Prof. Cond. R. 1.7.*

Accordingly, due to a current conflict of interest, Mr. Shafkowitz could not have simultaneously represented both Mr Fruz and Christiana Mall. *Id.* Nor could Mr. Shafkowitz have informed Christiana Mall about Mr. Fruz's decision to seek bankruptcy protection. *Prof. Cond. R. 1.6.* Christiana Mall willfully

failed to ensure that its interests were adequately protected. Under the circumstances, Christiana Mall's failure to consult or retain counsel does not constitute excusable neglect.

Not only did Christiana Mall fail to consult or retain counsel, Christiana Mall failed to follow-up about the status of the litigation. On December 11, 2012, Mr. Francone sent an inquiry to Mr. Shafkowitz. Without receiving a response, Mr. Francone waited ten (10) days and then left for vacation on December 21, 2012. (B330, Francone Aff. ¶5.) The trial court commented about the negligence:

> Francone ignored the Complaint for weeks and went on vacation. He did so without knowing how long the extension Shafkowitz had obtained and whether Emory Hill knew Shafkowitz was purportedly representing the Christiana Mall.

(Op. Jurden pg. 10.)

When he returned from vacation the week of January 10, 2013, Mr. Francone believes he called Mr. Shafkowitz and that Mr. Shafkowitz misrepresented to him that Christiana Mall had an ongoing extension while the parties discussed settlement. (B331). Prior to this alleged phone call, on December 11, 2012, counsel for Emory Hill notified Mr. Shafkowitz that Christiana Mall's answer was past due and that Mr. Fruz must answer no later than December 31, 2012. (B288). Mr. Francone admits, however, he "cannot say for sure" whether or not this call in January ever took place. (B336).

The Supplemental Francone Affidavit contradicts the previously submitted Francone Affidavit. Mr. Francone previously affirmed that he never received a response to the inquiry that he made to Mr. Shafkowitz on December 11, 2012[8]. (B154 Mot. to Vacate ¶6; B248 Francone Aff ¶2.) Additionally, Christiana Mall did not identify the alleged January conversation in their responses to Emory Hill's interrogatory requests. (B351-52, Resp. Interg. No. 7). The trial court also acknowledged that lack of evidence supporting the communication:

> There is no evidence of communication between Francone and Shafkowitz or Francone and Earle, between December 10, 2012 and February 12, 2013.

(Op. Jurden pg. 5)

Notwithstanding the questionable affidavit submitted by Mr. Francone[9], Christiana Mall should have consulted its own counsel to protect its interest in

---

[8] Christiana Mall represented in its Motion to Vacate that it never received a response to the December 11, 2012 inquiry. (B154 Mot. to Vacate ¶6; B248 Francone Aff ¶2).

[9] The trial court committed abuse of discretion by considering the alleged conversation that occurred in the week of January 10, 2012 between Mr. Shafkowitz and Mr. Francone in its analysis. (Op. Jurden 10-11.) Counsel for Christiana Mall later qualified and/or retracted the affirmation made by Mr. Francone by admitting the witness "cannot say for sure." (B366.) And, the supplemental affidavit completely contradicted Mr. Francone's previous affidavit and the Christiana Mall's responses to Emory Hill's interrogatory requests. (B351-52, Resp. Interg. No. 7.). *See Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 738 (Del. 2003) (finding that the court may disregard a sham affidavit on summary judgment that contradicts previous testimony); *see also, In re Asbestos Litig. (Sweetman)*, 2006 WL 3492370, *3-5 (Del. Super.).

the Mechanics' Lien Action. Christiana Mall had independent obligations to the court to timely answer the allegations made against it in the Complaint. Christiana Mall was facing claims separate and apart from Mr Fruz.[10] Christiana Mall did not receive notice of assignment of counsel to defend these claims. Christiana Mall did not confirm an extension of time with plaintiff's counsel to respond to these claims. It was not the responsibility of its co-defendants counsel, Mr. Shafkowitz, to do this for it.

The trial court's finding of excusable neglect in this matter has negative policy implications in a jurisdiction that has a high volume of litigation arising out-of-state. Parties located out-of-state (like Christiana Mall) do not want to pay the additional legal expense associated with Delaware counsel, although Delaware counsel is needed to properly protect their interests, as it was here.

Mechanics' lien law is state-specific, varying significantly based upon the jurisdiction. Mr. Shafkowitz may not have known that Christiana Mall had to answer the Complaint independently from Mr Fruz. Mr. Francone may not have known that a mechanics' lien could be asserted against the fee simple if written permission is given by the owner for the work. In some jurisdictions, only the leasehold is subject to a mechanics' lien. More importantly, Mr. Shafkowitz was precluded by the attorney-client privilege to inform Christiana Mall about Mr.

[10] The statement of mechanics' lien, the claim of *quantum meruit* and the claim of unjust enrichment were only asserted against Christiana Mall.

Fruz's decision to seek protection under the United States bankruptcy code. Under the circumstances, Christiana Mall's failure to retain or consult counsel does not constitute excusable neglect.

IV. THE TRIAL COURT COMMITTED ABUSE OF DISCRETION WHEN IT FOUND THAT CHRISTIANA MALL ESTABLISHED A MERITORIOUS DEFENSE TO EMORY HILL'S CLAIM OF *QUANTUM MERUIT*.

1. Question Presented

Whether the trial court abused its discretion by finding that Christiana Mall established a meritorious defense to Emory Hill's claim of *quantum meruit* by relying upon arguments presented by Christiana Mall for the first time in their reply brief, after the trial court already permitted Christiana Mall leave to supplement its motion to vacate on the issue and failed to do so. **This question was preserved below in Emory Hill's Response. (B261-64).**

2. Scope of Review

A motion to set aside a default judgment is addressed by the sound discretion of the trial court and should not be disturbed on appeal unless this Court finds that the trial court abused its discretion. *Battaglia v. Wilmington Savs. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977); *see also, Hardy v. Harvell*, 930 A.2d 928 (Del. 2007).

3. Merits of the Argument

The trial court committed abuse of discretion when it relied upon arguments presented by Christiana Mall for the first time in its Reply. (A28-A29). Christiana Mall argues for the first time in its Reply that it has meritorious

defense to the claim of *quantum meruit* asserted by Emory Hill based upon (1) the existence of a contract between Mr. Fruz and Emory Hill, and (2) that the labor and materials were not furnished under circumstances where Emory Hill would reasonably expect payment from Christiana Mall. (*Id.*)

These arguments were critical to the trial court's finding that Christiana Mall established a meritorious defense to the claim of *quantum meruit* brought by Emory Hill. In its opinion, the trial court stated:

> Christiana argues that the circumstances under which Emory Hill undertook fit-out work for Mr. Fruz were not such Emory Hill could reasonably expect payment for Christiana. Plaintiff correctly notes that recovery under a claim of *quantum meruit* is for reasonable value of the service, not the value 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.** Christiana's argument may not be successful, but it does constitute a meritorious defense.

(Op. Jurden pg. 14 (emphasis added)).

In the excerpt of the trial court's opinion above, the trial court cited to "Christiana's Reply 6" in FN73 when referring Christiana Mall's argument supporting a meritorious defense. When the trial court refers to Emory Hill's response as non-responsive, it cites to "Suppl. Resp. 4" in FN74. This is problematic because Emory Hill's supplemental response was filed prior to the reply of Christiana Mall. Emory Hill was responding to the prior arguments raised in Christiana Mall's Motion to Vacate and the Supplemental Francone

Affidavit and the Chambliss Affidavit. This is why, as the trial court noted, Emory Hill's argument does not address Christiana Mall's argument.

Delaware law is well-settled that a party who fails to raise legal issues in the opening brief or moving papers constitutes a waiver of later raising the issues in the proceedings before the court. *In re Asbestos Litig.* (AADG, Inc), 2007 WL 2410879, * 4 (Del. Super.) (citing *Murphy v. State,* 632 A.2d 1150, 1152 (Del. 1993)). Judge Slights referred to the problem of counsel asserting new arguments in a reply brief as the "sand bag issue" and disfavored the practice by Delaware counsel *Id.* at *3; *see also, In re Asbestos Litig. (Vala)*, 2012 WL 2389898, *1 (Del. Super.) (Parkins, J.); *In re Asbestos Litig. (Montgomery)*, 2011 WL 539554, *4 (Del. Super.) (Ableman, J.)

This "sand bag issue" was present in this litigation, confusing the trial court, as demonstrated above, and depriving Emory Hill of a full and fair opportunity to respond. Christiana Mall filed the Motion to Vacate on April 16, 2013 (B5 Doc. No. 27.). In the Motion to Vacate, Christiana Mall argued that it has a meritorious defense to *quantum meruit* on the grounds that Christiana Mall did not benefit from the labor and material furnished to the structure by Emory Hill, wrongfully applying the measure of damages of unjust enrichment to the claim for *quantum meruit.* On May 10, 2013, Emory Hill filed its response to

Christiana Mall's motion to vacate the default judgment. (B6 Doc. 33.). The trial court heard oral argument on May 15, 2013. (B307.)

The trial court recognized that Christiana Mall did set forth a meritorious defense to the claim of *quantum meruit*. (B317-320 May 15, 2012 Tr.11:21-14:11). Although Christiana Mall had failed to meet its burden, the trial court granted Christiana Mall leave to supplement its original motion. (B320 May 15, 2012 Tr. 14:8-11). For the purpose of supplementing its motion, on June 6, 2013, Christiana Mall filed the affidavits of Steven Chambliss (B326) and Frank Francone. (B329-332).

The Chambliss and Francone affidavits, however, did nothing to support a meritorious defense to the claim of *quantum meruit* (*i.e.*, the value of the labor and materials furnished to the structure, not the retained value which is the measure of damages for unjust enrichment). Even after being granted leave from the Court to do so, Christiana Mall again failed to present any evidence of a meritorious defense to Emory Hill's claim of *quantum meruit*. (B342.)

On June 21, 2013, Emory Hill filed its supplemental response (B338) and, among other issues, addressed the failure of the affidavits of Steven Chambliss and Frank Francone to support a meritorious defense of *quantum meruit.* (B342). In its Reply, Christiana Mall abandoned its previous position that it had a valid defense to the claim of *quantum meruit* on the grounds that Christiana

Mall did not retain a benefit from the work, and asserted two new arguments. (B364, 368-369.) The two new arguments advanced by Christiana Mall were: (1) the existence of a contract between Emory Hill and Mr. Fruz, and (2) that the labor and materials were not furnished under circumstances where the owner would be expected to pay for them. (B364, 368-369.)

Notwithstanding that these additional arguments were waived by Christiana Mall for not asserting them in its original motion papers, or asserting them when the trial court granted Christiana Mall leave to do so, Christiana Mall's belated arguments are also without merit. First, although there was a contract between Emory Hill and Christiana Mall, there was no contract between Emory Hill and Christiana Mall for the labor and materials furnished. Delaware case law has recognized the right of a subcontractor to bring a claim of *quantum meruit* against an owner, despite the existence of a contact between the subcontractor and general contractor. *C&C Drywall v. Milford Lodging, LLC,* 2010 WL 1178233, *3 (Del. Super.)[11].

[11] In *C&C Drywall*, the plaintiff was permitted to pursue a claim a *quantum meruit* against the owner even though it had a contract with a subcontractor, but had no contract with the owner. *C&C Drywall,* 2010 WL 1178233 at *3. The critical question was that it had no ability to recovery against a contractor for which it had a direct contractual relationship. *Id.* Here, Emory Hill cannot recover against Mr. Fruz because the entity filed bankruptcy and it had no contractual relationship with Christiana Mall.

Moreover, Emory Hill furnished the labor and materials with the written permission of Christiana Mall and in accordance with its design criteria. (B194, 300, Lease Art. 2.). Emory Hill furnished the labor and materials with the understanding that if it did not get paid by Mr. Fruz that it would seek recovery from Christiana Mall. (B358 Liberato Aff. ¶4). If Christiana Mall did not pay, Emory Hill would assert a mechanics' lien against the structure. Christiana Mall offered no evidence to contradict the affidavit submitted by Robert Liberato. (*See Id.*)

Christiana Mall understood, as do all owners allowing labor and materials to be furnished to their properties with their written permission, that contractors can assert mechanics' liens against the structure if they are not paid for the work. In fact, under Delaware law, the mere furnishing of labor and material to a structure is *prima facie* evidence that the material and labor were furnished on the credit of the structure. *Sans v. McKnight Constr. Co.*, 304 A.2d 339 (Del. Super. 1973). Christiana Mall was on constructive notice of Delaware law.

Furthermore, the subcontract between Emory Hill and Mr. Fruz specifically contemplated mechanics' liens. (B304 Subcontract § A.4.2.5) Christiana Mall would have had a copy of the subcontract when it approved the contract specifications for the project pursuant to Article 2(d) of the Lease. (B195.) Notwithstanding that Christiana Mall waived these arguments by not

asserting them in its original motion papers, and when it had a second opportunity to supplement them, Christiana Mall still has not established a meritorious defense to the claim of *quantum meruit*.

V. THE TRIAL COURT COMMITTED LEGAL ERROR BY FAILING TO CONSIDER THE CONDUCT OF MR. FRUZ AS THE INDEMNITOR OF CHRISTIANA MALL IN ITS EXCUSABLE NEGLECT ANALYSIS.

1. Question Presented

Whether the trial court committed a legal error by not considering the conduct of Mr. Fruz as the indemnitor of Christiana Mall when finding excusable neglect on behalf of Christiana Mall, where Christiana Mall relied entirely on the indemnitor to protect its interests.

2. Scope of Review

The question as to whether the trial court should have also considered Mr. Fruz's conduct as the indemnitor of Christiana Mall when determining excusable neglect is a question of law for which this Court has *de novo* review. *State v. Kelly,* 2008 WL 187945 (Del.). **This question was preserved below in Emory Hill's Response (B257-62), Christiana's Reply (B366-68), Aug. 21, 2013 Hearing Tr. B338-89).**

3. Merits of the Argument

Christiana Mall relied completely on MRF Atlantic (d/b/a Mr. Fruz) to protect its interest in the Mechanics' Lien Action. Upon receiving the suit papers, Christiana Mall merely forwarded them to MRF Atlantic, relying completely on the indemnification provision of the Lease. The circumstances

here are no different than an insured forwarding suit papers to an insurer with the expectation that the insurer will defend and indemnify them. In these circumstances, however, the conduct of the indemnifying-insurer is also considered when determining excusable neglect.

The Delaware Supreme Court in *A Child's Dream, Inc. v. Mill* upheld the trial court's decision to deny a motion to vacate a default judgment where there was inexcusable neglect by the indemnifying-insurer, but no neglect on behalf of the insured. 765 A.2d 950 (Del. 2000). Thus, in determining excusable neglect pursuant to Rule 60(b), the indemnifying-insurer's conduct is considered, as well as the insured's when determining excusable neglect. *Watson v. Simmons*, 2009 WL 1231145, *3 (Del. Super.).[12]

MRF Atlantic (d/b/a Mr. Fruz) made no effort to defend Christiana Mall. Prior to taking default judgment, on December 11, 2012, counsel for Emory Hill notified Mr. Shafkowitz that Mr. Fruz must respond to the complaint on or before December 31, 2012 or risk a default judgment. (B288). In addition, counsel for Emory Hill also notified Mr. Shafkowitz that Christiana Mall never requested an extension of time and its response to the Complaint is past due.

---

[12] This Court noted that the trial court in *Williams v. Delcollo Elec., Inc.*, also considered the conduct of the indemnifying-insurer when determining whether excusable neglect was present. *A Child's Dream*, 765 A.2d at 950. Christiana Mall, however, failed to consider the conduct of Mr. Fruz when relying on *Williams v. Delcollo* in its papers below. (A26-A28).

(*Id.*) On January 16, 2013, Emory Hill sent a certified letter to Mr. Shafkowitz warning that default judgment was imminent. (B290-294.) Neither Mr. Fruz nor Christiana Mall answered the Complaint, and Emory Hill directed the Prothonotary to enter the default judgments. (B1-B3.)

The notice of the impending default judgments provided to Mr. Fruz should be imputed to Christiana Mall under the principles of *A Child's Dream, Inc*, 765 A.2d 950 (Del. 2000). Emory Hill should not have had to conduct a search to determine the identity of Christiana Mall's counsel, merely because Christiana Mall did not want to participate in the litigation. Because Christiana Mall delegated the responsibility of its defense to MRF Atlantic, the trial court should have also considered the conduct of MRF Atlantic when determining excusable neglect.

Under the circumstances, Christiana Mall's recourse should be limited to pursuing litigation against MRF Atlantic and its principal owner for failing to defend and indemnify Christiana Mall. It is my understanding that Christiana Mall has already pursued this litigation. Accordingly, this Court should overturn the trial court's finding of excusable neglect under the principles of *A Child's Dream, Inc.*

CONCLUSION

For the reasons stated herein, Emory Hill and Company respectfully requests that This Honorable Court affirm the trial court's finding of substantial prejudice and overturn and reverse the trial court's findings of excusable neglect and a meritorious defense for 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: February 6, 2014