

**IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI**

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.))
<i>Plaintiff</i>)
) Case No. 0816-cv-04217
vs.)
)
Novation, LLC <i>et al.</i> ,)
<i>Defendants</i>)

**PLAINTIFF’S OPPOSITION TO DEFENDANT
LATHROP & GAGE LLP’S MOTION TO DISMISS DEFENDANT ROBERT J. ZOLLARS**

Comes now the plaintiff Samuel K. Lipari appearing *pro se* and objects to the defendant Lathrop & Gage LLP’s motion to dismiss the defendant Robert J. Zollars. The plaintiff respectfully opposes the motion for the following reasons:

STATEMENT OF FACTS

1. Robert J. Zollars has consistently been represented by John K. Power of Husch Blackwell Sanders LLP, in this litigation under three other case numbers and in three concurrent jurisdictions.

2. Lathrop & Gage LLP has not represented Robert J. Zollars but their motion appears to be a general appearance on behalf of Robert J. Zollars.

3. Alternatively Lathrop & Gage LLP’s motion to dismiss Zollars is on behalf of the interest of Robert J. Zollars is contrary to the requirements of Rule 55.03 Signing Of Pleadings, Motions And Other Papers; Representations To Court in subsection (a) which states : “(a) Signature Required. Every pleading, motion, and other paper **shall be signed by at least one attorney of record** in the attorney’s individual name...” [emphasis added].

4. Robert J. Zollars has actual and constructive knowledge of the petition in this action which was served on his attorney John K. Power of Husch Blackwell Sanders LLP.

5. Husch Blackwell Sanders LLP is named as a defendant in this action with detailed averments of fact related to Husch Blackwell Sanders LLP’s hospital supply antitrust violations in this jurisdiction.

6. The plaintiff has not yet obtained any discovery and therefore has not yet received the information he is entitled to which will help him locate the hospital cartel’s co-conspirator Robert J. Zollars.

7. The plaintiff has vigorously sought to prosecute his claims without delay including those against Robert J. Zollars by trying to appeal the partial dismissals and amending his complaint.

8. Even before this court reacquired jurisdiction, Hon. Judge Michael W. Manners ordered the submission of the proposed amended complaint with a deadline of ten days (see **exhibit 1** attached order) that has made serving Zollars futile or premature because the court has not yet determined which petition he will have to respond to.

9. The petitioner is already the prevailing party in this action as a private attorney general enforcing the antitrust law under *Ellis v. University of Kansas MedicalCenter* 10thCir. Case No. 96-3343a 12/21/1998 when the Husch Blackwell Sanders LLP represented defendant hospital CoxHealth opened its procurement of hospital supplies to suppliers outside of the Novation LLC cartel.

10. Dismissing Zollars will result in another Missouri antitrust complaint being filed in the Independence court, an unnecessary use of the court and party's resources.

SUGGESTION IN OPPOSITION

The trial court had previously denied the plaintiff's request for relief from judgment to revise the partial order of dismissal under 74.01(b) to make the dismissal appealable. The trial court previously granted leave to amend the petition to include substantively the same facts as the proposed second amended petition. Under these same circumstances it would be an error to now dismiss the petitioner's cause of action:

"The logical effect of the trial court's granting leave to amend the petition was to revise the 1989 order to make it a dismissal of the petition only and not the action. This the court had authority to do under Rule 74.01(b). *Ward*, 844 S.W.2d at 473[2-3].

In its February 4, 1994, order, the trial court appears to have relied solely on the portion of our dismissal of Wilson's earlier appeal in which this court noted the operation of Rule 67.03 on the March 16, 1989, dismissal. *Wilson*, 791 S.W.2d at 499. What the trial court order overlooks is the latter portion of the Wilson opinion in which this court notes the potential for revision of the dismissal pursuant to Rule 74.01(b). 791 S.W.2d at 500."

Wilson v. Mercantile Bank of Springfield, 904 S.W.2d 44 at 49 (Mo. App. S.D., 1995)

The "failure to serve" one of many defendants with the initial petition is an erroneous basis for now dismissing the plaintiff's case of action. In *State ex rel. Labor and Industrial Relations Commission v. Elliston*, 779 S.W.2d 733 (Mo.App. S.D.1989), the Southern District court held:

"With rare exception, see *State ex rel. O'Reilly v. Kirkwood*, 407 S.W.2d 613 (Mo.App.1966), the appropriate relief for insufficiency of process or insufficiency of service of process is to quash the purported service of process. It is not to dismiss the action."

Elliston, 779 S.W.2d at 735. Accord: *Kennedy v. Empire Gas Co., Inc.*, 756 S.W.2d 945, 947-48 (Mo.App. S.D.1988); *Texas-Western Co. v. Giesecke*, 342 S.W.2d 266, 272 (Mo.App.1961).

“Under Missouri Rule of Civil Procedure 55.03(a), leave to amend a pleading ‘shall be freely given unless justice so requires.’” *DeMarr v. Kansas City, Mo., School Dist.*, 802 S.W.2d 537 at 541 (Mo. App.W.D., 1991).

Robert J. Zollars interest has been asserted by the defendant law firm Lathrop & Gage LLP’s motion which does not assert a legal basis for an absence of subject matter jurisdiction over Robert J. Zollars that would invalidate service of process and return of service under Missouri Rules of Civil Procedure. As such, Lathrop & Gage LLP’s motion to dismiss Robert J. Zollars is a general entry of appearance on behalf of Robert J. Zollars who is now a defendant under the jurisdiction of this court:

"As a general rule, a defendant makes a general appearance when he or she takes any part in the action or proceeding." (*In re Marriage of Fitzgerald & King* (1995) 39 Cal.App.4th 1419, 1428.) "A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act." (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756;”

706 Sansome Properties v. Fuchs, A117520 (Cal. App. 6/11/2008) (Cal. App., 2008).

Under Missouri precedent, Lathrop & Gage LLP’s motion to dismiss Robert J. Zollars is also a general entry of appearance:

“This brings us to the question of the effect of defendant's action in filing its claim for allowance thereof with the receiver. Plaintiff insists that its effect is that of a general appearance, while defendant is of contrary opinion. **1 Bouvier's Law Dict., p. 212, defines appearance as "a coming into court as a party to a suit, whether as plaintiff or defendant." The same authority classifies appearances as compulsory, conditional, de bene esse, general, etc. We need consider only general appearance under plaintiff's point mentioned. General appearance has been defined as "a simple and absolute submission to the jurisdiction of the court."** [Bouvier.] A general appearance waives all questions as to service of process and is equivalent to personal service; but it does not cure want of jurisdiction of the subject-matter. [*Wheelock v. Lee*, 74 N.Y. 495; *Railroad v. Loughmiller*, 193 Fed. 689.] It is not disputed that if defendant entered a general appearance in the District Court of ShawneeCounty, Kansas, in the receivership matter, he thereby gave that court jurisdiction to make a final and complete adjudication of any claim defendant might have against the property in the custody of that court or its proceeds.

We adopt the rule announced in *Zacher v. Trust Co.*, supra, together with the definition and character of a general appearance and hold defendant did not enter its appearance for the purpose of having its lien claim adjudicated by filing its claim for allowance of the product shipped.” [Emphasis added].

Davis v. Morgan Foundry Co., 23 S.W.2d 231 at 234-235 (Mo. App., 1929).

Clearly Robert J. Zollars had both actual notice and constructive notice of this action against him through both his attorney in the concurrent federal actions and has now made a general appearance by

Lathrop & Gage LLP's Motion to Dismiss seeking to join in the other defendants denial of amendment and dismissal of all claims. This motion transcends a limited appearance and acknowledges the court's subject matter jurisdiction over him if served.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 24th day of March , 2009, via email to:

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S/Samuel K. Lipari

Samuel K. Lipari