

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
for Use and Benefit of	:	
FRANCIS MCCOLLUM, et al.	:	NO. 98-2826
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DAWNCO CONSTRUCTION, et al.	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

March 16, 2000

Presently before this Court is Defendants Controlled Environmental, Inc.’s, Star Insurance Company’s, Jerry Ganz Inc.’s and Ohio Casualty’s (“Defendants”) Motions for Summary Judgment Pursuant to Fed.R.Civ.P. 56. For the reasons discussed below, Defendants’ Motion will be granted.

I. BACKGROUND

Six individual plaintiffs (“Plaintiffs”) brought this action for unpaid wages against nine defendant construction firms and three insurance companies (as sureties of the various payment bonds) for work performed at various locations. Plaintiffs allege that the construction firms were required to maintain payment bonds for each work site pursuant to the Miller Act, 40 U.S.C. § 270a et seq., the Pennsylvania Public Works Contractors’ Bond Law of 1967, 8 Pa.

Cons. Stat. Ann. § 191 et seq. (West Supp. 1998-1999), and other legal or contractual bases. See Am. Compl. ¶ 7 at 5. After performing services at the work sites, Plaintiffs were allegedly not paid. See Am. Compl. ¶ 18 at 6.

In the instant motion, Defendants contend at the outset that this Court lacks subject matter jurisdiction under the Miller Act. Arguably then, the lack of a federal anchor claim would render this Court without jurisdiction over the state law wage claim. In the alternative, Defendant argues that Plaintiffs are not payment bond beneficiaries and are therefore barred from making a claim on any payment bond that would have been required by the Miller Act. Furthermore, Defendant contends that Plaintiffs have no standing to recover under the payment bond posted pursuant to the PA Bond Law, as Plaintiffs are employees of Defendant Dawnco.

Plaintiffs respond by stating that this Court does have jurisdiction over this matter pursuant to Title 28 U.S.C. § 1352 and the Miller Act. In so arguing, Plaintiffs contend that the payment bonds at issue were executed “under law of the United States,” specifically, Title 24 C.F.R. § 968.135(b).

II. STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323

(1986). A factual dispute is “material” if it might affect the outcome of the case under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Additionally, an issue is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

On summary judgment, it is not the court’s role to weigh the disputed evidence and decide which is more probative; rather, the court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. See id. at 255. If a conflict arises between the evidence presented by both sides, the court must accept as true the allegations of the non-moving party. See id.

If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). In doing so, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence of the non-moving party is “merely colorable,” or is “not significantly probative,” summary judgment may be granted. Anderson, 477 U.S. at 249-50.

III. DISCUSSION

“In determining whether subject matter jurisdiction exists, a district court is not limited to the face of the pleadings. Rather, as long as the parties are given an opportunity to contest the existence of federal jurisdiction, the court ‘may inquire, by affidavits or otherwise, into the facts as they exist.’” Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 410 n.10 (3d

Cir. 1992) (quoting Land v. Dollar, 330 U.S. 731, 735 n.4 (1947)) (citations omitted). (E.D. Pa. 1973) (Bechtle, J.).

The Miller Act states in pertinent part:

§ 270a. Bonds of contractors of public buildings or works
(a) Type of bonds required
Before any contract, exceeding \$25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as “contractor”:

40 U.S.C. § 270a(a). The statute allows for a laborer or materialman working on a “public building or public work of the United States” to sue in federal court on the payment bond that § 270a(a) requires.

The Miller Act does not specifically define “public buildings or work of the United States,” however courts have stated that the typical Miller Act case is one in which “the United States both owns the land and the contracts for its improvement.” United States ex rel. General Electric Supply Co. v. United States Fidelity & Guaranty Co., 11 F.3d 577, 580 (6th Cir.1993) (no Miller Act jurisdiction where United States Court of Appeals for the Sixth Circuit found that the U.S. was only connected to the project as the funding source); United States ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc., 542 F.2d 262 (5th Cir.1976). Herein lies the crux of Defendants’ argument.

Plainly stated, Defendants contend that because none of the labor was performed on property owned by the United States, the Miller Act is inapplicable. Plaintiffs argue that as a public housing authority, the Philadelphia Housing Authority is “subject to the oversight and control” of the United States Department of Housing and Urban Development. Plaintiff contends

that such “oversight and control” is not a case of the United States merely providing funding, but rather taking an active and involved role in the operation of the Philadelphia Housing Authority. Therefore, Plaintiff concludes that the Philadelphia Housing Authority is a public work or public building of the United States.

Courts have held that, in order to maintain jurisdiction in federal court, the United States must, at a minimum, be a “contracting party and that a bond was required in its favor.” United States ex rel. Motta v. Able Bituminous Contractors, Inc., 640 F.Supp. 69, 71 (D.Mass.1986) (contractor entered into a written contract with the United States for highway construction, and bonds were issued pursuant to the Miller Act); United States ex rel. Miller v. Mattingly Bridge Co., 344 F.Supp. 459, 462 (W.D.Ky.1972)(no Miller Act jurisdiction when United States was not a party to contract and bonds did not run in favor of the United States).

In the case at bar, it is undisputed that the United States does not hold title to either the properties or the buildings involved. The parties do not dispute that the United States did not sign the contracts for the construction of the improvements to the buildings involved. It is undisputed that bonds were furnished and that the Miller Act requires that if the project is a public work of the United States, then a bond must be furnished. However, Plaintiffs have not provided any evidence to support the notion that the bonds were issued pursuant to the Miller Act. Plaintiffs filed an Amended Complaint that states a Miller Act claim on its face. However, simply because a bond was issued, the Court is not required to find that Miller Act jurisdiction exists.¹ See General Electric Supply Co., 11 F.3d at 582. Defendants provided the Court with

1. “The Miller Act requires that if the project is a public work, then the bond must be furnished. But just as the perfectly valid premise that all squirrels have tails does not lead to the conclusion that any animal with a tail is a
(continued...)

evidence that the projects at issue were not federally funded, and Plaintiffs are only able to respond that the United States' "oversight and control" of the Philadelphia Housing Authority provides the basis for Miller Act jurisdiction. This is simply not the case. Assuming arguendo, that the Philadelphia Housing Authority is subject to the oversight or control of the United States, this does not make the United States a party to the contracts. Therefore, I find that the Miller Act is inapplicable to the case sub judice and this Court lacks subject matter jurisdiction over this dispute under the Act.

Plaintiffs contend that pursuant to Title 28 U.S.C. § 1352, this Court has jurisdiction over any "action on a payment bond executed under any law of the United States," and because the contracts in the case at bar meet the requirements of 24 C.F.R. § 928.135(b), jurisdiction lies in this District Court. Plaintiffs claim that because this federal regulation requires a performance and payment bond for 100 percent of the contract price and the bonds met this requirement, subject matter jurisdiction exists. Defendants disagree and claim that the bonds were executed in compliance with the Pennsylvania state regulations that require that the prime contractor must furnish a performance bond and a payment bond, the latter being for 100 percent of the contract amount. 8 P.S. § 191.

Plaintiffs cite to Del Hur, Inc. v. Nat'l Union Fire Ins. Co., 94 F.3d 548 (9th Cir.1996), wherein the United States Court of Appeals for the Ninth Circuit held that because the payment bond was executed under section 905.170(a)--a federal regulation--the District Court

1. (...continued)

squirrel, so also the premise that all Miller Act projects must have bonds does not lead to the conclusion that any project with a bond is a Miller Act project. United States ex rel. General Electric Supply Co. v. United States Fidelity & Guaranty Co., 11 F.3d 577, 582.

properly exercised jurisdiction over the claim. Even though Defendants have not responded to this argument, I am not able to find the Ninth Circuit's decision to be persuasive, for the facts are dissimilar to those in the case at bar.

The Plaintiffs' Second Amended Complaint's Jurisdictional Count explicitly states that the within action was brought "pursuant to the Miller Act." The First Count of the Second Amended Complaint states that the Defendants were "required to maintain payment bonds for each work site pursuant to the Miller Act, 40 U.S.C. § 270a et seq., Public Works Contractors' Bond Law of 1967, 8 P.S. § 191 et seq. or other legal or contractual bases." The Second Amended Complaint further alleges that Defendants are "liable to the individual plaintiffs on the basis of the Miller Act, 40 U.S.C. § 270a et seq., Public Works Contractors' Bond Law of 1967, 8 P.S. § 191 et seq. or other legal or contractual bases."² In Del Hur, the Ninth Circuit found jurisdiction to exist in the district court because the bond was executed pursuant to Section 905.170(a). However, in the case at bar, the premise for jurisdiction was the bond requirements of the Miller Act.

In the Plaintiffs' Reply Brief in Opposition to Defendants' Motions for Summary Judgment, Plaintiff's introduce the argument above--that because Defendant Controlled Environmental, Inc. entered into a contract with the Philadelphia Housing Authority for the replacement of windows at the Paschall Homes in the amount of \$678,750, the payment and

2. The clause "other statutory bases" is vague and ambiguous and not a sufficient grounds for jurisdiction. The dispute between the parties has evolved from whether the bonds that were executed were done so pursuant to the Miller Act or the Pennsylvania Public Works Contractors' Bond Law, to whether the bonds were executed pursuant to federal regulations or Pennsylvania state law regulations.

performance bond was executed in satisfaction of 24 C.F.R. § 928.135(a)(1). This however, is entirely unsupported by the record.

Notwithstanding the fact that Plaintiffs have based their jurisdiction argument on the Miller Act, the record includes a Contract Bond that specifically references the Pennsylvania Public Works Contractors' Bond Law of 1967. Paragraph F of the Contract Bond states:

[r]ecover by any person, co-partnership, association, or corporation hereunder shall be subject to the provisions of the Act of December 20, 1967, P.L. 869, Act No. 385 (8 P.S. 191 et seq.), as amended, which Act is incorporated herein and made a part hereof, as fully and completely as though its provisions were fully and at length herein recited

Clearly, this Contract Bond was created to conform with the Pennsylvania Public Works Contractors' Bond Law and not the Code of Federal Regulations' Section 968.135(b), and Plaintiffs' Second Amended Complaint inherently suggests that. The fact that the bonds at issue were executed in a manner consistent with federal regulations does not automatically confer jurisdiction on this Court. Plaintiffs were afforded the opportunity to amend their Complaint, and in fact did so, only to add three additional defendants. Plaintiffs failed to cure the vague and ambiguous language (i.e., "other statutory bases") when given the opportunity to do so.³

Both sides have spent a great deal of time and effort on this jurisdictional issue, and it is clear that Plaintiffs sought federal jurisdiction under the Miller Act. The record reflects that the bonds were executed pursuant to Pennsylvania statutory requirements and not any federal

3. Under the "well-pleaded complaint" rule, the presence of federal question jurisdiction is determined solely by the allegations contained in the plaintiff's complaint. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 112-13, 57 S.Ct. 96, 97-98, 81 L.Ed. 70 (1936)); Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir.1997); Dukes v. U.S. Healthcare, 57 F.3d 350, 353 (3d Cir.), cert. denied, 516 U.S. 1009, 116 S.Ct. 564, 133 L.Ed.2d 489 (1995).

regulations. This Court is convinced that the Miller Act is inapplicable to this cause of action, and therefore, the case is dismissed.

Plaintiffs' remaining claims all find their substantive basis in state law. As there are no federal anchor claims upon which original subject matter jurisdiction may be exercised, this Court dismisses the pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3). See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir. 1990) (“the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court”).

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
for Use and Benefit of	:	
FRANCIS MCCOLLUM, et al.	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 98-2826
	:	
DAWNCO CONSTRUCTION, et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 16th day of March, 2000, upon consideration of Defendants' Motions for Summary Judgment (Docket Nos. 50 and 54), and Plaintiff's response thereto, it is hereby ORDERED that said Motions are GRANTED in accordance with the accompanying memorandum. This case may be marked CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.