

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.

September 22, 1998

Presently before this Court is Defendant Controlled Environmental, Inc.'s Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) and 12(b)(6) (Docket No. 4). Two days after Plaintiffs filed their opposition to the motion (Docket No. 5), they filed a First Amended Complaint and Jury Demand (Docket No. 6). Nothing in the amended complaint alters this Court's disposition of the pending motion and thus, the Court will consider Defendant's motion as being addressed to the amended pleading as well. For the reasons discussed below, Defendant's motion is DENIED without prejudice to renew.

I. BACKGROUND

Six individual plaintiffs brought this action for unpaid wages originally against nine defendant construction firms 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. The amended complaint only joins three additional defendants (all insurance companies) who were allegedly sureties of the various payment bonds. See Am. Compl. ¶ 8 at 5.

In the instant motion, Defendant Controlled Environmental, Inc. contends at the outset that this Court lacks subject matter jurisdiction under the Miller Act. See Def. Mem. at 4-5. Arguably then, the lack of a federal anchor claim would render this Court without jurisdiction over the state law wage claim. See id. at 5. In the alternative, Defendant argues that Plaintiffs fail to state a claim upon which relief can be granted because they are employees of a sub-contractor and therefore, are not protected by any payment bond maintained by Defendant. See id. at 6-7. Furthermore, Defendant contends that Plaintiffs are neither third-party beneficiaries of any contract into which Defendant entered, nor owed a contractual obligation to have wages paid to them by Defendant. See id. at 7-8.

II. DISCUSSION

Defendant's motion is denied on both grounds. "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). By contrast, in reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the district court must accept all well-pleaded allegations in the

complaint as true and view them in the light most favorable to plaintiffs. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). While a motion to dismiss may be treated as one for summary judgment if “matters outside the pleadings are presented to and not excluded by the court,” Fed. R. Civ. P. 12(b)(6), the court may not consider items of information presented in briefs or memoranda of law without presentation in affidavit form, see Kramer v. Scientific Control Corp., 365 F. Supp. 780, 786 (E.D. Pa. 1973) (Bechtle, J.).

With respect to this Court’s subject matter jurisdiction, the Miller Act pertains to the maintenance of payment bonds “for the construction, alteration, or repair of any public building or public work of the United States” 40 U.S.C. § 270a(a). While Defendant has submitted the Affidavit of Michael Fox in support of its jurisdictional argument, see Def. Mem. (Exhibit B thereto), this Court agrees with Plaintiffs that Defendant has failed to present sufficient factual information to deny the jurisdiction of this Court under the Miller Act.

With respect to the Fed. R. Civ. P. 12(b)(6) motion, Defendant’s contentions are dependent on numerous factual allegations concerning Plaintiffs’ employment status and the various alleged construction contracts. These matters are outside the boundaries of the complaint and are only presented to the Court in Defendant’s memorandum of law. Exclusion of these matters from the Court’s consideration warrants denial of the relief requested.

For the foregoing reasons, Defendant’s motion is DENIED without prejudice to renew. An appropriate order follows.

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.	:	

ORDER

AND NOW, this 22nd day of September 1998, upon consideration of Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) and 12(b)(6) (Docket No. 4) and Plaintiff's response thereto (Docket No. 5), it is hereby ORDERED that Defendant's motion is DENIED without prejudice to renew, in accordance with the accompanying memorandum.

BY THE COURT:

RONALD L. BUCKWALTER, J.