

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

THE UNITED STATES for the use of : CIVIL ACTION
J.D.M. MATERIALS CO. :
 :
 :
 v. :
 :
 :
 FIREMAN'S FUND INSURANCE COMPANY : No. 98-CV-5186

M E M O R A N D U M

Ludwig, J.

February 3, 1999

Defendant Fireman's Fund Insurance Company moves to dismiss the amended complaint of plaintiff J.D.M. Materials Company. Fed. R. Civ. P. 12(b)(6).¹ Jurisdiction is federal question, 28 U.S.C. § 1331, which is exclusive in actions under the Miller Act, 40 U.S.C. § 270b(b).

This Miller Act action is by a subcontractor's supplier to enforce a claim for \$16,276.40 against a payment bond. 40 U.S.C. § 270a (1998). By order of December 17, 1998 defendant's motion to dismiss the original complaint was granted because of plaintiff's non-compliance with the Miller Act's notice and limitations requirements. Plaintiff's contention that these time requirements should be extended under the doctrine of equitable estoppel was rejected. On January 4, 1999, plaintiff filed an amended

¹Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle her to relief. Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997). Here, the issue – which involves equitable tolling – may be made under Rule 12(b)(6) because both parties rely solely on the complaint. See Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997) (once a party goes "beyond the face of the pleadings, the district court should . . . treat[] the issue of equitable tolling in a manner consistent with Rule 56").

complaint, as permitted by the dismissal order. Plaintiff now maintains that the time requirements are satisfied under the doctrine of equitable tolling.

To recapitulate the allegations of the amended complaint, J.A. Jones Management Services, Inc. was the prime contractor for the U.S. Navy's Communications Center Project, at Philadelphia, PA. Am. compl. ¶¶ 5, 11. Between July 1, 1997 and September 24, 1997, plaintiff supplied concrete materials to Brosius Construction Consultants, Inc., a subcontractor. Id. ¶ 4. On November 13, 1997, having not been paid, plaintiff asked the Navy for payment bond information. Id. ¶ 6. On November 17, 1997,² the Navy's project manager mistakenly advised plaintiff that Brosius was the prime contractor. Id. ¶ 7. As a result, plaintiff served its claim on Brosius, the wrong entity for such notice. Id. ¶ 8.

Sometime after January 15, 1998 plaintiff learned the identity of the prime contractor, and on February 19, 1998, filed a proof of claim with J.A. Jones at Jones' request. Id. ¶¶ 11, 14, 15. Eventually, on August 26, 1998, after considerable effort, plaintiff obtained a copy of the payment bond. Id. ¶ 15, 20, 21, 23, 24. On September 30, 1998, despite uncertainty as to the correct project contract number, plaintiff commenced this action. Id. ¶¶ 25-27, 30, 32.

Relative to a construction contract with the United States, the Miller Act requires the prime contractor to obtain a bond "for

²It is apparent that the date in the complaint – November 17, 1998 – is a typographical error. Am. compl. ¶ 7.

the protection of all persons supplying labor and material." 40 U.S.C. § 270a(a)(2) (1998). The Act has been construed liberally "to protect those whose labor and materials go into public projects." J.W. Bateson Co. v. United States ex rel. Board of Trustees of Nat. Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 594, 98 S.Ct. 873, 877-78, 55 L.Ed.2d 50 (1978).

Under the Act, the right to recover is subject to three important conditions on the right to recover. First, "a Miller Act bond's coverage is limited to 'first-tier' subcontractors . . . and those who contract with them." Ragan v. Tri-County Excavating, Inc., 62 F.3d 501, 509 (3d Cir. 1995) (citing J.W. Bateson, 434 U.S. at 594, 98 S.Ct. at 877-78). Second, a sub-subcontractor with no contractual relationship with the contractor must give the prime contractor notice of the claim within ninety days after the completion of its work. See 40 U.S.C. § 270b(a). A third restriction is that no suit "shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied." 40 U.S.C. § 270b(b).

Conceding that it did not comply with the limitations or notice requirements, plaintiff urges that these time constraints should be equitably tolled.

"Time limitations analogous to a statute of limitations are subject to equitable modifications such as tolling On the other hand, when a time limitation is considered jurisdictional, it cannot be modified and non-compliance is an absolute bar." Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 617-18 (3d

Cir. 1998); see also Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 504 (3d Cir. 1998) (equitable doctrines are "read into every federal statute of limitation"). The law in our Circuit based on a 1958 decision is that the Miller Act's one-year limitations period is jurisdictional. See United States ex rel. Soda v. Montgomery, 253 F.2d 509, 512 (3d Cir. 1958). More recent holdings by the 5th, 6th, and 10th Circuits would analogize the Miller Act time bar to a statute of limitations. See United States ex rel. Skip Kirchdorfer, Inc. v. M.J. Kelley Corp., 995 F.2d 656, 659 (6th Cir. 1993); United States ex rel. Bernard Lumber Co. v. Lanier-Gervais Corp., 896 F.2d 162, 164 (5th Cir. 1990); United States ex rel. Nelson v. Reliance Ins. Co., 436 F.2d 1366, 1370 (10th Cir. 1971). However, even if our Court of Appeals were to overturn Soda,³ plaintiff has not met the criteria for equitable tolling in this case.

Our Court of Appeals has cautioned that equitable tolling must be used sparingly.⁴ Seitzinger v. Reading Hosp. & Med. Ctr., _____

³A district court has no authority to reject a doctrine developed by a higher court unless subsequent events "make it almost certain that the higher court would repudiate the doctrine if given a chance to do so." Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986). But see Brusstar v. Southeastern Transp. Auth., 636 F. Supp. 1557, (E.D. Pa. 1986) (Luongo, C.J.) ("I am not free to reconsider or reject the Third Circuit's holding in Kramer. Kramer remains the law of this circuit unless or until it is overruled.").

⁴The cases in which equitable tolling has been allowed in other Circuits are not comparable to plaintiff's claim. See, e.g., Skip Kirchdorfer, 995 F.2d at 660 (filing Miller Act claim in wrong court resulted in equitable tolling of limitations period because proper venue and jurisdiction in this case were "ill-defined"); Bernard Lumber, 896 F.2d at 169 (supplier excused from limitations

F.3d ____ (3d Cir. 1999).

Equitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed. We have instructed that there are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994) (citations omitted); see also Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997). Plaintiff must also show that it "exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." Miller, 145 F.3d at 619-20 (alteration in original) (citations omitted).

Here, defendant is not alleged to have misled plaintiff and plaintiff did not file its claim in the wrong forum. Plaintiff's sole contention is that it was prevented from asserting its rights because parties other than defendant hindered its identification of the prime contractor and the issuer of the surety bond.

Viewed most favorably to plaintiff, the complaint does not set forth that the belated filing of plaintiff's claim can be attributed to misinformation or to being misled by others. No

period because it was forbidden by court injunction from initiating litigation); United States ex rel. T.L. Wallace Constr., Inc. v. Fireman's Fund Ins. Co., 790 F. Supp. 680, 685 (S.D. Miss. 1992) (holding equitable tolling inapplicable where supplier was required to provide remedial work past the completion of the project).

doubt some of the filing delay was beyond plaintiff's control. The Navy, the contractor, and the subcontractor did not readily provide information regarding the payment bond. Am. compl. ¶¶ 6, 10, 14, 15, 20, 21, 23. Were the delay solely the fault of third-parties, equitable tolling might be appropriate. Here, however, plaintiff itself was responsible for much of the delay. Less than two months following the supply of plaintiff's materials, plaintiff attempted to find out about the payment bond. Id. ¶¶ 4, 6. Three months later, it correctly filed a proof of claim with J.A. Jones, and then waited another three months to resume its search for bond information. Id. ¶¶ 15, 17, 20. Moreover, plaintiff obtained a copy of the payment bond and learned the identity of the surety before the limitations period had run. Id. ¶ 24. Even if plaintiff encountered extraordinary difficulties in this process, it still had twenty-seven days to file the claim. It did so, belatedly, on the thirty-fifth day. See J.W. Bateson, 434 U.S. at 594, 98 S.Ct. at 878. (Miller Act's liberal construction "does not justify ignoring plain words of limitation.").

Plaintiff presents a more compelling case to excuse its untimely notice to the prime contractor but does not show that it exercised reasonable diligence. Plaintiff was required to inform the contractor as to "the amount claimed and the name of the party to whom the material was furnished" within ninety days after supplying the concrete materials. 40 U.S.C. § 270b(a). That plaintiff initially notified the wrong party may be understandable under these circumstances - albeit the identity of the prime

contractor should have been a simple matter to verify. Nevertheless, plaintiff did not file its proof of claim with Jones until requested to do so, am. compl. ¶ 15, even though it had previously become aware that Jones was, indeed, the prime contractor. Id. ¶ 11. Here, again, not all of the delay can be attributed to third parties.

Where a plaintiff has not shown that it was prevented from asserting its rights, limitations periods must be strictly enforced. "Statutes of limitation serve vital social interests . . . [including] preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities." Central States Pension Fund v. NAVCO, 3 F.3d 167, 172 (7th Cir. 1993); see also United States ex rel. Kinlau Sheet Metal Works, Inc. v. Great Am. Ins. Co., 537 F.2d 222, 223 (5th Cir. 1976) (purpose of notice requirement is to protect the general contractor by fixing a date beyond which he will not be liable for subcontractor's debts).

Accordingly, the amended complaint does not state a claim upon which relief can be granted, and this action will be dismissed.

Edmund V. Ludwig, J.

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

THE UNITED STATES ex rel. : CIVIL ACTION
J.D.M. MATERIALS CO. :
 :
v. :
 :
FIREMAN'S FUND INSURANCE COMPANY : No. 98-CV-5186

O R D E R

AND NOW, this 3rd day of February, 1999, defendant Fireman's Fund Insurance Company's motion to dismiss the complaint is granted. Fed. R. Civ. P. 12(b)(6).

A memorandum accompanies this order.

Edmund V. Ludwig, J.