

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**UNITED STATES OF AMERICA f/b/o)
IRVING EQUIPMENT, INC.,)**

Plaintiff)

v.)

Docket No. 05-215-P-S

JAMES N. GRAY CO., et al.,)

Defendants)

**RECOMMENDED DECISION ON MOTION OF DEFENDANTS JAMES N. GRAY CO.
AND TRAVELERS CASUALTY AND SURETY CO. TO DISMISS OR FOR SUMMARY
JUDGMENT**

James N. Gray Co. (“Gray”) and Travelers Casualty and Surety Co. (“Travelers”), two of the three named defendants in this action, move to dismiss Counts I and II of the complaint, the only counts asserted against either or both of them, or, in the alternative, for summary judgment on those counts. Defendants James N. Gray Co. and Travelers Casu[al]ty and Surety Co.’s Motion to Dismiss, or in the Alternative, for Summary Judgment, etc. (“Motion”) (Docket No. 8). I recommend that the court deny the motion to dismiss but grant the motion for summary judgment.

I. Motion to Dismiss

A. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6), which provides for dismissal upon failure to state a claim on which relief may be granted. Motion at 1. “[I]n ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable

inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff[s] would not be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

B. Factual Background

The complaint alleges the following relevant facts. Gray entered into a contract with an agency of the United States to construct additions to and perform alterations upon Hangar 6 at the Brunswick Naval Air Station in Brunswick, Maine. Complaint (Docket No. 1) ¶ 3. On September 26, 2003, Gray, as principal, and Travelers, as surety, executed a payment bond to the United States binding themselves jointly and severally in the amount of \$7,958,000.00. *Id.* ¶ 4. Thereafter, Gray entered into a contract with Irving Equipment, Inc. (“the plaintiff”) for certain subcontracting work to be performed at Hangar 6. *Id.* ¶ 6. Defendant Irish Settlers, acting as a subcontractor of Gray, asked the plaintiff to supply certain labor, materials and equipment for use in repair work being performed on Hangar 6. *Id.* ¶ 7. From December 2004 through February 2005 the plaintiff provided construction labor, materials and equipment to Irish Settlers for use in that work. *Id.*

Irish Settlers and Gray have failed to pay the plaintiff the sum of \$17,740.00, which is the amount due for the materials, equipment and labor so supplied by the plaintiff. *Id.* ¶ 8. The plaintiff has complied with all of the requirements of the Miller Act to perfect a right of action under the payment bond. *Id.* ¶ 9. Formal notice of the claim dated May 12, 2005 was served on Gray via certified mail. *Id.*

Gray, in its capacity as general contractor on the project, accepted labor, materials and equipment from the plaintiff. *Id.* ¶ 13. Gray knew or should have known that the plaintiff expected to be paid for these services and materials. *Id.* ¶ 14.

C. Discussion

The moving defendants contend that they are entitled to dismissal of Count I because the Miller Act, which the parties agree applies to this claim, requires that a claimant serve notice within 90 days after the day on which the claimant did or performed the last of labor or furnished or supplied the last of the material for which the claim is made, and in this case the required notice was served 93 days after that date. Motion at 4. The applicable statute provides, in relevant part:

(1) In general. — Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

(2) Person having direct contractual relationship with a subcontractor. — A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made.

40 U.S.C. § 3133(b)(1) – (2). The moving defendants contend that the “complaint alleges that [the plaintiff] last ‘performed labor’ or ‘furnished material’ for the Project on February 8, 2005,” and that service of the notice of claim on May 12, 2005, Complaint ¶ 9, 93 days after that date, was untimely, Motion at 4. However, the complaint does not allege any specific date on which the plaintiff last performed labor or supplied material on the project. Accordingly, it is not possible to determine for purposes of the

motion to dismiss when the 90-day period would have expired. The motion to dismiss Count I should be denied.

With respect to Count II, the moving defendants argue that the plaintiff “has failed to show all of the elements necessary to state a claim for unjust enrichment under Maine law.” Motion at 8. A claim for unjust enrichment under Maine law, which is applicable to Count II, has the following elements:

- (i) [the plaintiff] conferred a benefit on the defendant; (ii) the defendant had appreciation or knowledge of the benefit; and (iii) the defendant’s acceptance or retention of the benefit was under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Glenwood Farms, Inc. v. Ivey, 228 F.R.D. 47, 52 (D. Me. 2005). The complaint appears to allege all of these elements in Count II, which is asserted only against Gray. Complaint ¶¶ 12-15. The moving defendants argue only in terms of what the plaintiff must “show,” relying on facts not included in the complaint. Motion at 8-12. Such a presentation addresses the standard applicable to a motion for summary judgment; it is not appropriate for consideration of a motion to dismiss. The motion to dismiss Count II should be denied.

II. Motion for Summary Judgment

A. Applicable Legal Standard

1. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is

such that a reasonable jury could resolve the point in favor of the nonmoving party.” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

2. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each

denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted." (citations and internal punctuation omitted)).

B. Factual Background

The statements of material facts submitted by the parties pursuant to Local Rule 56 include the following undisputed material facts.

Gray entered into Contract No. N62472-01-D-0073 (the "Contract") with the United States Department of the Navy. Defendants James Gray Co. [sic] and Travelers Casualty and Surety Co.'s

Statement of Material Facts Not in Dispute (“Defendants’ SMF”) (Docket No. 9) ¶ 1; Plaintiff’s Opposition to Defendants James N. Gray Co. and Travelers Casualty and Surety Company’s Statement of Material Facts, etc. (“Plaintiff’s Responsive SMF”) (Docket No. 17) ¶ 1. Under the Contract, Gray performed construction work at various naval installations including Hangar 6 at Brunswick Naval Air Station in Brunswick, Maine (the “Hangar 6 Project”) and the RATC Center and Control Tower at the same location (the “Tower Project”). *Id.* Gray was awarded separate task orders under the Contract for the Hangar 6 Project on or around June 21, 2002 and for the Tower Project on or around September 26, 2003. *Id.* ¶ 2.

On September 26, 2003 Gray and Travelers executed a payment bond, number N63472-01-D-0073 (the “Bond”) to the Department of the Navy for work on the Tower Project. *Id.* ¶ 3. Gray entered into a subcontract with Kirt A. Newton, d/b/a Irish Settlers (“Irish Settlers”) for certain work to be performed on the Tower Project. *Id.* ¶ 4. Gray did not enter into a subcontract with Irish Settlers for work on the Hangar 6 Project. *Id.* ¶ 5. The agreement concerning the Tower Project involved the supply of certain labor and materials, including an 82-ton crane. *Id.* ¶ 6. The plaintiff issued a quote for the rental of the crane for use at the Tower Project to Irish Settlers. Plaintiff’s Statement of Additional Material Facts (“Plaintiff’s SMF”) (included in Plaintiff’s Responsive SMF, beginning at [2]) ¶ 1; Defendants James N. Gray Co.’s and Travelers Casualty and Surety Co.’s Reply to Plaintiff Irving Equipment Inc.’s Statement of Additional Facts (“Defendants’ Responsive SMF”) (Docket No. 25) ¶ 1. The plaintiff agreed to provide the crane and crane operators at a certain price for a minimum period of two weeks. *Id.* ¶ 3. The agreement was to be extended on an as-needed basis until the project was finished and the crane was no longer needed. *Id.* ¶ 4. Invoices were typically sent every four weeks. *Id.* ¶ 6. Irish Settlers was charged for the equipment based on the time it was actually operated by one of the operators supplied by the

plaintiff. *Id.* ¶ 7. The crane was last operated by an Irving Equipment operator on February 8, 2005. *Id.* ¶ 9. Although the crane was not used at the Tower Project worksite after February 8, 2005, the plaintiff alleges that it remained at the worksite until February 17, 2005 at the request of Irish Settlers. Defendants’ SMF ¶ 9; Plaintiff’s Responsive SMF ¶ 9. Prior to that date, the plaintiff understood that the project was not finished and the crane was still needed. Plaintiff’s SMF ¶ 15; Defendants’ Responsive SMF ¶ 15. An invoice was sent on February 23, 2005 charging Irish Settlers for operation of the crane through February 8 because that was the last day an operator was provided. *Id.* ¶ 17.

The plaintiff has not been paid in full for the rental of the crane. *Id.* ¶ 19. The plaintiff alleges that the amount still due for materials and equipment it provided for the Tower Project is \$17,740.00. Defendants’ SMF ¶ 11; Plaintiff’s Responsive SMF ¶ 11. The plaintiff provided formal notice of its claim to Gray by certified mail dated May 12, 2005. *Id.* ¶ 12. The plaintiff does not allege that it had a direct contractual relationship with either Gray or Travelers. *Id.* ¶ 13.

C. Discussion

1. Count I.

As the First Circuit has observed,

[t]he Miller Act requires a general contractor performing a contract . . . on any public construction project to obtain a performance bond for the protection of persons supplying labor and material in the prosecution of the work on the project. *See* 40 U.S.C. § 270a(a)(2).¹ The Act provides that persons who have “furnished labor or material” to a public project may sue to recover from the payment bond any amount owed to them. *Id.* § 270b(a).²

The purpose of the Miller Act is “to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection

¹ Now 40 U.S.C. § 3131.

² Now 40 U.S.C. § 3133.

they might receive under state statutes with respect to the construction of nonfederal buildings. *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216 . . . (1957); *see also United States ex rel. Pittsburgh Tank & Tower, Inc. v. G & C Enterprises, Inc.*, 62 F.3d 35, 35 (1st Cir. 1995) (same). Courts give the Act a liberal interpretation to achieve that purpose. *See, e.g., Carter*, 353 U.S. at 216 . . . ; *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 . . . (1944).

Despite the “highly remedial” nature of the Act, *MacEvoy*, 322 U.S. at 107 . . . , there are two important limitations on who can recover from the payment bond. First, the Miller Act allows recovery from the bond by persons who have a “direct contractual relationship” with either the general contractor or a first-tier subcontractor of the general contractor. 40 U.S.C. § 270b(a).

* * *

Second, the Act imposes a strict notice requirement upon suppliers who have a direct contractual relationship with a first-tier subcontractor, but no relationship with the general contractor. In order to recover from the payment bond, such suppliers must send written notice of their claim on the payment bond to the general contractor within ninety days from the date that they supply the last of the materials for which they make a claim.

United States ex rel. Water Works Supply Corp. v. George Hyman Constr. Co., 131 F.3d 28, 31-32 (1st Cir. 1997). It is the application of this notice requirement that is at issue here. The defendants contend that February 8, 2005 was the date on which the plaintiff last performed labor or furnished material, making the notice dated May 12, 2005 untimely. Motion at 4-8. The plaintiff asserts that the correct date is February 17, 2005, when the crane was removed from the worksite, making the notice timely. Plaintiff’s Opposition to Defendants’ Motion to Dismiss or in the Alternative, for Summary Judgment, etc. (“Opposition”) (Docket No. 18) at [7]-[8].³

The plaintiff relies, *id.* at [3]-[6], on case law from other jurisdictions involving the rental of equipment, *e.g., United States ex rel. Pippin v. J.R. Youngdale Constr. Co.*, 923 F.2d 146 (9th Cir.

³ Counsel for the plaintiff is reminded that this court’s Local Rule 7(e) requires all memoranda of law to be submitted on numbered pages.

1991) (plaintiff supplied equipment and personnel to subcontractor which left project; after ten days, general contractor terminated subcontractor; court held that 90-day period began to run on date of termination because equipment remained available for use until that date, relying on case law dealing with rented or leased equipment); *Mike Bradford & Co. v. F.A. Chastain Constr., Inc.*, 387 F.2d 942 (5th Cir. 1968) (equipment was rented to plaintiff by defendant, which supplied operators for it; where return of equipment entirely up to plaintiff, limitation period began to run only when it was returned); *United States ex rel. Malpass Constr. Co. v. Scotland Concrete Co.*, 294 F. Supp. 1299 (E.D.N.C. 1968) (90-day notice period for rental equipment begins to run from date on which equipment was last available for use).

There are two problems with the plaintiff's argument. First, the undisputed facts submitted by the parties appear at first blush to be in conflict on the question whether the means by which Irving provided labor and materials to Irish Settlers was a rental contract or a contract for services. Compare Defendants' SMF ¶ 6, Plaintiff's Responsive SMF ¶¶ 6-7 ("Irving billed Irish Settlers for the use of the equipment based upon the dates of operation. Irving did not bill Irish Settlers for dates the crane was available for Irish Settlers' use on the project if it was not physically being operated with labor supplied by Irving."); Plaintiff's SMF ¶¶ 3-6, Defendants' Responsive SMF ¶¶ 3-6 ("Irish Settlers was charged for the equipment based upon the time it was actually operated by one of the operators supplied by Irving Equipment.") with Plaintiff's SMF ¶ 1, Defendants' Responsive SMF ¶ 1 ("Irving issued a quote for the *rental* of a crane to Kirt A. Newton d/b/a Irish Settlers" (emphasis added)). I conclude, however, that there is no such conflict because the latter cited paragraph of the plaintiff's statement of material facts asserts only that a quoted price was issued for the potential rental of the crane, not that the unwritten agreement which ensued was in fact a rental, and because none of the other agreed facts, or facts asserted by the plaintiff, is consistent with the characterization of the arrangement as a lease or rental of the crane. See generally

Crane Serv. & Equip. Corp. v. United States Fid. & Guar. Co., 496 N.E.2d 833, 835 (Mass. App. 1986) (reference to contractual arrangement as “lease” or “rental” does not dictate its true nature; dispositive factors are possession and control; where only plaintiff’s employees operated, maintained and secured crane, contract was one for service rather than rental).

The second problem is that the plaintiff’s argument rests primarily on paragraphs 10-15 of its statement of material facts. Opposition at [2], [7]. Paragraphs 10-11 and 14 are critical to the plaintiff’s argument. The moving defendants have objected to those paragraphs on the ground of hearsay, Defendants’ Responsive SMF ¶¶ 10-11, 14, and those objections are well-taken. The paragraphs are based on the affidavit of Fred W. Hamilton, in which he reports statements allegedly made by Kirt Newton of Irish Settlers. Such statements of Newton, a third party, are presented for the truth of the matter asserted, which is the definition of hearsay. Fed. R. Evid. 801(c). The plaintiff did not seek leave to respond to the objections, so no exception to the hearsay rule is at issue. Accordingly, the court cannot consider the plaintiff’s argument to the extent that it is based on those paragraphs of its statement of material facts.

The plaintiff’s argument begins with the assertion that “[t]he Miller Act is highly remedial in nature,” and quotes *Malpass*, a 1968 case from the District of North Carolina, to the effect that the Act should be liberally construed. Opposition at [3]-[4]. As noted above, the First Circuit has used the term “highly remedial” in discussing the Miller Act, but the plaintiff’s presentation ignores the caveat with which the First Circuit immediately follows its use of that term: the notice requirement is “strict.” The First Circuit holds that the 90-day notice requirement “is a strict condition precedent to the existence of any right of action upon the principal contractor’s bond.” *United States ex rel. John D. Ahern Co. v. J. F. White Contracting Co.*, 649 F.2d 29, 31 (1st Cir. 1981). In *Ahern*, the plaintiff notified the subcontractor with which it had an

agreement to sandblast and paint lock gates to be installed by the subcontractor of its claim within 90 days of the termination of the agreement between the parties but 150 days after the plaintiff had suspended its work on the site. *Id.* at 30. The plaintiff contended that the 90-day period did not begin to run until the date on which the agreement was terminated. *Id.* at 31. The First Circuit's holding is instructive for the purposes of the instant motion. It said:

Any person having a direct contractual relationship with a subcontractor must file a claim within ninety days of the date on which it last physically worked or supplied materials, regardless of the expectations of the parties or the circumstances surrounding the termination of work.

Id. This precedent controls the actions of this court. Even if the hearsay evidence submitted by the plaintiff could be considered, *Ahern* requires in this case that the 90-day period for notice under the Miller Act run from February 8, 2005, the date on which the plaintiff's crane was last "supplied" or on which its employees physically worked.

The motion for summary judgment on Count I should be granted.

2. Count II.

Count II alleges unjust enrichment against Gray. Complaint ¶¶ 12-15. The moving defendants contend that the plaintiff will not be able to submit evidence on all of the elements of such a claim under Maine law. Motion at 8-12. The parties appear to agree that Maine law applies to this claim. *See also United States ex rel. Arlmont Air Condition Corp. v. Premier Contractors, Inc.*, 283 F. Supp. 343, 348 & n.7 (D. Me. 1968) (considering under Maine law *quantum meruit* claim brought in Miller Act action).

As noted earlier, under Maine law,

[i]n order to establish a claim for unjust enrichment . . . , a plaintiff must prove that (i) it conferred a benefit on the defendant; (ii) the defendant had appreciation

or knowledge of the benefit; and (iii) the defendant's acceptance or retention of the benefit was under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Glenwood Farms, 228 F.R.D. at 52. Specifically, Gray asserts that the plaintiff will be unable to establish the third element of the claim because "Gray has fully paid its subcontractor, Irish Settlers, for the value of labor and material furnished to the Project in accordance with the Gray-Irish Settlers subcontract." Motion at 9. Gray cites paragraph 14 of its statement of material facts in support of this assertion. *Id.*

That paragraph asserts that "Gray has fully paid Irish Settlers all sums due for labor and material furnished to the Project under the terms of the Gray-Irish Settlers subcontract." Defendants' SMF ¶ 14.

The plaintiff's response to this paragraph states, in full:

Unknown. Irving understands that James N. Gray Co. has not paid Irish Settlers in full for all sums due under the project. (Affidavit of Fred W. Hamilton, attached to Plaintiff's Statement of Material Facts).

Plaintiff's Responsive SMF ¶ 14. This response fails to comply with Local Rule 56(c), which requires each numbered response to a moving party's statement of material facts to begin with the designation "Admitted," "Denied," or "Qualified." The response also fails to comply with Local Rule 56(f), which requires that the record citation given in support of a response be to the specific page or paragraph of the cited material. Since the plaintiff's response fails to indicate which of the 22 paragraphs of the affidavit of Mr. Hamilton supports its assertion, this court may disregard the response entirely. Local Rule 56(f).

Even if the court were to consider the plaintiff's response and were to deem it a denial, the plaintiff has failed to controvert the moving defendants' factual assertion. The moving defendants have objected to the response as hearsay. Defendants James N. Gray Co.'s and Travelers Casualty and Surety Co.'s Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss, etc. ("Reply") (Docket No. 24) at 6. The only paragraph of the cited affidavit which may reasonably be read to support the response provides:

I do not know whether James N. Gray Co. has paid Kirt Newton for the equipment; Kirt Newton has told me he has not been paid in full by James N. Gray Co.

Affidavit of Fred W. Hamilton (“Hamilton Aff.”) (Attachment 1 to Docket No. 17) ¶ 19.⁴ The second sentence of this paragraph, the one which supports the plaintiff’s response, is clearly hearsay and therefore will not be considered.

Under these circumstances, Local Rule 56(f) directs the court to deem Paragraph 14 of the defendants’ statement of material facts admitted “if supported by record citations as required by this rule.” The moving defendants cite Paragraph 5 of the Declaration of Forrest Miller in support of that paragraph. Defendants’ SMF ¶ 14. That paragraph of the declaration provides:

Gray has paid Irish Settlers all sums due it for work performed on, and labor and material furnished to, the Tower Project in accordance with the Gray-Irish Settlers subcontract agreement

Declaration of Forrest Miller (Attachment 1 to Docket No. 9) ¶ 5.⁵

Given the fact that Gray has paid Irish Settlers all that was due for the work done by the plaintiff as a subcontractor to Irish Settlers, it is difficult to see how the plaintiff can show that Gray’s acceptance or retention of the plaintiff’s labor and material was inequitable, since it has made “payment of its value.” The plaintiff asserts that “[p]ayment by the general contractor to the subcontractor does not preclude a claim under the Miller Act,” citing *United States ex rel. Lincoln Elec. Prods. Co. v. Greene Elec. Serv. of*

⁴ The affidavit recites that it is “based upon my personal knowledge, information and belief, and where based upon information or belief, I believe the information to be true.” Hamilton Aff. at 3. All affidavits submitted in connection with a motion for summary judgment must be made only on personal knowledge. Fed. R. Civ. P. 56(e).

⁵ Miller’s declaration suffers from the same failure to comply with Fed. R. Civ. P. 56(e) as does the Hamilton affidavit. However, it is clear from the declaration as a whole that Miller has personal knowledge of the facts stated in paragraph 5. See *Murray v. Bath Iron Works Corp.*, 867 F.Supp. 33, 38 n.5 (D. Me. 1994).

Long Island, Inc., 252 F. Supp. 324 (E.D.N.Y. 1966).⁶ Opposition at [8]. What is at issue here, however, is not a claim under the Act. It is a state-law claim against Gray. The plaintiff goes on to argue that Gray “could have protected itself” against having to pay twice for the work by requiring the plaintiff to furnish a bond. *Id.* Gray had no need to do so because it had obtained a payment bond against which Irish Settlers’ subcontractors, like the plaintiff, could make timely claims if they were not paid for their work. The state-law claim against Gray is separate and distinct from the Miller Act claim against Gray and Travelers, its surety, as a matter of law. It is only the state-law claim that is at issue here. The plaintiff is not left without a remedy, assuming that it cannot recover from Irish Settlers, provided it complies with the terms of the Miller Act.

Defendant Gray is entitled to summary judgment on Count II. *See generally Pendleton v. Sard*, 297 A.2d 889, 895 (Me. 1972).

III. Conclusion

For the foregoing reasons, I recommend that the motion of defendants James N. Gray Co. and Travelers Casualty and Surety Co. to dismiss be **DENIED** and that their motion for summary judgment on Counts I and II be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

⁶ In fact, *Greene* does not deal with a claim of unjust enrichment at all. If it did, the applicable state law would presumably be that of New York in any case, not that of Maine.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of December, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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