

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**THE UNITED STATES OF AMERICA)
FOR THE USE AND BENEFIT OF)
GREAT WALL CONSTRUCTION,)
INC.,)**

PLAINTIFF

v.

CIVIL No. 00-180-P-H

**MATTIE & O'BRIEN MECHANICAL)
CONTRACTING CO., INC., ET AL.,)**

DEFENDANTS

**MEMORANDUM DECISION AND ORDER ON DEFENDANTS'
MOTION TO DISMISS COUNTS V, VI AND VII OF
THE PLAINTIFF'S AMENDED COMPLAINT¹**

This lawsuit arises out of a Navy construction project in Kittery, Maine. A subcontractor claims that the general contractor and its surety failed to pay for the subcontractor's completed refurbishing of the Navy housing. The subcontractor has sued the general contractor and the surety under the Miller Act and the federal Prompt Payment Act.² It also asserts against the surety claims under Maine's Overdue Payment Act and Unfair Claim Settlement Practices Act, 24 M.R.S.A. §§ 2436, 2436-A (West 2000), and Massachusetts's Consumer

¹ The plaintiff's motion for reconsideration of the Court's dismissal of Count V of Great Wall's Amended Complaint is **GRANTED**. Because there is no evidence that the defendants will be prejudiced, the plaintiff may plead Count V of the Amended Complaint as an alternative to the relief sought under Counts VI and VII. Therefore, the defendants' motion to dismiss Count V of the Amended Complaint is no longer moot and this Order covers that motion as well.

² Against the general contractor only, the subcontractor asserts state common law counts for
(continued on next page)

Protection Act, Mass. Gen. Laws, ch. 93A, §§ 2, 9, 11 (West 1997). The relief sought under those statutes is attorney fees and a penalty interest rate under the Maine Act, Am. Compl. ¶ 39, and attorney fees and a doubling or trebling of recovery under the Massachusetts Act, Prayer for Relief ¶¶ 6, 7. I conclude that the subcontractor cannot enlarge its Miller Act bond recovery against the surety in this fashion.

The motion to dismiss the Maine and Massachusetts state bad faith claims against the surety (Counts V, VI and VII) is therefore **GRANTED** because these state law claims improperly attempt to expand the federal remedies provided by the Miller Act, 40 U.S.C.A. § 270b (West 1986).

FACTS

Because the motion is brought under Fed. R. Civ. P. 12(b)(6), I take the allegations of the Amended Complaint as true for purposes of this ruling. General contractor Mattie & O'Brien Mechanical Contracting Co., Inc. ("Mattie & O'Brien") entered into a contract with the Department of the Navy to renovate housing at the Portsmouth Housing Units—Admiralty Village at Kittery, Maine. Am. Compl. ¶ 6. Mattie & O'Brien obtained a payment bond with First National Surety ("First National") to comply with the provisions of the Miller Act. *Id.* ¶ 7. In November 1998, Mattie & O'Brien contracted with subcontractor Great Wall Construction, Inc. ("Great Wall") to refurbish the interior of the naval housing in Kittery. *Id.* ¶ 8. Mattie & O'Brien agreed to pay Great Wall, according to a fee

breach of contract and unjust enrichment.

schedule, once the units were substantially completed and occupied by the Navy. Id. ¶¶ 8, 10.

Great Wall performed its work in accordance with the agreement and the Navy accepted all units completed by Great Wall. Id. ¶ 9. Mattie & O'Brien, however, failed to make timely payments for the completed work. Great Wall finished the units it had started and discontinued work on the naval housing project. Id. Thereafter, Great Wall made several attempts to obtain payment from Mattie & O'Brien and then from First National under the payment bond. Id. ¶¶ 12-14. After Mattie & O'Brien and First National failed to pay, Great Wall filed this Miller Act suit against the general contractor and the surety. The defendants have moved to dismiss Count V, which alleges that the surety violated Maine's unfair settlement practices and overdue payment laws, 24-A M.R.S.A. §§ 2436, 2436-A (West 2000), and Counts VI and VII, which allege that the surety violated Massachusetts' consumer protection laws, Mass. Gen. Laws, ch. 93A, §§ 2, 9, 11 (West 1997).

DISCUSSION

In F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116, 127-28 (1974), the Supreme Court held that state law or policy does not determine whether an award of attorney's fees is proper under the Miller Act. The Court stated explicitly that the Miller Act provides a federal cause of action, and that the scope and substance of the Miller Act rights should be a matter of federal and not state law. Id. According to the Court, Miller Act litigants would

be better served by rules of national uniform application. It was “better to extricate the federal courts from the morass of trying to divine a ‘state policy’ as to the award of attorney’s fees in suits on construction bonds.” Id.; see also American Auto Ins. Co. v. United States ex rel. Luce, 269 F.2d 406, 408 (1st Cir. 1959) (noting that a “suit under the Miller Act . . . is a special federal right of action limited to federal court; Congress specified the [Miller Act bonds’] conditions; the meaning of which should not vary from state to state”).

Cases from other circuits allow state law claims to proceed against the Miller Act surety only when these claims are not used to expand the Miller Act remedies. See, e.g., United States ex rel. Cal’s A/C & Elec. v. Famous Constr. Corp., 220 F.3d 326, 329 (5th Cir. 2000) (preventing recovery of state law claim against surety, noting that “recovery on the bond must be under the Miller Act”); United States ex rel. Varco Pruden Bldg. v. Reid & Gary Strickland Co., 161 F.3d 915, 919 (5th Cir. 1998) (noting that supplementary jurisdiction over state law claims provided “only a half step [enlargement] because recovery on the bond must be under the Miller Act”); K-W Indus. v. National Surety Corp., 855 F.2d 640, 643 (9th Cir. 1988) (allowing state law claim to proceed only because the plaintiff was not suing under the bond, but under state tort law).³ A plaintiff cannot resort to state law for attorney fees or to statutes that increase the interest payable on a bond.

³ A plaintiff can prosecute state law claims only if it can assert additional substantive damages that are exclusive of the Miller Act. See Alvarez v. Insurance Co. of North Am., 667 F. Supp. 689, 691, 694 (N.D. Cal. 1987) (allowing state law claim to proceed where “rather than asking the court to expand the federal remedy, plaintiff brings an additional but separate state claim”).

See Tacon Mech. Contractors, Inc. v. Aetna Cas. & Surety Co., 860 F. Supp. 385, 388 (S.D. Tex. 1994), aff'd on other grounds, 65 F.3d 486 (5th Cir. 1995); Alvarez, 667 F. Supp. at 691, 694.

(1) Count V: Claims under Maine law, 24 M.R.S.A. §§ 2436, 2436-A (West 2000) (overdue payment and unfair settlement practices)

In Count V, the plaintiff asserts a claim under Maine's unfair settlement practices law. But it does not seek any substantive relief under Maine law; it merely claims that the subcontractor is entitled to attorney fees and interest of 1-½% per month because of the surety's failure to settle the Miller Act claim. Am. Compl. ¶ 39. This is an attempted expansion of the Miller Act remedy in the exact manner that F.D. Rich forbids, see 417 U.S. at 127—filling an alleged gap in the Miller Act with a state law claim for attorney fees.⁴ Therefore, the defendants' motion to dismiss Count V is **GRANTED**.

(2) Counts VI and VII: Claims under Massachusetts law: Massachusetts Gen. Law, ch. 93A, §§ 2, 9, 11 (West 1997) (unfair settlement practices and unfair trade practices)

In Counts VI and VII, the plaintiff asserts a claim under Massachusetts's unfair trade practices law. But it does not seek any substantive relief under Massachusetts law; it merely seeks interest and a doubling or trebling of its Miller Act recovery.⁵ Adding these state penalties based on chapter 93A to the Miller Act

⁴ The Supreme Court in F.D. Rich, 417 U.S. at 129-30 has noted that attorney fees may be awarded if an opposing party acts in bad faith, and the First Circuit in United States ex rel. GE Supply v. C & G Enterprises, Inc., 212 F.3d 14, 19 (1st Cir. 2000), has awarded attorney fees in a Miller Act claim under federal common law where the contract contained a fee-shifting provision. Neither claim is made under Counts V, VI and VII.

⁵ Substantive relief is sometimes available. Under the statute, a plaintiff may recover damages, including lost profits, and equitable relief. See MASS. GEN. LAWS, ch. 93A, § 11 (West 1997). But here, based on the Amended Complaint, the plaintiff, if successful on the Chapter 93A counts, would only be able to recover interest due from the defendant's failure to pay under the bond even under state law. See Kapp v. Arbella Mutual Ins. Co., 689 N.E.2d 1347, 1349 (Mass. 1998) (“[w]here there has been no judgment [on the underlying claim], . . . base damages are calculated according to the interest lost on the money wrongfully withheld by the insurer, compensating claimants for ‘the costs and expenses directly resulting from the insurer’s conduct’”); see also MASS. GEN. LAWS, ch. 93A, § 11 (West 1997) (recovery of *(continued on next page)*)

claim would expand the federal claim, contrary to F.D. Rich. See 417 U.S. at 127; see also supra section (1). Therefore, the defendants' motion to dismiss Counts VI and VII is **GRANTED**.

CONCLUSION

For the foregoing reasons, the defendants' motions to dismiss Counts V, VI and VII are **GRANTED**.

SO ORDERED.

DATED THIS 14TH DAY OF FEBRUARY, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

only "actual damages" to business plaintiffs under chapter 93A).

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 00-CV-180

The United States of America for the use and
benefit of GREAT WALL CONSTRUCTION, INC.

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