

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1350

Dependable Insurance Company, Inc.,

Appellee,

versus

Eun Dong Kim,

Appellant,

and

Chol Hwan Kim; Chang Sik Yang;
Hyong Sup Kim; Yong Ki Hon;
Chong Ku Kim; Yoon Chol Chang;
Clayton N. Parrott,

Defendants,

versus

Keith & Pickett, Inc.,
William S. Pickett,
Jacqueline P. Pickett,

Third Party Defendants.

Appeal from the United States District Court for the Eastern
District of Virginia, at Alexandria. Richard L. Williams,
District Judge. (C/A 83-0477)

Argued February 4, 1985.

Decided May 17, 1985

Before RUSSELL, PHILLIPS and SNEEDEN, Circuit Judges.

Howard A. Birmiel for Appellant; Christine Nicholson (Mark W.
Foster; Zuckerman, Spaeder, Moore, Taylor & Kolker on brief) for
Appellee.

PER CURIAM:

Eun Dong Kim appeals a final order of the United States District Court for the Eastern District of Virginia dismissing his claim under the Miller Act, 40 U.S.C. § 270a-d for lack of subject matter jurisdiction. We affirm.

I

Eun Dong Kim worked for the Keith & Picket Construction Co. (K&P) for a number of years as a carpenter/laborer on government construction contract projects in Virginia, Maryland, and Washington, D.C. Pursuant to the Miller Act, 40 U.S.C. § 270a-d K&P as a government contractor posted a surety bond on these projects for the protection of those supplying labor and material on the projects. Appellee Dependable was surety on the bond.

K&P became insolvent in 1981, defaulted on its obligations and terminated its corporate existence, leaving Kim and other employees unpaid for work performed during a substantial period of 1981. In late 1981, the employees filed claims with Dependable to recover their wages. In May 1983, having reached no settlements, Dependable brought an action in federal court pursuant to 28 U.S.C. § 2201, seeking a declaratory judgment to determine its liability to the employees under the Miller Act. In August 1983, the employees counterclaimed against Dependable and cross-claimed against K&P's owners for unpaid wages and materials, overtime compensation, liquidated damages and attorneys' fees. In November 1983, six of the eight employees

settled with Dependable and stipulated to their dismissal as parties.

Dependable then tendered payment in full of the wage claims of appellant Kim and his brother Chol Hwan Kim, the two remaining employees in the suit. Chol took the money; Kim accepted the tender on one of his two Virginia-based wage claims, but rejected the tender on his second claim, demanding attorneys' fees. Dependable then moved the district court for dismissal claiming its tender to Kim removed the district court's subject matter jurisdiction under the Miller Act. Kim opposed the motion claiming entitlement to attorneys fees, liquidated damages, and prejudgment interest over and above the tendered wage payments.

The district court granted Dependable's motion to dismiss finding that Dependable's tender of the Virginia-based wage claims satisfied its Miller Act obligation to Kim. Kim moved for reconsideration under Fed. R. Civ. P. 59(e), claiming that the district court failed to consider the federal Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., as authority for award of attorneys' fees and liquidated damages under the Miller Act. The district court denied the motion to reconsider and this appeal by Kim followed.

II

Under the Miller Act, 40 U.S.C. § 270a-d, federal government contractors must post surety bonds "for the protection of all persons supplying labor and material in the prosecution of the

work provided for" in any contract exceeding \$25,000 in amount. 40 U.S.C. § 270a(a)(2). A laborer and materialman who has furnished labor or material and who has not been paid in full within 90 days after the last work was performed or material supplied may bring a federal action on the surety bond for the balance of "sums justly due him." 40 U.S.C. § 270b(a).

In F.D. Rich Co. v. United States for the Use of Industrial Lumber Co., 417 U.S. 116 (1973), the Court held that "sums justly due" under 40 U.S.C. § 270b(a) do not include attorneys' fees. In that case, the Ninth Circuit had awarded attorneys' fees in Miller Act litigation by looking to the "public policy" of the state in which the action was brought. The Supreme Court rejected the Ninth Circuit's extrinsic policy incorporation approach as violative of the traditional American rule that parties bear their own litigation costs in the absence of express exception by statute or recognized judicial rule. Noting the absence of any provisions for fee shifting in the Miller Act, the Court said

Miller Act suits are plain and simple commercial litigation. In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do.

Id. at 130-31.

Appellant Kim's attempt in this litigation to incorporate the attorneys' fees and liquidated damages provisions of the Fair Labor Standards Act into the Miller Act is of a piece with the

rejected attempt in Rich to incorporate an extrinsic state policy of fee shifting in comparable litigation. In the absence of specific provision in the Miller Act for liquidated damages and attorneys' fees, and in light of the Supreme Court's strict construction of the Miller Act in this respect, the district court properly dismissed the action once Dependable tendered amounts in satisfaction of Kim's Virginia-based wage claims. 40 U.S.C. § 270b(b).

The judgment of the district court is therefore affirmed.

AFFIRMED.