

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7190
Summary Calendar

KALWALL CORPORATION,

Plaintiff-Appellant,

VERSUS

J.D.B. CONSTRUCTION, ET AL.,

Defendants,

FIDELITY AND GUARANTY LIFE
INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-J92-0249(W) (C))

(November 30, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Plaintiff Kalwall Corporation sued a construction company and its bonding company, Fidelity & Guaranty Insurance Co. ("F & G"), for nonpayment on a delivery of custom-made window panel systems used in a construction project. The district court summarily

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissed the claim against F & G on the basis that Kalwall is not a protected person under a statute which extends the benefit of such a bond to certain claimants. Kalwall appeals from the partial dismissal certified as final under Rule 54(b). We affirm.

Mississippi law extends coverage under surety bonds to certain claimants, but expressly limits that privilege to those claimants only:

(4) The only persons protected by such payment bond . . . are:

(a) Subcontractors and material suppliers of the contractor;

(b) Sub-subcontractors and material suppliers of those subcontractors named in subsection (4)(a) of this section; and

(c) Laborers who have performed work on the project site.

Miss. Code Ann. § 31-5-51(4) (1991). Kalwall does not suggest that it is a laborer under subsection (4)(c).

Kalwall's possible protection as a subcontractor or material supplier of the contractor under subsection (4)(a) is also easily eliminated. "The term 'subcontractor' means one who has contracted with the original contractor for the performance of all or a part of the work or services which such contractor has himself contracted to perform." O'Neal Steel Co. v. Leon C. Miles, Inc., 187 So.2d 19, 24 (Miss. 1966). The original contractor, J.D.B. Construction, had no contractual relationship with Kalwall. As Kalwall admits, Thrasher Company had agreed with the general contractor, J.D.B., to obtain these window panel systems for use in the project. Kalwall manufactured and delivered the window panel

systems to the job site under a contract with Thrasher Company. Accordingly, Kalwall is not a subcontractor or material supplier of the general contractor under subsection (4)(a).

The only question remaining is whether Kalwall qualifies as a sub-subcontractor or material supplier of a subcontractor under subsection (4)(b). Accordingly, we agree with F & G that the focus shifts to Thrasher's status: Kalwall can be protected only if the middleman, Thrasher, is a subcontractor.

As noted by the district court, the Mississippi Supreme Court has held that a middleman who fabricated materials, furnished them, and finally erected them into a building in compliance with the plans and the specifications of the general contractor was a subcontractor,² but that a middleman who prefabricated parts but did not perform construction work on the building was not.³ Thus, the decisive factor is whether Thrasher not only supplied materials but also did part of the construction work on the building. O'Neal Steel, 187 So.2d at 24. It is undisputed that Thrasher performed no construction at the job site and merely supplied windows according to its agreement with J.D.B. Kalwall delivered the completed window panel systems to the project site, and they were later installed by T & L Glass. Thrasher is therefore not a subcontractor, and Kalwall can not be protected by subsection (4)(b) of the statute.

The district court correctly concluded that Kalwall is not

² O'Neal Steel, 187 So.2d at 25.

³ Frazier v. O'Neal Steel, Inc., 223 So.2d 661, 665 (Miss. 1969).

protected by the Mississippi statute.

AFFIRMED.