

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WAUSAU TILE, INC.,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-600-S

NAVIGATORS INSURANCE COMPANY,
THOMAS J. KRENZ, KRENZ & HANNAN
INTERNATIONAL, INC., LONGINOTTI
MECCANICA, S.r.l., G.T.I. ROLL
TRANSPORTATION SERVICES, INC.,
CAST LINE, LTD., ABC INSURANCE
COMPANY, UVW INSURANCE COMPANY,

Defendants.

Plaintiff Wausau Tile, Inc. commenced this action in the circuit court for Marathon County, Wisconsin alleging that defendants are responsible for damages to manufacturing equipment which occurred during shipping. The matter was removed to this Court pursuant to 28 U.S.C. § 1331 on the basis that it arises under the United Nations Convention on Contracts for International Sale of Goods, an international treaty governing the sales transaction at issue. The matter is presently before the Court on the motions of defendants Thomas J. Krenz and Krenz and Hannan International, Inc. (collectively "Krenz") to dismiss certain claims pursuant to Rule 12(6), Fed. R. Civ. P. The following is a summary of the factual allegations of the amended complaint relevant to the claims against Krenz.

FACTS

Plaintiff, a floor tile manufacturer in Wausau Wisconsin, purchased a custom built tile grinding and polishing machine from an Italian seller, defendant Longinotti Meccanica, Inc. in September, 2003. In January, 2004 plaintiff engaged Krenz as its customs broker and facilitator, contacting with Krenz to inspect, insure and arrange for shipment of the machine from Italy to Wisconsin. Plaintiff gave Krenz a Customs Power of Attorney to allow it to act on plaintiff's behalf in arranging for the importation of the machine. Pursuant to its contract with plaintiff, Krenz contracted with defendants G.T.I. Roll Transportation Services, Inc. and Cast Line Ltd. and otherwise arranged for transport of the machine. The machine was damaged in shipment so that it was worthless when it arrived in Wausau.

Krenz failed to properly inspect the machine, see that it was properly packed for export, insure it, or properly arrange for and supervise the transportation of the machine. Its failure to properly perform these duties led to the destruction of the machine and the absence of insurance coverage.

MEMORANDUM

The Krenz defendants moved to dismiss primarily on the basis that the allegations of contract are insufficient because they are vague. Plaintiff opposes the motion as untimely and on its merits.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

Plaintiff's complaint is sufficient to state a claim for breach of contract. Plaintiff alleges that the parties entered into a contract pursuant to which Krenz assumed obligations to inspect the machine, assure proper packing, arrange for safe transport and insure the goods. Plaintiff further alleges that defendant breached all these contractual obligations and that its breaches caused injury to plaintiff. If true, these allegations establish all elements of breach of contract as alleged in claims 1, 2, 3 and 5.

Of course, plaintiff must ultimately be able to prove the existence of the contract and the breach of its various obligations, but those are matters for summary judgment or trial--not a motion to dismiss. See Bennett v. Schmidt, 153 F.3d 516, 518-519 (7th Cir. 1998) Plaintiff is not obligated to produce or identify a contract document or allege the specifics of an oral

exchange in the pleadings. The complaint provides Krenz with sufficient information on each element of a contract claim to pursue discovery on these matters and prepare defenses.

For the first time in its reply Krenz attacks plaintiff's complaint for mixing tort and contract terms in its claims by alleging "negligence" in the performance of various obligations. It is correct that negligent performance of a contractual obligation is ordinarily not a tort. Landwehr v. Citizens Trust Co., 110 Wis. 2d 716, 722-23, 329 N.W.2d 411 (1982). However, the test of the sufficiency of a complaint is not the precision of its legal language, but whether the facts are sufficient to state a claim under any legal theory. Car Carriers, 745 F.2d at 1106. Plaintiffs need not plead legal theories at all. Bennett, 153 F.3d at 518. Plaintiffs complaint is sufficient to state a claim.

ORDER

IT IS ORDERED that the Krenz defendants' motion to dismiss is DENIED.

Entered this 2nd day of February, 2006.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge