

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

AQUA FINANCE, INC.,

Plaintiff,

v.

THE HARVEST KING, INC.
and JOHN T. MADRID,

Defendants.

OPINION and ORDER

07-C-015-C

In this civil diversity action for monetary relief, plaintiff Aqua Finance, Inc. alleges that defendants Harvest King and John T. Madrid (1) breached the terms of a contract between plaintiff and defendant Harvest King and (2) misrepresented the facts regarding the customer accounts assigned to plaintiff. On March 6, 2007, plaintiff filed an amended complaint; defendants responded by moving under Fed. R. Civ. P. 12(b)(6) to dismiss plaintiff's breach of contract claim against defendant Madrid and its misrepresentation claims against both Madrid and the company under Fed. R. Civ. P 9(b). In the alternative, defendants ask the court to order plaintiff to provide a more definite statement of its misrepresentation claims.

Before entering a civil action, a federal district court must establish federal jurisdiction

over a suit. Because the parties are diverse and the amount in controversy exceeds \$75,000, jurisdiction exists under 28 U.S.C. § 1332.

I conclude that plaintiff has alleged facts sufficient to put defendants on notice of its claims for breach of contract and misrepresentation. Defendants' motions to dismiss these claims will therefore be denied. Also, I conclude that plaintiff need not amend its misrepresentation claim to provide a more definite statement.

In ruling on a motion to dismiss for failure to state a claim, a court takes all of the plaintiff's well-pleaded facts as true and draws all inferences in favor of the plaintiff. Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992). In its amended complaint, plaintiff alleges the following facts.

FACTUAL ALLEGATIONS

A. Parties

Plaintiff Aqua Finance, Inc. is a Wisconsin corporation that provides financing for water treatment equipment. Its principal place of business is in Wisconsin.

Defendant Harvest King, Inc. is a Texas corporation with its primary place of business in Carrollton, Texas. Defendant John T. Madrid is a citizen of Colombia and is president of defendant Harvest King.

B. Purchase of Service Contracts

On August 9, 2005, defendant Madrid signed and submitted a dealer agreement to plaintiff, which plaintiff accepted. Under the terms of the dealer agreement, plaintiff agreed to purchase consumer credit sale contracts from defendants. In turn, defendants agreed to provide several warranties on the consumer contracts. Among other warranties, defendants agreed that “the Instruments [they produced] w[ould] represent bona fide sales and deliveries to the purchaser named on the Instruments” and that the “Equipment purchased by the Purchaser w[ould be] carefully and properly installed, inspected, and adjusted to factory recommendations.” Am. Cpt., Ex. A, ¶ 1.

The parties’ dealer agreement specifies that plaintiff would “have recourse with respect to any accounts in which defendant Harvest King were to breach “any of the representations or warranties” or provide any “misrepresentation or fraudulently obtained information, signatures, or consent on the part of the Dealer, Dealer Representative, or customer.” Am. Cpt., Ex. A, ¶ 4.

The sale contracts defendant assigned to plaintiff did not match the terms of the agreement. The most common problems with the accounts were that the equipment had been installed by an unlicensed installer, that installation was not up to code and that customers had complained about installation problems. Moreover, other problems existed with specific accounts. Customers complained that defendants had failed to correct service

problems and forged their signatures on contracts. In specific instances, the goods failed inspection by a state authority and defendants failed to return money to plaintiff after promising to do so. One customer claimed his signature had been forged and that he had not purchased any goods. Other customers complained that the wrong type of equipment had been installed in their homes, that defendants had failed to pay them installation damages and that equipment had not been installed at all. Several of these customers refused to pay plaintiff until the problems were rectified.

Despite these problems, defendants represented to plaintiff that every contract was legitimate, even though defendant Madrid knew he had not obtained any of the proper permits or inspections for installation of the equipment. Defendants failed to address customer complaints about repairs when plaintiff brought them to defendants' attention. Additionally, defendants were aware that they employed salespeople who were collecting payments directly from customers and forging customers' signatures. Despite customer claims that their signatures were forged on contracts assigned to plaintiff, on February 24, 2006, defendant Madrid told plaintiff that the salespeople had never signed contracts for customers.

In March and April 2006, defendants appeared to move toward remedying problems with some of the accounts. On March 2, 2006, defendant Madrid promised plaintiff that he would repurchase certain Arkansas accounts from plaintiff if defendant Harvest King had

acted fraudulently or improperly in making the consumer contracts. Defendant Madrid also promised to fix customer accounts originating from Arkansas so that they met the terms of the agreement. On March 9 and 10, 2006, defendant Madrid told the Attorney General of Arkansas and plaintiff that for every Arkansas account he would fix any service problems and certify the installation. Also on March 10, 2006, defendant Madrid told plaintiff that by the end of the month he would obtain the license defendant Harvest King needed to rectify problems with certain New Mexico accounts. Through his attorney on April 25, 2006, defendant Madrid told plaintiff that the Arkansas matter was “resolved,” despite knowing that he had not obtained the necessary licenses or paid the repairs.

Defendants continued to delay fixing problem accounts by refusing or failing to make promised buy-backs, refusing to release information about schedules for repairs, not participating in conference calls to discuss cure options and not cooperating with plaintiff’s attempts to resolve the matter.

Plaintiff suffered money losses from the purchase of the fraudulent contracts and from having to pay to repair or rectify uncertified installations on defendants’ behalf. Plaintiff also suffered loss of income on the contracts.

OPINION

A. Breach of Contract Claim

Defendants contend that plaintiff's breach of contract claim against defendant Madrid is one for which relief cannot be granted under Fed. R. Civ. P. 12(b)(6). According to defendants, plaintiff cannot proceed against defendant Madrid because Madrid was not a party to the dealer agreement between plaintiff and defendant Harvest King. Defendants maintain that defendant Madrid is protected from personal liability as president of defendant Harvest King by the corporate veil doctrine and therefore cannot be sued in his individual capacity.

Generally, owners of a corporation are not personally liable for the contractual obligations of the corporation. Sprecher v. Weston's Bar, Inc., 78 Wis. 2d 26, 37, 253 N.W.2d 493, 498 (1977). To pierce the "corporate veil" and hold defendant Madrid personally liable for the contract, ultimately plaintiff will have to prove that defendant Madrid:

- (1) [exerted] complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) such control [was] used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) the aforesaid control and breach of duty . . . proximately cause[d] the injury or unjust loss [of which plaintiff] complain[s].

Consumer's Co-op v. Olsen, 142 Wis. 2d 465, 484, 419 N.W.2d 211, 217-218 (1988);

Wiebke v. Richardson & Sons, Inc., 83 Wis. 2d 359, 265 N.W.2d 571 (1978).

Plaintiff alleges that defendant Madrid is president and sole owner of defendant Harvest King and that he exercised sufficient control over the company to merit piercing the corporate veil. Defendants concede that if plaintiff's allegations are true, defendant Madrid may have exerted control over the company and his control may have caused plaintiff's injury. However, defendants contend that plaintiff did not allege adequately that defendant Madrid misused the corporate form. According to defendants, plaintiff has failed to allege facts sufficient to pierce the corporate veil and hold defendant Madrid liable as the alter ego of Harvest King. The remedy, defendants contend, is dismissal of plaintiff's breach of contract claim against defendant Madrid.

In their briefs on the question of dismissal, the parties appear to forget that plaintiff's *claim* is for breach of contract; the equitable *remedy* it seeks is piercing the corporate veil. Under Fed. R. Civ. P. 8, a plaintiff is required to plead claims, not remedies. Fed. R. Civ. P. 8(a)(2) (in its complaint, plaintiff need only set out a "short and plain statement of the claim showing that the pleader is entitled to relief"). And with respect to those claims, the plaintiff need not plead either facts or legal theories: under the Federal Rules of Civil Procedure, a plaintiff need not plead any more than is necessary to place the defendants on notice of his claim. Pizzo v. Bekin Van Lines Co., 258 F.3d 629, 634 (7th Cir. 2001). A complaint need not contain all of the facts that will be necessary to prevail at trial. Hoskins

v. Poelstra, 320 F.3d 761, 764 (7th Cir. 2003).

At the pleading stage, the court is not concerned with the merits of plaintiff's argument. In its amended complaint, plaintiff has alleged specific ways in which defendant Madrid allegedly misused his control over the company. Among other allegations, plaintiff maintains that in his position acting as president of defendant Harvest King, defendant Madrid evaded legal requirements for HVAC installations in several states, employed salespeople who engaged in fraudulent behavior, evaded customer issues and responsibility for bringing the equipment up to code and assigned fraudulent or unenforceable installation contracts to plaintiff. Plaintiff alleges also that defendant Madrid has complete control over the company's finances and policies and that he is the only officer and sole owner of defendant Harvest King.

Dismissal is appropriate when it is clear beyond a doubt that a plaintiff may not prevail on its claim or when the remedy it is seeking (in this case, piercing the corporate veil) is unavailable as a matter of law. That is not the case here. Plaintiff's allegations suggest that defendant Madrid exerted enough control over the company to warrant holding him liable as the alter ego of Harvest King for an alleged breach of contract. This is sufficient to retain defendant Madrid as a party to plaintiff's claim. Whether plaintiff will be able to prove its allegations against defendant Madrid remains to be seen. For now, however, plaintiff has done enough to state a claim against him. Defendants' motion to dismiss plaintiff's breach

of contract claim against defendant Madrid will be denied.

B. Misrepresentation Claims

Defendants move in the alternative for dismissal of plaintiff's misrepresentation claims against both defendant Harvest King and defendant Madrid under Fed. R. Civ. P. 9(b) or for a more definite statement of plaintiff's misrepresentation claims under Fed. R. Civ. P. 12(e). I will address each in turn.

I. Motion to dismiss

Rule 9(b) of the Federal Rules of Civil Procedure requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” To meet the particularity of Rule 9(b), a plaintiff must “allege the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated.” Slaney v. The International Amateur Athletic Federation, 244 F.3d 580, 599 (7th Cir. 2001); see also Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992). This pleading rule serves three main purposes: (1) protecting a defendant's reputation from harm; (2) minimizing “strike suits” and “fishing expeditions”; and (3)

providing notice of the claim to the adverse party. Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1327 (7th Cir. 1994) (citing Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 924 (7th Cir. 1992)). Plaintiff's amended complaint must meet this heightened pleading standard for its claims to withstand dismissal.

The misrepresentation claims plaintiff alleges in the amended complaint appear to fall into two categories: one based on defendant Madrid's direct communications with plaintiff and the other based on defendants' assignment of contracts to plaintiff that violated the terms of the contract with plaintiff. First, plaintiff appears to contend that defendant Madrid lied about important features of the service contracts plaintiff purchased under the dealer agreement and about efforts defendant Harvest King was making to rectify problems with those contracts. Second, plaintiff appears to argue that each sale of a nonconforming contract constituted an actionable misrepresentation.

It is difficult to understand what information defendants believe is lacking with respect to the misrepresentation claims regarding defendant Madrid's direct communication about the allegedly nonconforming contracts. In the amended complaint, plaintiff alleges the dates and content of the alleged misrepresentations. Plaintiff includes detailed examples of these misrepresentations, such as when defendant Madrid allegedly told plaintiff that defendant Harvest King's salespeople never forged contracts with customers (when they allegedly did) and promised to fix problems with the contracts or installation (which

defendants allegedly did not).

Plaintiff's second set of misrepresentation claims presents a more difficult question. First, I note that it is not clear whether Wisconsin law recognizes misrepresentation claims that factually overlap with claims for breach of contract, as plaintiff's claims appear to do. See, e.g., Kaloti Enterprises, Inc. v. Kellogg Sales Co., 283 Wis. 2d 555, 699 N.W.2d 205 (2005). Second, plaintiff's allegations regarding the assignment of allegedly fraudulent service contracts lack the clarity of its claims regarding defendant Madrid's representations of those contracts. In the amended complaint, plaintiff identified each allegedly nonconforming contract by account number and cataloged the alleged defects in the contracts. However, defendants complain, plaintiff failed to identify the person who made the allegedly false representation regarding each account and the date on which the misrepresentation was made.

It is clear that under plaintiff's second theory of misrepresentation, defendant Madrid made each alleged misrepresentation by selling nonconforming contracts to plaintiff under the terms of the dealer agreement. Although the amended complaint does not identify that dates on which defendants assigned each account to plaintiff, it is clear that defendants understand the nature of plaintiff's claims against it. By providing defendants with the account number of each nonconforming account, plaintiff gave defendants the information they needed to identify all details relevant to plaintiff's claims against them. Plaintiff's

argument that the assignment of accounts qualifies as misrepresentation seems unlikely, but it is sufficiently alleged to meet the requirements of Rule 9(b). Therefore, defendants' motion to dismiss plaintiff's misrepresentation claims will be denied.

2. Motion for a more definite statement

As an alternative to dismissal, defendants ask the court to order plaintiff to make a more definite statement of its misrepresentation claims under Fed. R. Civ. P. 12(e). The rule provides:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Defendants request that at a minimum plaintiff state the identity of the person who made the alleged misrepresentations, the time and place they occurred, their content and how they were communicated.

I have found already that the complaint provides sufficient detail to maintain plaintiff's misrepresentation claims against defendants. The only information missing from the amended complaint is a list of the dates on which defendants assigned the various

accounts to plaintiff. To the extent that defendants seek this information, their motion has been rendered moot: attached to plaintiff's response brief is a list of the relevant dates for each allegedly nonconforming contract. Dkt. #16, Exh 2. Because defendants have been given the information they sought, their motion for a more definite statement will be denied as moot.

ORDER

IT IS ORDERED that defendants John Madrid's and Harvest King's

1. Motion to dismiss plaintiff Aqua Finance's breach of contract claim against defendant Madrid under Fed. R. Civ. P. 12(b)(6) is DENIED;

2. Motion to dismiss plaintiff's misrepresentation claims under Fed. R. Civ. P. 9(b) is DENIED; and

3. Motion for a more definite statement under Fed. R. Civ. P. 12(e) is DENIED as moot.

Entered this 12th day of June, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge