

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

LYNN PROPERTIES, LLC,

Plaintiff,

OPINION AND ORDER

v.

21-cv-305-wmc

JTH TAX INC., AND HARTFORD
FIRE INSURANCE COMPANY,

Defendants.

Plaintiff Lynn Properties, LLC (“Lynn Properties”) brings claims against defendants JTH Tax, LLC (“JTH Tax”)¹ and Hartford Fire Insurance Company (“Hartford Insurance”), all of which arise out of a dispute over JTH Tax’s lease of a commercial building and real estate owned by Lynn Properties (“the Property”). More specifically, Lynn Properties claims that JTH Tax breached the terms of its lease and negligently failed to heat the building, resulting in flooding after a frozen pipe burst and caused substantial damage. Lynn Properties almost named Hartford Insurance as a defendant, as JTH Tax’s insurer.

Although this case was originally filed in state court, defendants removed to federal court and JTH Tax subsequently moved to dismiss the complaint in its entirety, arguing

¹ As still reflected in the caption, JTH Tax was originally erroneously named by plaintiff as “JTH Tax, Inc.” However, as defendants point out, JTH Tax converted from a corporation to a limited liability company in 2019, and thus, it is currently known as JTH Tax, LLC. In their joint discovery plan, the parties indicated they are “in the process of negotiating a Stipulation and Proposed Order to include JTH Tax LLC as a party.” (Joint Discovery Plain (dkt. #17) 2.) If the parties cannot agree on a stipulation, plaintiff may separately seek to amend its complaint under Federal Rule of Civil Procedure 15(c) to correct the misnomer. *Hill v. Shelander*, 924 F.2d 1370, 1376 (7th Cir. 1991) (citing *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)). Alternatively, defendant may move to amend the caption to comport with its current legal status. Regardless, as this court has already determined, the misnomer does not affect this court’s diversity jurisdiction over the present matter. (Order (dkt. #29).)

that plaintiff failed to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).² For the reasons discussed below, defendants' motion will be denied.

ALLEGATIONS OF FACT³

Plaintiff Lynn Properties is the owner of the Property at issue. (Compl. (dkt. #1-1) ¶ 1.) The Property was leased by defendant JTH Tax, which conducts some of its business under its trade name "Liberty Tax Service." (*Id.* ¶ 3.) At the time of the alleged flooding, JTH Tax carried a commercial liability insurance policy through defendant Hartford Insurance. (*Id.* ¶ 4.)

For a period beginning August 17, 2015, and ending April 30, 2018, JTH Tax first leased the Property from its former owner, Marian Walters. (*Id.* ¶ 8.) Under the terms of that lease, JTH Tax was responsible for the gas and electric utilities for the property. (Compl., Ex. A (dkt. #1-1) ¶ 6.) The leasing contract also dictated in part that:

Lessee shall not abandon (two or more months without rent paid) or vacate the premises at any time during the term of this lease. In the event of abandonment of premises by Lessee, [it] shall be in breach of this lease and may be sued for damages, court costs, and lost rent for the remainder of the lease by Lessor.

(*Id.* ¶ 4.) The lease also purported to be "binding upon successors and assignees of the parties hereto." (*Id.* ¶ 13.)

² Defendant Hartford Insurance moved to join JTH Tax's motion to dismiss (dkt. #15), which the court granted. (Dkt. #16.)

³ For purposes of defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court "accept[s] as true all of the well-pleaded facts in the complaint and draw[s] all reasonable inferences in favor of" plaintiff. *Jakupovic v. Curran*, 850 F.3d 898, 902 (7th Cir. 2017) (internal citation omitted).

On April 19, 2018, JTH Tax renewed the lease with Walters, extending its term to April 30, 2019. (Compl., Ex. B (dkt. #1-1) ¶ 1.) The second provision in the renewed lease agreement reads, “[Lessor] consents to the sublease of the Premises, at no cost, to a Liberty Tax Service franchisee.” (*Id.* ¶ 2.) The renewal lease agreement designates Walters as the “Lessor” and “JTH Tax Inc.” as the “Lessee.” (*Id.*) The agreement also states that the original lease has not been “amended, modified or supplemented, is in full force and effect and, together with this Agreement, represents the entire agreement between the Lessor and Lessee with respect to the Premises.” (*Id.* ¶ 6.)

On September 5, 2018, Walters then sold the commercial property to Lynn Properties, the plaintiff in this action. (Compl., Ex. C (dkt. #1-1).) As a part of the purchase, Walters signed a letter expressly assigning her rights to the remainder of JTH Tax’s renewed lease to Lynn Properties. (*Id.*)

At some point during the early months of 2019, a pipe in the building froze and burst, flooding the building and resulting in substantial damage, which plaintiff alleges necessitates over \$100,000 in repairs. (Compl., Ex. D (dkt. #1-1).) Plaintiff Lynn Properties filed this suit on February 24, 2021, alleging claims of breach of contract and negligence. (Compl. (dkt. #1-1).) In response, defendant JTH Tax moved to dismiss for failure to state a claim, affirmatively alleging that Lynn Properties accepted JTH Tax’s surrender of the lease and its obligations to maintain the Property before any damages occurred. (Defs.’ Br. (dkt. #6).)

OPINION

Under Rule 12(b)(6), dismissal is proper “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). To survive a motion to dismiss, a complaint must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff need not provide detailed factual allegations but must provide “enough facts to raise [the claim] above the level of mere speculation.” *Riley v. Vilsack*, 665 F. Supp. 2d 994, 997 (W.D. Wis. 2009).

In reviewing the sufficiency of a complaint under this “plausibility standard,” the court must accept the well-pleaded facts in the complaint as true, but “need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Moreover, exhibits or documents attached to a complaint are considered part of the pleadings, and they may be considered on a motion to dismiss for failure to state a claim. *See Thompson v. Illinois Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002) (citing *Beam v. IPCO Corp.*, 838 F.2d 242, 244 (7th Cir. 1988); Fed. R. Civ. P. 10(c)).

In moving for dismissal here, defendant JTH Tax attaches to its motion certain documents that it represents can be incorporated by reference into the allegation in the original complaint. Plaintiff in its opposition brief to this motion also attaches new documents, presumably under the same theory. Accordingly, the court will begin by addressing whether any of these new documents can be accepted as part of the original

complaint, and then will turn to the principal question -- whether the facts as pleaded and taken as true support plaintiff's claims.

I. Documents Attached to Motion to Dismiss

Motions to dismiss are not motions for summary judgment; thus, the court generally may not consider material outside the complaint without converting the motion to one for summary judgment. Fed. R. Civ. P. 12(b). Still, while the complaint and its attached exhibits are the typical boundaries in a motion to dismiss under Rule 12(b)(6), documents referred to in the plaintiff's complaint and central to the claims under Rule 10(c) may be considered part of the pleadings. This exception is meant to "prevent parties from surviving a motion to dismiss by artful pleading or by failing to attach relevant documents." *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002). For example, in the context of a contractual dispute like this one, a court may consider documents attached to a motion to dismiss without transforming it to a motion for summary judgment, *provided* the documents are referred to in the plaintiff's complaint, are central or integral to the claim of breach, and go to "the core of the parties' contractual relationship." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431-32 (7th Cir. 1993). In *Venture*, the court reasoned that a defendant's exhibits should be included in considering a motion to dismiss in a breach of contract case because the complaint made numerous references to the defendant's exhibits and because the attached documents were the "core of the parties' contractual relationship." *Id.*

However, five years later, the Seventh Circuit clarified in *Levenstein v. Salafsky*, 164 F.3d 345 (7th Cir. 1998), that "this is a narrow exception aimed at cases interpreting, for example, a contract, [and] is not intended to grant litigants license to ignore the distinction between

motions to dismiss and motions for summary judgment.” *Id.* at 347. Notwithstanding *Levenstein*, contractual disputes do not automatically mean that a court should look beyond a complaint to decide a motion to dismiss. For example, in *Berthold Types Ltd. v. Adobe Sys. Inc.*, 242 F.3d 772 (7th Cir. 2001), the court more recently reversed a district court’s grant for dismissal when the district judge’s reasoning was based “not on the complaint but on the text of the contract, which was not attached to the complaint.” *Id.* at 775. Indeed, the Seventh Circuit emphasized that dismissal was inappropriate in that case because the complaint contained a well-pleaded claim for breach of contract and was “not self-defeating.” *Id.*

Here, defendants offer what they represent to be a “surrender agreement” (Def.’s Br., Ex. A (dkt. #6-1)), along with a declaration of Dan Brashier authenticating that agreement (Def.’s Br., Ex. 1 (dkt. #6-1)). However, at least under current Seventh Circuit case law, these documents are not properly considered part of the complaint and may not be considered in resolving defendants’ motion to dismiss. To start, plaintiff’s original pleading contains no reference to the purported surrender agreement. (Def.’s Br., Ex. A (dkt. #6-1).) According to defendants and their affiant, Brashier, the document should be interpreted to be a binding, surrender agreement between the parties to the lease, relieving JTH Tax of any further legal obligations under its terms, and therefore, going to the “core of the parties’ contractual obligations” as in *Venture*. However, the facts in *Venture* are readily distinguishable. In that case, *Venture* as the plaintiff alleged in its complaint that a series of letters between the parties formed a contract, which defendant *Zenith* then breached, but *Venture* failed to attach the letters to its original pleading. *Id.* Thus, because the defendant attached the letters to its motion to dismiss, the Seventh Circuit agreed that those letters were properly considered by the district court on a motion dismiss as they

were *both* (1) referred to in the plaintiff's complaint and (2) went to the core of the contractual relationship. *Id.* While a surrender agreement *could* also be considered something that would go to the core of a contractual relationship, that document is obviously *not* referred to in the plaintiff's complaint in the present case.

Moreover, it is not even clear what the document that defendants claim to be a surrender agreement actually is. While titled "Verification of keys returned," dated August 16, 2018, and appearing to be a one-page form filled out with handwritten answers confirming the return of three keys to a property manager (Def.'s Br., Ex. A (dkt. #6-1)), the document contains no language specifying that it represents an agreement upon termination of the lease between JTH Tax and Lynn Properties. Indeed, on the line titled "Lease expiration," the date "4/18/2019" is handwritten in the space, which is ambiguous at best. (*Id.*) JTH Tax represents that because it turned in these keys it no longer had access to the property, thereby effectuating surrender as implied by law, but the document does not state that the three keys turned in represent *all* the keys to the property; it simply states three keys were turned in, and plaintiff makes clear in its briefing on this motion that there are contentious factual disputes between the parties as to what this document actually represents. This is not to say that defendants could not prevail on a more robust record at summary judgment or at trial, but it is to hold that these disputes are not appropriately resolved on a motion to dismiss.

Finally, plaintiff, too, offered various, additional documents to support its opposition to defendants' motion. In particular, plaintiff produced: a declaration of witness Richard Lynn; six financial records proving payment of rent; and three pieces of correspondence sent from defendant to plaintiff. (Pl.'s Br., Ex. A-G (dkt. #11); Pl.'s Dec.

Ex. A (dkt. #19).) However, plaintiff made no attempt to argue that these documents should be considered part of the pleadings for purposes of deciding the present motion to dismiss, and it appears that they were produced by plaintiff only to respond to defendants' attempted use of documents outside of the complaint.

Accordingly, neither defendants' nor plaintiff's proffered documents can be considered at this time, and to the extent the court might have *converted* the present motion to one for summary judgment under Rule 12(d), neither side has requested that. Regardless, notwithstanding defendants' disingenuous assertion that plaintiff has admitted that JTH Tax "abided by the rules and regulations within the lease" in surrendering possession of all keys and vacating the Property" (Reply Br. (dkt. #25) p. 2), the briefing on the present motion underscores the need for a full-blown exchange of proposed findings of fact, responses and replies, as well as briefing on the principal issue of what constitutes a "surrender agreement" under Wisconsin law, as contemplated by this court's Procedures on Summary Judgment.

II. Contract and Negligence Claims

Having resolved the proper scope of the pleadings in to be considered on defendants' motion to dismiss, the court will also address whether plaintiff has stated a claim on which relief may be granted. Because defendants' arguments primarily relied on the surrender agreement, which as explained above cannot be considered on the present motion, this discussion will be brief.

Plaintiff in this action pleads two claims: breach of contract and negligence. To state a claim under Wisconsin law for a breach of the lease contract, plaintiff Lynn Properties must

allege “(1) the existence of a contract creating obligations flowing from defendant to plaintiff; (2) a breach of those obligations; and (3) damages from the breach.” *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 801 (W.D. Wis. 2006) (citing *Northwestern Motor Car, Inc. v. Pope*, 51 Wis.2d 292, 296, 187 N.W.2d 200 (1971)). Plaintiff Lynn Properties alleges facts in its complaint which, when taken as true at the pleading stage, show that: the plaintiff and JTH Tax had a contract consisting of many obligations, including responsibility for the gas and electric utilities to the building and an obligation not to abandon the property; JTH Tax breached this contract by abandoning the property and not maintaining heat; and plaintiff incurred damages from the bursting of a frozen pipe and flooding as a result of that breach. Accordingly, plaintiff has properly pleaded its contract claim, and it will survive this motion to dismiss.

As to plaintiff’s negligence claim, the specific elements of a cause of action in negligence under Wisconsin law are: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Green Spring Farm v. Kersten*, 136 Wis. 2d 304, 319 (1987). Although there remains a question as to whether contract or tort law or both are ultimately at play here, plaintiff has similarly alleged facts in its complaint which, when taken as true, show JTH Tax owed it a duty, breached that duty, and that breach caused actual damages. Accordingly, plaintiff has also properly pleaded its negligence claim. Therefore, the motion to dismiss will also be denied as to that claim.

ORDER

IT IS ORDERED that:

- 1) Defendants' motion to dismiss (dkt. #5) is DENIED; and
- 2) The court will hold a scheduling conference on May 13, 2022, at 1:00 p.m. to keep this matter moving forward.

Entered this 5th day of May, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge